



FACULTY OF LAW  
Lund University

Lydia Ekvall

# The Treaty on the Prohibition of Nuclear Weapons

- A Silver Lining in the Mushroom Cloud?

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# Summary

As the Treaty on the Prohibition of Nuclear Weapons (TPNW) entered into force on 22 January 2021, a new legal instrument regulating nuclear weapons entered the international arena. With considerations of the humanitarian and environmental consequences of the use of nuclear weapons, the new Treaty aims for the total elimination of nuclear weapons. In order to accomplish its high ambitions, the Treaty entails far-reaching and comprehensive provisions, as it prohibits all forms of acquisition, use and possession of nuclear weapons. The entry into force of the TPNW undoubtedly raises questions of what impact it will have.

To evaluate the new Treaty's impact in terms of its substance, one must first examine already established international law and the legality of acquiring, using and possessing nuclear weapons. Pertaining to the subject of acquisition, it is mainly regulated by the Treaty on the Non-Proliferation of Nuclear Weapons (NPT), which prohibits non-nuclear-weapon State Parties to acquire nuclear weapons. In the analysis of the NPT and its regulation of the acquisition of nuclear weapons it is found that there are some ambiguities in its text and that it does not prohibit proliferation in all instances. Hence, the NPT does not provide a general and absolute prohibition of the acquisition of nuclear weapons.

In analysing the legality of the use of nuclear weapons, the areas of jus ad bellum, international humanitarian law, the right to life under human rights law and international environmental law have been considered. By this examination, it is found that international humanitarian law is applicable in most scenarios where there is a risk for use of nuclear weapons. This area of international law considerably limits the possibilities of lawfully using nuclear weapons. With that said, there is no general and absolute prohibition on this subject either.

In examining the possession of nuclear weapons, it is found that it is fairly unregulated in international law beyond the new Treaty. However, the most central legal instrument relating to this subject is the NPT. The NPT implicitly prohibits possession of nuclear weapons for the non-nuclear-weapon State Parties, as they are prohibited to acquire such weapons. Furthermore, the NPT entails obligations relating to disarmament, which are concluded to not be fulfilled at this moment.

Through this analysis of current international law beyond the new Treaty, it is possible to conclude that there are several legal instruments already applicable to nuclear weapons. There are, however, no general and absolute prohibitions on acquisition, use or possession of nuclear weapons. The new TPNW could thus be of significant impact, as it has the potential of 'filling in several gaps' of already established law. Nevertheless, to fully evaluate the new Treaty's impact, one must also consider its legal effect in terms of creating legally binding obligations, and for what states. As only 54 states have ratified the treaty, it could be concluded that the TPNW has a limited legal effect. There is, however, room to argue that the TPNW also entails obligations for Signatory States. Furthermore, the TPNW could affect nuclear policy and laws regulating the weapons in the future. It can thus be concluded that the impact of the TPNW, despite a limited amount of State Parties, is not insignificant. It is deemed likely that more states will ratify the Treaty, and that it has the potential to create change beyond the legal sphere, in world politics. It also contributes to the discourse focusing on the devastating humanitarian consequences of nuclear weapons and signifies that the only way to prevent the use of nuclear weapons is to eliminate them.

# Sammanfattning

Det nya traktatet Treaty on the Prohibition of Nuclear Weapons (TPNW), eller Traktatet om förbud mot kärnvapen, trädde i kraft den 22 januari 2021, och således har ett nytt regelverk trätt in på internationella arenan. Med hänsyn till både konsekvenser för miljön och humanitära konsekvenser syftar det nya traktatet till att totalt eliminera kärnvapen. För att uppnå sina höga ambitioner innehåller traktatet långtgående och omfattande bestämmelser, då det förbjuder alla typer av förvärv, användande och innehav av kärnvapen. Ikraftträdandet av TPNW väcker onekligen frågor om vilken effekt traktatet kommer att ha.

För att fastställa det nya traktatets effekt i förhållande till dess innehåll måste redan etablerad folkrätt undersökas, och huruvida det är lagligt att förvärva, använda eller inneha kärnvapen. Förvärv av kärnvapen är främst reglerat av the Treaty on the Non-Proliferation of Nuclear Weapons (NPT), eller Traktatet om icke-spridning av kärnvapen, vilket förbjuder stater utan kärnvapen som är part till traktatet att förvärva dessa vapen. Vid analys av detta traktat och dess föreskrifter kan man utröna vissa otydligheter i dess text och att det inte förbjuder all typ av spridning av kärnvapen. Traktatet erbjuder således inget generellt och absolut förbud vad gäller förvärv av kärnvapen.

I analysen av huruvida det är lagligt att använda kärnvapen undersöks områdena jus ad bellum, internationell humanitärrätt, rätten till liv som mänsklig rättighet och internationell miljö rätt. Genom denna undersökning kan det fastställas att internationell humanitärrätt är tillämplig i de flesta situationer där det finns en risk för användning av kärnvapen. Detta område av folkrätten begränsar möjligheterna för lagligt användande av kärnvapen avsevärt. Trots detta kan det konstateras att det även på detta område finns en avsaknad av ett generellt och absolut förbud.

Innehav av kärnvapen är relativt oreglerat i folkrätten, men det mest centrala regelverket är även på detta område Traktatet om icke-spridning av kärnvapen (NPT). Detta traktat förbjuder indirekt innehav av kärnvapen för de stater som inte har kärnvapen och som är parter till traktatet, eftersom de inte har några lagliga möjligheter att förvärva vapnen. Vidare innehåller Traktatet om icke-spridning av kärnvapen skyldigheter vad gäller nedrustning, vilka inte uppfylls för tillfället.

Det finns alltså flera regelverk, utöver det nya traktatet, som redan är applicerbara på kärnvapen. Dessa innehåller dock inga generella och absoluta förbud vad gäller förvärv, användande eller innehav av kärnvapen. Följaktligen skulle TPNW kunna ha en betydande effekt, eftersom det erbjuder mer heltäckande bestämmelser. Vid bedömandet av det nya traktatets effekt måste dock även hänsyn tas till dess tillämpningsområde. Eftersom bara 54 stater har ratificerat traktatet hittills kan det konstateras att TPNW har en begränsad rättslig effekt vad gäller skapa rättsligt bindande skyldigheter. Det finns dock utrymme att argumentera för att även stater som endast skrivit under traktatet också har skyldigheter i förhållande till dess innehåll. Vidare skulle TPNW i framtiden kunna påverka kärnkraftspolitiken och de regelverk som reglerar kärnvapen. Trots en begränsad rättslig effekt är det nya traktatet således inte obetydligt. Det bedöms troligt att fler stater kommer att ratificera traktatet, och att det har potential att skapa förändring bortom den juridiska sfären, i världspolitiken. Traktatet bidrar också till diskursen som fokuserar på de förödande humanitära konsekvenserna av användandet av kärnvapen och signalerar att det enda sättet att förhindra framtida användande är att totalt eliminera vapnen.

# Preface

Today, every inhabitant of this planet must contemplate the day when this planet may no longer be habitable. Every man, woman and child lives under a nuclear sword of Damocles, hanging by the slenderest of threads, capable of being cut at any moment by accident or miscalculation or by madness.

The weapons of war must be abolished before they abolish us.

- *John. F. Kennedy.*<sup>1</sup>

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<sup>1</sup> John F. Kennedy Presidential Library and Museum: “Address before the General Assembly of the United Nations, September 25, 1961” <<https://www.jfklibrary.org/archives/other-resources/john-f-kennedy-speeches/united-nations-19610925>>, visited 12 May 2021.



# Abbreviations

AChHR	Arab Charter on Human Rights
ACHR	American Convention on Human Rights
CIHL Study	Customary International Humanitarian Law Study
DPR Korea	Democratic People's Republic of Korea
ECHR	European Convention on Human Rights
HRL	Human Rights Law
IACoMHR	International American Commission on Human Rights
IAEA	International Atomic Energy Agency
ICAN	International Campaign to Abolish Nuclear Weapons
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTY	International Criminal Tribunal for the Former Yugoslavia
IHL	International Humanitarian Law
NATO	North Atlantic Treaty Organisation
NGO	Non-Governmental Organisation
NPT	Treaty on the Non-Proliferation of Nuclear Weapons
NWS	Nuclear Weapon States
NNWS	Non-Nuclear Weapon States
SIPRI	Stockholm International Peace Research Institute
The Court	International Court of Justice
TPNW	Treaty on the Prohibition of Nuclear Weapons
UK	United Kingdom
UN	United Nations
UN Charter	Charter of the United Nations
US	United States
VCLT	Vienna Convention on the Law of Treaties
VERTIC	Verification Research, Training and Information Centre

# 1 Introduction

On 7 July 2017, the Treaty on the Prohibition of Nuclear Weapons (TPNW) was adopted by the United Nations Conference to negotiate a legally binding instrument to prohibit nuclear weapons, with the intent of total elimination of the weapons.<sup>2</sup> The Treaty was adopted by a vote of 122 states in favour, with one vote against and one abstention.<sup>3</sup> In accordance with Article 13 of the Treaty, it opened for signature to all states at the United Nations Headquarters in New York 20 September 2017.<sup>4</sup> In consistency with Article 15 of the Treaty, it entered into force 90 days after the fiftieth instrument of ratification had been deposited by Honduras 24 October 2020. The TPNW entered into force on 22 January 2021.<sup>5</sup>

The initiative to, through the adoption of a new legally binding instrument, prohibit nuclear weapons was a product of the discourse centred around endorsing greater awareness and understanding of the humanitarian consequences that would follow from any use of nuclear weapons.<sup>6</sup> In recent years, an interest in the humanitarian impact of nuclear weapons has been manifested. This can be seen in the final document of the 2010 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, which expressed a deep concern for the catastrophic humanitarian consequences of any use of nuclear weapons.<sup>7</sup> Such concerns were also apparent in resolution 67/56, adopted by the UN General Assembly in 2012.<sup>8</sup> The UN General Assembly, through this resolution, established an open-ended working group, with the aim of developing proposals to take forward multilateral nuclear disarmament negotiations with the purpose of achieving and maintaining a world without

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<sup>2</sup> UN Treaty Collection: “Treaty on the Prohibition of Nuclear weapons” <[https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XXVI-9&chapter=26](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVI-9&chapter=26)>, visited 14 February 2021.

<sup>3</sup> UN Office for Disarmament Affairs: “Treaty on the prohibition of nuclear weapons”, <<https://www.un.org/disarmament/wmd/nuclear/tpnw/>>, visited 12 April 2021.

<sup>4</sup> UN Treaty Collection: “Treaty on the Prohibition of Nuclear weapons” <[https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XXVI-9&chapter=26](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVI-9&chapter=26)>, visited 14 February 2021.

<sup>5</sup> ICAN: “Signature and ratification status”, <[https://www.icanw.org/signature\\_and\\_ratification\\_status](https://www.icanw.org/signature_and_ratification_status)>, visited 18 February 2021.

<sup>6</sup> UN Office for Disarmament Affairs: “Treaty on the prohibition of nuclear weapons”, <<https://www.un.org/disarmament/wmd/nuclear/tpnw/>>, visited 12 April 2021.

<sup>7</sup> Final Document of the 2010 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, p. 19.

<sup>8</sup> General Assembly Res. 67/56, UN Doc A/RES/67/56.

nuclear weapons.<sup>9</sup> Furthermore, a series of three international conferences were convened in 2013 and 2014 in Norway, Mexico and Austria. The subject of these conferences was the humanitarian impact of nuclear weapons, as they sought to introduce a fact-based understanding of both the short and long-term effects of a nuclear weapon detonation. A large majority of states, the International Committee of the Red Cross (ICRC) and hundreds of representatives of non-governmental organisations (NGO) participated in the conferences. These conferences were largely coordinated by the International Campaign to Abolish Nuclear Weapons (ICAN),<sup>10</sup> a coalition of non-governmental organisations in one hundred countries, which promotes the adherence to and implementation of the new Treaty.<sup>11</sup>

At the time of writing, 54 countries have ratified the Treaty, becoming State Parties, and 86 countries have signed the Treaty, but not yet ratified it, making them Signatory States.<sup>12</sup> The Treaty is legally binding for the State Parties and includes a comprehensive ban on nuclear weapons. According to Article 1 of TPNW, each State Party undertakes to never under any circumstances develop, test, produce, manufacture, otherwise acquire, possess or stockpile nuclear weapons or other nuclear explosive devices. State Parties are also prohibited to transfer or receive nuclear weapons, or the control of such weapons. Article 1 also prohibits the use of nuclear weapons as well as assisting, encouraging or inducing anyone to engage in activities prohibited under the Treaty. Neither can a state seek or receive assistance from anyone in activities prohibited under the Treaty. Lastly, Article 1 prohibits stationing, installation or deployment of such weapons in its territory or any place under its jurisdiction or control.<sup>13</sup>

The discourse of the past decade and the entry into force of a Treaty with such far-reaching and comprehensive obligations might raise some questions pertaining to what direction nuclear policy and the international law governing nuclear weapons is heading. Is this a sign that the world is heading in the direction of finally eradicating these devastating weapons?

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<sup>9</sup> General Assembly Report, UN Doc A/68/514.

<sup>10</sup> UN Office for Disarmament Affairs: “Treaty on the prohibition of nuclear weapons”, <<https://www.un.org/disarmament/wmd/nuclear/tpnw/>>, visited 12 April 2021.

<sup>11</sup> ICAN: “The Campaign”, <[https://www.icanw.org/the\\_campaign](https://www.icanw.org/the_campaign)>, visited 18 February 2021.

<sup>12</sup> ICAN: “Signature and ratification status”, <[https://www.icanw.org/signature\\_and\\_ratification\\_status](https://www.icanw.org/signature_and_ratification_status)>, visited 18 February 2021.

<sup>13</sup> See Article 1 of the TPNW.

## 1.1 Purpose and questions

Due to the recent entry into force of the new TPNW, questions of what role it will play in the international community are undoubtedly raised. The purpose of this thesis is thus to examine what legal impact the new Treaty will or potentially could have. The impact will be assessed by examining the Treaty's substance in relation to already established international law, with the purpose of determining if the Treaty provides any new regulations on the subject of nuclear weapons. The impact will also be assessed by examining if it provides any clarification on potential ambiguities in current international law. Simply put, this thesis aims to evaluate if the TPNW has the potential to 'fill in any gaps' of already established international law. To examine the TPNW's impact in these two aspects, one must first examine *de lege lata* (the law as it is). Consequently, an additional purpose of this analysis is to establish how current international law beyond the new Treaty regulates the acquisition, use and possession of nuclear weapons and if such acts are already prohibited under international law.

Lastly, this thesis aims to determine the TPNW's impact in terms of creating legally binding obligations, and for what states. This is done through assessing what states are, or potentially could become, legally bound by the obligations found in the Treaty. Consequently, this thesis aims to answer the following questions:

- Are the acts of acquisition, use and possession of nuclear weapons lawful under current international law beyond the TPNW?
- What is the impact of the TPNW in terms of its substance and clarifying already established international law?
- For what states does the TPNW create legally binding obligations?

## 1.2 Method and perspective

This thesis mainly takes on a *de lege lata*-perspective, which entails the establishment of the law as it exists (*de lege lata*). This could be said to be done through the legal dogmatic method, which has its basis in the doctrine of legal sources. Legal sources of international law include treaty law, customary international law, case law and doctrine.<sup>14</sup> Doctrine is largely

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<sup>14</sup> Korling & Zamboni, pp. 21–23.

used with the intent of interpreting the law and its applicability to nuclear weapons in certain situations, in order to establish *de lege lata*. In interpreting treaty law this thesis also frequently applies provisions of the 1969 Vienna Convention on the Law of Treaties (VCLT).

This thesis is not, however, limited to solely applying a *de lege lata*-perspective, as it at times adopts a *de lege ferenda*-perspective, i.e. an analysis of what the law should be. A *de lege ferenda*-perspective is in this thesis mainly applied in relation to areas of international law where the interpretation could be ambiguous, or in areas where there is little consensus. It could also be argued to be present in the speculations of the TPNW's impact.

Furthermore, this thesis aims to assess facts and speculations, which are not solely of a legal nature. Such considerations include facts concerning the more scientific aspects of nuclear weapons and their effects as well as questions of the humanitarian consequences of the use of nuclear weapons. Moreover, one cannot examine nuclear weapons without also acknowledging their very political nature. Such political considerations are also included in this thesis.

As this thesis does not solely entail a description of applicable law, but also aims to analyse and at times also criticise current international law, the method extends beyond the legal dogmatic method. Hence, the method of this thesis as a whole could be described as a legal analytical method.<sup>15</sup> Unlike the legal dogmatic method, the legal analytical method aims not only to determine *de lege lata*, but also to critically examine and analyse the law. This method extends beyond the doctrine of legal sources, which means that material other than the traditional legal sources can be considered as a basis for the analysis.<sup>16</sup>

### **1.3 Material and research today**

Nuclear weapons are a vigorously debated subject, both from political and legal perspectives. The material on the subject could thus be said to be generally plentiful. There are, however, exceptions, depending on what area of nuclear weapons is examined. This analysis aspires to describe international law in the most contemporary sense possible, and an effort has thus been made to find and use sources that are up to date. Needless to say, in some areas this has proven difficult, given that some of the most recent developments in the area include the

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<sup>15</sup> Sandgren, p. 50.

<sup>16</sup> Sandgren, pp. 45–46.

TPNW entering into force as recently as on the 22 January 2021. Furthermore, much of the material relating to the acquisition of nuclear weapons was generated during the decades following the adoption of the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) in 1968. Nevertheless, it is not impossible to find sources of a more contemporary nature relating to the subject, which often discuss NPT's effect and impact. Such sources include "Nuclear Weapons under International Law", edited by Gro Nystuen, Stuart Casey-Maslen and Annie Golden Bersagel.<sup>17</sup> This work has been of value in the examination of several areas of international law and has also been useful in discovering further material to examine.

As mentioned, this thesis is largely based upon legal sources, such as treaty law, customary law, case law and doctrine. As interpreting treaty law can be complex, academic works which have inspired this thesis also include literature on both treaty interpretation and comments on *de lege lata*. Literature on treaty interpretation includes the "Vienna Convention on the Law of Treaties: A Commentary", edited by Oliver Dörr and Kirsten Schmalenbach, and "Commentary on the 1969 Vienna Convention on the Law of Treaties" by Mark E. Villiger. Furthermore, literature commenting on *de lege lata* and its effects is extensively used in this thesis and includes both articles from legal journals and books. In this aspect, authors such as Louise Doswald-Beck, Nobuo Hayashi and Daniel H. Joyner have been valuable to this analysis. The purpose of extensive presentation of different commentators and their views is to provide the reader with both a nuanced analysis and an understanding of the constant presence of disagreement in international law.

## 1.4 Demarcations

The subject of nuclear weapons is both comprehensive and complex, and a legal analysis of these weapons could include many different areas of international law. Discussions pertaining to the legality of acquiring, using and possessing nuclear weapons can take many perspectives and take many different considerations into account. For the purpose of this particular analysis, however, some demarcations have to be made in relation to the scope of this thesis.

This thesis aims to examine *de lege lata* concerning the legality of acquiring, using and possessing nuclear weapons. There will be no historically oriented discussions of the legality of their use during the second world war. The present analysis will, however, at times adopt a

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<sup>17</sup> Nystuen et al.

de lege ferenda perspective (what the law should be). This analysis intends to focus on existing legal instruments applicable to nuclear weapons, such as treaties and customary law. Consequently, little attention will be given to institutional safeguards and practical institutions that help govern the adherence to these legal instruments. Moreover, questions of responsibility and accountability for states in violation of current international law will be left outside the scope of this thesis.<sup>18</sup>

The subject of nuclear testing could be considered relevant to both the use and acquisition of nuclear weapons. This thesis does however only intend to examine the legality of using nuclear weapons in relation to the targeting of another state. Use such as testing will thus not be included in this thesis. Furthermore, nuclear testing could also be considered indirectly relevant pertaining to acquisition, as prohibiting nuclear tests limits possibilities of developing or manufacturing such weapons. Treaties regulating nuclear testing will, however, not be included in the scope of this thesis as it is not considered directly relevant.<sup>19</sup> Consequently, cases by the International Court of Justice (ICJ or ‘the Court’) concerning nuclear tests will not be included in this analysis.<sup>20</sup>

There are several regional treaties relating to nuclear weapons, regulating so-called nuclear-weapon-free zones.<sup>21</sup> Nevertheless, such regional legal instruments will not be included in the scope of this analysis, as it aims to take a global perspective. Consequently, this thesis will not examine the bilateral Treaty between the United States and Russia, on Measures for the Further Reduction and Limitation of Strategic Offensive Arms (New START Treaty).<sup>22</sup>

The legality of the use of nuclear weapons is particularly comprehensive, and thus requires several demarcations. These include demarcations in relation to the right to self-defence, as some discussions relating to this right are considered redundant for the purpose of this analysis. Specifically, discussions of collective, pre-emptive and anticipatory self-defence and

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<sup>18</sup> On this subject, see for example the International Law Commission’s Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA).

<sup>19</sup> Treaties regulating nuclear testing include the 1963 Treaty Banning Nuclear Weapon Test in the Atmosphere, in Outer Space and under Water (Partial Test Ban Treaty) and the 1996 Comprehensive Test Ban Treaty.

<sup>20</sup> On this subject, see the ICJ Nuclear Tests cases (Australia v. France; New Zealand v. France), Judgement 20 December 1974, concerning proceedings against France for atmospheric tests of nuclear weapons in the South Pacific region.

<sup>21</sup> Roscini, pp. 321-322.

<sup>22</sup> For further information, see U.S. Department of State: “New START Treaty”, <<https://www.state.gov/new-start/>>, visited 15 May 2021.

self-defence in relation to non-state actors will be excluded from the scope of this thesis. Issues of non-state actors in other areas of international law will also be excluded from this analysis, as this thesis focuses on the relationship between states. Moreover, as this analysis examines international human rights law in relation to the legality of using nuclear weapons, it will mainly focus on the International Covenant on Civil and Political Rights (ICCPR), and in particular the right to life. The emphasis on this specific right derives from it being discussed in the Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons (hereinafter the Nuclear Weapons Advisory Opinion),<sup>23</sup> and the treaty body monitoring the ICCPR having commented on its applicability in relation to both armed conflicts, and nuclear weapons.<sup>24</sup> This thesis will also not include any in depth analysis of the use of nuclear weapons as a crime under the Rome Statute of the International Criminal Court (Rome Statute).

When considering nuclear weapons, and in particular their use, such considerations could undoubtedly include issues of threatening to use such weapons. For instance, questions of whether not merely possessing nuclear weapons could be a threat have been raised in the past.<sup>25</sup> The threat of use of force will, however, not be independently examined in this analysis.

Finally, this thesis will not examine what potential role the UN Security Council could have in this matter. Moreover, it could be argued that the Iran Nuclear Deal could be of interest, as it is related to the subject of nuclear weapons. The Iran Nuclear Deal, however, is not deemed directly relevant to determining the impact of the TPNW and will thus not be included in this thesis.

## 1.5 Disposition

This thesis is divided into seven chapters: an introductory chapter, an overview of the history, effect and current status of nuclear weapons, three chapters on the lawfulness of acquiring, using and possessing nuclear weapons, an analysis on the impact of the new TPNW, and finally, a conclusion. The first chapter has provided an introduction to the TPNW, in order to describe its ambitions and its content. This is done to create a solid foundation for the reader of what recent developments entail. The first chapter also includes a presentation of the

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<sup>23</sup> See for example Nuclear Weapons Advisory Opinion, para 25.

<sup>24</sup> See for example UN Human Rights Committee, General Comment No. 36, para 66.

<sup>25</sup> See for example the Nuclear Weapons Advisory Opinion, para 48.



purpose of this analysis as well as questions which this thesis aims to answer. It also entails descriptions of the methods and material used in order to conduct this study as well as a clarification on the scope of this thesis.

Within the second chapter, the history and effects of nuclear weapons are established to create a better understanding of a selection of the issues relating to nuclear weapons. Furthermore, this chapter also establishes which states are thought to be in possession of nuclear weapons, how many nuclear weapons are thought to exist in the world today and a depiction of varieties of nuclear weapons.

Chapters 3, 4 and 5 relate to the lawfulness of acquisition, use and possession of nuclear weapons and are all examinations of *de lege lata*, excluding the TPNW, which will be further analysed in Chapter 6. These three chapters all aspire to examine whether or not there are any legal instruments limiting or prohibiting acts pertaining to nuclear weapons in each of these areas. Of these three chapters, Chapter 4 is the most extensive as it examines the lawfulness of use of nuclear weapons under international law. This examination is carried out by examining the prohibition of the use of force and self-defence, international humanitarian law (IHL), the right to life as stated in the ICCPR and international environmental law.

Chapter 6 aims to answer the question of what impact the TPNW will or potentially could have. As *de lege lata* has been examined in the previous chapters, this chapter aims to analyse whether the TPNW ‘fills in any gaps’ and contributes to the progressive development of the law regulating nuclear weapons. It also provides an analysis of what states are, or potentially could become, legally bound by the Treaty.

The final Chapter 7 provides a conclusion of the analysis undertaken in the previous chapters and provides concrete answers to the questions asked in Chapter 1, as it compiles what has been presented throughout the thesis.

## 2 An Overview of Nuclear Weapons

This chapter aims to provide a brief overview of the history of how nuclear weapons came to be, as well as an examination of how many nuclear weapons or nuclear warheads exist today. Moreover, it will also offer an examination of the varieties of nuclear weapons that exist today. Additionally, this chapter intends to depict the devastating effects of the use of nuclear weapons, with the purpose of giving the reader an understanding of the severe issues surrounding these weapons.

### 2.1 The History of Nuclear Weapons

In 1939 Niels Bohr, recipient of the Nobel Prize for Physics in 1922 and head of the Institute for Theoretical Physics at Copenhagen University,<sup>26</sup> informed the United States that the Germans had split the atom. The news urged then-US President Theodore Roosevelt to establish the Manhattan Project, with the apprehension that the Nazis could develop extremely powerful weapons. As a result of the work at the Manhattan Project, the world's first detonation of a nuclear weapon took place on 16 July 1945 at MacDonald's Ranch in New Mexico.<sup>27</sup> Just a few months post the first detonation of a nuclear weapon, the first nuclear attack transpired as 'Little Boy' was dropped upon Hiroshima in Japan by the United States on 6 August 1945. Three days later, 9 August 1945, 'Fat man' was dropped upon Nagasaki in Japan. The attacks had devastating effects, unlike anything previously feasible by a single weapon. In each of the cities, both immediate and delayed fatalities almost certainly reached well into six figures.<sup>28</sup>

The second state to test a nuclear bomb was the Soviet Union in 1949. In October 1962 the Cuban Missile Crisis almost caused a worldwide nuclear war, and estimates propose that if the US had struck first, it would have suffered casualties amounting to over half of its population at the time. The following month, the US detonated a hydrogen bomb in space,

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<sup>26</sup> The Nobel Prize: "Niels Bohr" <<https://www.nobelprize.org/prizes/physics/1922/bohr/biographical/>>, visited 15 February 2021.

<sup>27</sup> Nystuen & Casey-Maslen, pp. 4-5.

<sup>28</sup> Quinlan, p. 6.

402 metres above the earth's surface. As a result of the detonation, seven satellites were destroyed, including the world's first communication satellite.<sup>29</sup>

Following these first tests, India tested its first nuclear weapon in 1974 and in 1998 Pakistan did the same.<sup>30</sup> In October 1986 Mordechai Vanunu, a former Israel nuclear technician, disclosed in a British newspaper that Israel had developed nuclear weapons. He was later abducted by Israeli intelligence operatives in Rome and forcibly returned to Israel, where he served eighteen years in prison.<sup>31</sup> The latest nuclear test above-ground is supposed to have taken place by China in 1980. In October 2006 however, the Democratic People's Republic of Korea (DPR Korea) executed a test of a low-yield nuclear device underground, revealing to the world that it had joined the list of nuclear-weapon states.<sup>32</sup>

## 2.2 The Effects and Varieties of Nuclear Weapons

A nuclear weapon is an explosive device, with a destructive force deriving from either nuclear fission chain reactions or combines nuclear fission and fusion reactions. Nuclear weapons that are generally referred to as 'atomic bombs' acquire their explosive force from *fission* reactions exclusively. There are also nuclear weapons that derive much or most of their energy in nuclear *fusion* reactions, so-called thermonuclear weapons or hydrogen bombs.<sup>33</sup>

The explosion of a nuclear weapon generates inconceivable quantities of heat upon detonation; between 60 and 100 million degrees centigrade.<sup>34</sup> In comparison, the temperature of the sun's surface is approximately 60,000 degrees centigrade.<sup>35</sup> Any unprotected person within a radius of approximately two and a half kilometres from ground zero will receive third-degree (full thickness) burns, which will almost certainly result in death. A unique characteristic of nuclear weapons is the radiation, which occurs at different times. The so-called 'prompt' radiation strikes first, soon after the explosion and is comprised of neutrons,

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<sup>29</sup> Nystuen & Casey-Maslen, p. 8.

<sup>30</sup> Bernstein, p. 5.

<sup>31</sup> Asser: "Vanunu: Israel's nuclear telltale", BBC 20 April 2004, <[http://news.bbc.co.uk/2/hi/middle\\_east/3640613.stm](http://news.bbc.co.uk/2/hi/middle_east/3640613.stm)>, visited 3 Mars 2021.

<sup>32</sup> Bernstein, pp. 4-7.

<sup>33</sup> Nystuen & Casey-Maslen, p. 3.

<sup>34</sup> Bernstein, pp. 137-138.

<sup>35</sup> Bernstein, pp. 171-173.

gamma rays and electrons. Neutron radiation is a particularly hazardous form of radiation for humans.<sup>36</sup>

In the bombing of the two cities of Japan, injuries during the first two weeks were mostly limited to burns from rays and flames, as well as wounds from the blast and falling structures. During the following third through eight weeks, however, there were symptoms of damage by radioactive rays. These included anaemia, loss of white cells, hair loss, bleeding and diarrhoea. In the third and fourth months, improvements could be established in relation to burn, trauma, and even radiation injuries. However, during this period secondary injuries became apparent. These included disfiguration, severe scar formations (keloids), blood abnormalities, sterility (both sexes) and psychosomatic disorders. Finally, after even more than half a century since the explosions, many after-effects lingered. Such after-effects included leukaemia, A-bomb cataracts and cancers of the thyroid, breast, lungs and salivary glands. After-effects also consisted of birth defects and fears of birth defects in children.<sup>37</sup>

The effects of nuclear weapons on human life and well-being will depend on a variety of factors, such as the size and type of nuclear weapon used. Factors such as whether the weapon is ground- or underwater-burst or detonated in the air or at high altitude will also affect the outcome. Moreover, the terrain and climate at the place of impact are also such factors on which the effects depend.<sup>38</sup> Effects are, however, always unpredictable to a certain extent, due to the inestimable behaviour of secondary radiation.<sup>39</sup> A nuclear explosion will always result in nuclear fallout. Nuclear fallout refers to the residual radioactive material propelled into the atmosphere following a nuclear explosion. Subsequently, some of these particles fall in the immediate area of the explosion, while some get carried by the upper winds, thousands of kilometres from the site of the explosion. When these particles ultimately fall to Earth, it is called 'fallout'. The fallout will generally contain roughly 50 percent of the total radioactivity.<sup>40</sup>

In the discussions surrounding nuclear weapons, one often come across the terms 'low-yield' and 'tactical' nuclear weapons. There is no formulation or definition of tactical nuclear

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<sup>36</sup> Nystuen & Casey-Maslen, p. 6.

<sup>37</sup> Nystuen & Casey-Maslen, p. 7.

<sup>38</sup> Casey-Maslen, pp. 106-107.

<sup>39</sup> Anastassov, p. 77.

<sup>40</sup> Casey-Maslen, pp. 106-107.

weapons, but such weapons are generally identified by their size. What could be said about these weapons is that they should be low-yield.<sup>41</sup> Nevertheless, there is no agreed-upon definition of what constitutes ‘low-yield’. Nuclear yields could be defined as the amount of energy released when a nuclear weapon is detonated.<sup>42</sup> This is measured in terms of the weight of TNT required to produce the same energy release. Conventional weapons, meaning weapons that are not of nuclear character, are commonly measured in pounds of TNT. Such measurements usually range from approximately 500 to 2000 pounds.<sup>43</sup> Due to the explosive power of nuclear weapons, these weapons are measured in tons, more specifically in kilotons (1,000 x 1 ton) and megatons (1,000,000 x 1 ton).<sup>44</sup>

Although there is no agreed-upon definition of ‘low-yield’, the Joint Chiefs of Staff have produced a manual that categorises yields. The Joint Chiefs of Staff is a body in the United States Department of Defence, in which the Chairman is the principal military adviser to the President, Secretary of Defence and the National Security Council.<sup>45</sup> The manual categorises yields as follows:

- Very low – less than 1 kiloton.
- Low – 1 kiloton to 10 kilotons.
- Medium – over 10 kilotons to 50 kilotons.
- High – over 50 kilotons to 500 kilotons.
- Very high – over 500 kilotons.<sup>46</sup>

Consequently, tactical nuclear weapons usually range from 0.1 kilotons to 10 kilotons. To put these numbers in perspective, a nuclear weapon of one kiloton has close to 2,2 million pounds of explosive (TNT) power, which is equivalent to 1,100 conventional bombs of 2000 pounds.<sup>47</sup> This could be compared to the bomb dropped upon Hiroshima, which was 12 kilotons and equated to 13,200 conventional bombs. Furthermore, an explosion from a low-yield nuclear weapon of 10 kilotons would destroy everything within a radius of approximately 250 metres but allow for some survivors within a radius of roughly 800 metres.

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<sup>41</sup> Chatham, p. 42.

<sup>42</sup> Casey-Maslen, pp.112-113.

<sup>43</sup> Approximately 230 to 900 kilograms according to the metric system.

<sup>44</sup> Chatham, p. 42.

<sup>45</sup> Joint Chiefs of Staff: “About” <<https://www.jcs.mil/About/>>, visited 17 May 2021.

<sup>46</sup> Joint Chiefs of Staff: “Doctrine for Joint Theater Nuclear Operations”, Joint Publication 3-12.1, 9 February 1996, GL-3, <[https://www.nukestrat.com/us/jcs/JCS\\_JP3-12-1\\_96.pdf](https://www.nukestrat.com/us/jcs/JCS_JP3-12-1_96.pdf)>, visited 17 May 2021.

<sup>47</sup> Approximately 900 kilograms according to the metric system.

Nevertheless, such an explosion would have a radioactive plume up to 3000 kilometres long and 3 kilometres wide, which could affect as many as 150,000 people in a large city. In fact, a nuclear weapon that is small in size and explosive power (low-yield) could cause severe amounts of radioactive damage.<sup>48</sup>

## 2.3 Estimated Stockpiles of Nuclear Weapons Today

When it comes to how many nuclear weapons or nuclear warheads exist in the world today, no one really knows (or agrees on a number). However, a total of nine states are thought to have stockpiles amounting to a total of about 17,300 warheads.<sup>49</sup> These nine nuclear-weapon states (NWS) include Russia, the United States of America, France, China, The United Kingdom, Pakistan, India, Israel and DPR Korea. ICAN has estimated that the nine NWS possess a total of nearly 14,000 nuclear weapons<sup>50</sup>, and the Stockholm International Peace Research Institute (SIPRI) claims that the number is 13,400.<sup>51</sup> Scholar and author Ward Wilson claims that the figure extends beyond 20,000.<sup>52</sup> Furthermore, SIPRI has estimated that around 3720 of the world's nuclear weapons are currently deployed with operational forces (potentially ready for use) and nearly 1800 of these are kept in a state of high operational alert. Of the global nuclear weapons, over 90 percent are possessed by the US and Russia.<sup>53</sup>

Even though there is a lack of consensus on the specific number of nuclear weapons, there is undoubtedly a large number existing in the world today. Considering the dangers posed to human life and wellbeing as well as the environment that has been presented in this chapter, one might wonder what legal instruments regulate these weapons, beyond the new TPNW. Hence, the following three chapters will offer an examination of how international law regulates the acquisition, use and possession of nuclear weapons.

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<sup>48</sup> Chatham, p. 42.

<sup>49</sup> Nystuen & Casey-Maslen, p. 9.

<sup>50</sup> ICAN: "The World's Nuclear Weapons", <[https://www.icanw.org/nuclear\\_arsenals](https://www.icanw.org/nuclear_arsenals)>, visited 18 February 2021.

<sup>51</sup> SIPRI: "Nuclear weapon modernization continues but the outlook for arms control is bleak: New SIPRI Yearbook out now", SIPRI 15 June 2020, <<https://www.sipri.org/media/press-release/2020/nuclear-weapon-modernization-continues-outlook-arms-control-bleak-new-sipri-yearbook-out-now>>, visited 25 March 2021.

<sup>52</sup> Wilson, p. 16.

<sup>53</sup> SIPRI: "Nuclear weapon modernization continues but the outlook for arms control is bleak: New SIPRI Yearbook out now", SIPRI 15 June 2020, <<https://www.sipri.org/media/press-release/2020/nuclear-weapon-modernization-continues-outlook-arms-control-bleak-new-sipri-yearbook-out-now>>, visited 25 March 2021.

# **3 The Legality of Acquiring Nuclear Weapons under International Law**

This chapter will offer an analysis of how international law regulates the acquisition of nuclear weapons. This will be done through examining the Treaty on the Non-Proliferation of Nuclear Weapons (NPT), which is considered central to the topic of acquisition.

## **3.1 The Acquisition of Nuclear Weapons and The Treaty on the Non-Proliferation of Nuclear Weapons**

The NPT, adopted in 1968 and entered into force two years later, is a product of a consensus developing in the early 1960s that serious action had to be taken to prevent the humanitarian catastrophe that would result from a global nuclear war. The Treaty has commonly been viewed as a ‘grand bargain’ in which the non-nuclear-weapon states (NNWS) renounce the option of acquiring nuclear weapons in exchange for the nuclear weapon states’ (NWS) legal obligation to refrain from transferring the weapons to any other states and to disarm and eventually eliminate their arsenals.<sup>54</sup>

Articles I and II of the NPT contain non-proliferation elements and could be considered to be at the very core of the subject of acquisition of nuclear weapons. Preceding the adoption of the Treaty, there were disagreements between the two aligned blocks (East and West) concerning the interpretation of the concept of non-proliferation. For the US side, it was essential that the Treaty did not affect the nuclear sharing arrangements that were already in place in the North Atlantic Treaty Organization (NATO). Secondly, the US demanded that the NPT should not preclude plans for a proposed Multilateral Force in NATO. This was found unacceptable by the Soviet Union, which precluded any language or wording that could be interpreted as permitting the placement of nuclear weapons in West Germany. In its draft, the Soviet Union proposed a prohibition that would go as far as precluding all existing sharing arrangements in NATO. This was instead unacceptable to the NATO states, as the United States and its allies did not want to confine its options of using delivery systems owned by a

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<sup>54</sup> Nystuen & Graff Hugo, pp. 374–375.

NNWS ally in the case of war. In order to reach a successful negotiation on the NPT, the US had to abandon the multilateral force project, making the negotiation come to a breakthrough. In August 1967 the United States and the Soviet Union each presented identical treaty drafts, and the wording of the two first articles remained largely untouched.<sup>55</sup>

Articles I and II of the mentioned Treaty, which continues to govern acquisition, both contain prohibitions on proliferation, where the first Article is directed at the NWS and the second at the NNWS. The articles are worded as follows:

**Article I**

Each nuclear-weapon State Party to the Treaty undertakes not to transfer to any recipient whatsoever nuclear weapons or other nuclear explosive devices or control over such weapons or explosive devices directly, or indirectly; and not in any way to assist, encourage or induce any non-nuclear-weapons State to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices, or control over such weapons or explosive devices.

**Article II**

Each non-nuclear-weapon State Party to the Treaty undertakes not to receive the transfer from any transferor whatsoever of nuclear weapons or other nuclear explosive devices or of control over such weapons or explosive devices directly, or indirectly; not to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices; and not to seek or receive any assistance in the manufacture of nuclear weapons or other nuclear explosive devices.

The NPT opened for signature in 1968 and entered into force on 5 March 1970.<sup>56</sup> In 1995 the State Parties to the NPT extended the Treaty's initial lifetime of twenty-five years indefinitely,<sup>57</sup> and with its 191 State Parties it is the most widely adhered to treaty in the field of nuclear non-proliferation, peaceful uses of nuclear energy and nuclear disarmament.<sup>58</sup>

As the NPT entered into force in 1970, one might wonder what significance it has had on the existence of nuclear weapons, and perhaps more relevant, the number of NWS. According to

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<sup>55</sup> Nystuen & Graff Hugo, pp. 379–380.

<sup>56</sup> Nystuen & Graff Hugo, pp. 374.

<sup>57</sup> Nystuen & Graff Hugo, pp. 374.

<sup>58</sup> International Atomic Energy Agency (IAEA): “The IAEA and the Non-Proliferation Treaty”, <<https://www.iaea.org/topics/non-proliferation-treaty>>, visited 20 February 2021.



retired Russian ambassador Roland Timerbaev, an expert in the area of nuclear non-proliferation and arms control and one of the founding fathers of the NPT<sup>59</sup> the NPT has played and continues to play a crucial role in limiting the nuclear weapon arsenals in the world, as well as limiting the number of states that have access to these weapons. Timerbaev stated in 2005 that ‘the NPT, over the years has been a reasonable success. Without the NPT, the total number of nuclear-weapon states might have reached 30 or 40 by now’.<sup>60</sup> This view is also held by Gro Nystuen, Professor of international humanitarian law and Torbjørn Graff Hugo, previously with the Section for Disarmament and Non-proliferation in the Norwegian Ministry of Foreign Affairs.<sup>61</sup> They argue that the NPT largely has succeeded in the task of preventing proliferation.<sup>62</sup> Hence, the NPT seems to have limited the possibilities of acquiring nuclear weapons significantly, at least for State Parties, and the two first articles appear to create an incontrovertible system for non-proliferation. Still, there are a few questions that could be raised.

The first two articles of the Treaty could be argued to hold some ambiguity regarding their wording. For example, one might ask what a ‘nuclear weapon’ is under the NPT since a definition is absent in the Treaty. The lack of a definition has facilitated for the United States to interpret the term as only nuclear warheads, not delivery systems. This created the possibility for the state to sell missiles to the United Kingdom, equipped with everything but the warheads.<sup>63</sup> Moreover, the prohibition to transfer nuclear weapons to ‘any recipient whatsoever’ appears to constitute a waterproof prohibition on the transferring of nuclear weapons altogether, even within military alliances. This is as stated not the case. The issue of military alliances under the NPT had been an issue of discussion from an early stage of the NPT’s development. The US side had several times established its intent not to allow any non-proliferation treaty that would affect existing consultative and planning arrangements with its NATO allies. Since the issue of nuclear planning and sharing in NATO had been a fundamental part of the discussion during much of the negotiations, it is safe to assume that most NNWS must have been aware that the Treaty would not exclude all forms of nuclear sharing.<sup>64</sup>

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<sup>59</sup> Timerbaev, p. 7.

<sup>60</sup> Timerbaev, p. 4.

<sup>61</sup> Nystuen et al., pp. viii-xiii.

<sup>62</sup> Nystuen & Graff Hugo, pp. 374–375.

<sup>63</sup> Willrich, p. 1474.

<sup>64</sup> Nystuen & Graff Hugo, pp. 387-388.

Another potential issue with the NPT is how to define the meaning of ‘manufacture’ in the context of the NPT. At what stage of planning, researching, exploitation of uranium or other activities related to creating nuclear weapons does the activity constitute manufacturing which is prohibited under the NPT? In connection with defining this term, the so-called ‘Foster Criteria’ is often cited. The criteria is named after William Foster, then-director of the US Arms Control and Disarmament Agency, who in a speech to the US Senate Foreign Relations Committee stated: ‘Facts indicating that the purpose of a particular activity was the acquisition of a nuclear explosive device would tend to show non-compliance’.<sup>65</sup> Worth noting is however the fact that the Foster Criteria does neither constitute a universally agreed understanding of the definition of the term ‘manufacture’, nor a legally binding definition of the term.

Daniel H. Joyner, Professor at the University of Alabama School of Law,<sup>66</sup> stresses that despite government officials and other observers holding that the prohibition on manufacturing of nuclear weapons reaches as far back as to the concept, capacity building, design research and experimentation stages of nuclear weapons, this is simply not a correct interpretation. Joyner references the plain meaning of the terms in Article II, as confirmed by the negotiating history of the NPT.<sup>67</sup> Joyner also refers to Article 31 and 32 of the VCLT, which states that a treaty interpreter must first look at the ordinary meaning of the terms of a treaty provision taken in their context and in light of the treaty’s object and purpose.<sup>68</sup> Joyner further argues that to find the meaning of the term ‘manufacture’, one simply needs to consult a dictionary, where one will find definitions along the lines of ‘the making of goods from raw materials by manual labour or machinery’. This definition will also be supplemented by a listing of synonyms, such as ‘assemble’ and ‘fabricate’. Hence, Joyner claims that the meaning of the term ‘manufacture’ in Article II of the NPT simply refers to the physical construction of a nuclear explosive device, or perhaps in its most extensive interpretation, to the physical construction of the component parts of a nuclear explosive device.<sup>69</sup> By contrast,

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<sup>65</sup> Senate Committee on Foreign Relations, Remarks Submitted by William C. Foster, 89<sup>th</sup> Congress, 2<sup>nd</sup> session, 10 July 1968.

<sup>66</sup> Nystuen et al., p. x.

<sup>67</sup> Joyner: “Iran’s Nuclear Program and the Legal Mandate of the IAEA”, JURIST – Forum, 9 November 2011, <<https://www.jurist.org/commentary/2011/11/dan-joyner-iaea-report/>>, visited 3 April 2021.

<sup>68</sup> See Article 31 of the VCLT.

<sup>69</sup> Joyner: “Iran’s Nuclear Program and the Legal Mandate of the IAEA”, JURIST – Forum, 9 November 2011, <<https://www.jurist.org/commentary/2011/11/dan-joyner-iaea-report/>>, visited 3 April 2021.

Andreas Persbo, the Executive Director of the Verification Research, Training and Information Centre (VERTIC) and specialized in arms control and disarmament verification with an emphasis on nuclear matters,<sup>70</sup> does not agree with Joyner's understanding. Persbo argues that Joyner's literal interpretation of the term would in fact 'undermine the objectives of the treaty as stated in the preamble, namely that "the proliferation of nuclear weapons would seriously enhance the danger of nuclear war"'.<sup>71</sup>

What can be deduced from what has been presented above is that there clearly is some disagreement regarding the interpretation of Articles I and II of the NPT. Even if one were to assume that the Foster Criteria is the correct way of defining 'manufacture' in Article II of the NPT, it presupposes that such activities' intent or purpose is known. Worth noting is also the possibility that certain nuclear fuel activities carried out by certain states might attract more attention than similar activities carried out by other states. Hence, the discussion could easily become politicised.<sup>72</sup>

Besides what can be argued amount to a few ambiguities or uncertainties regarding the interpretation of the Treaty text, there are a few other 'cracks in the non-proliferation pillar walls'. These include India, Pakistan and Israel never acceding to the Treaty, as well as the DPR Korea withdrawing from the Treaty in 2003, claiming it had the right to do so under Article X of the NPT. As is probably familiar to most at this point, states not acceding to the Treaty or states withdrawing from it are not legally bound by it.<sup>73</sup> Despite this fact, the Treaty has done well for itself in its aim of preventing the proliferation of nuclear weapons to NNWS. The Treaty, essentially being a non-proliferation treaty with the primary ambition to 'freeze' the status quo concerning the possession of nuclear weapons, can undeniably be argued to be a reasonable success. With 191 State Parties to the Treaty, the norm of non-proliferation has become firmly consolidated in the international community.<sup>74</sup> Despite some of the NPT's weaknesses, it has largely limited the possibility of acquiring nuclear weapons today and has played a great role in affirming the norm of non-proliferation. It does not, however, provide a general and absolute prohibition on acquiring nuclear weapons.

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<sup>70</sup> Presbo, p. 1.

<sup>71</sup> Presbo, p. 4.

<sup>72</sup> Nystuen & Graff Hugo, p. 390.

<sup>73</sup> Nystuen & Graff Hugo, p. 393.

<sup>74</sup> Nystuen & Graff Hugo, p. 393.

# 4 The Legality of Using Nuclear Weapons Under International Law

While the previous chapter has established that possibilities of lawfully acquiring nuclear weapons are limited, this chapter intends to offer an examination on if, when and how the use of nuclear weapons could be considered lawful under international law. This is done through analysing the prohibition of the use of force and the right to self-defence, international humanitarian law (IHL), the right to life under human rights law, and lastly, international environmental law. Subsequently, this chapter provides a legal analysis on how these different areas of international law are interconnected, with the intent of reaching a conclusion on the legality of using nuclear weapons under international law.

## 4.1 The Use of Nuclear Weapons and the Prohibition of the Use of Force

To answer the question of whether the use of nuclear weapons is lawful under international law beyond the new TPNW, it should first of all be noted that Article 2(4) of the Charter of the United Nations (UN Charter) states that ‘all members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations’. This provision is considered a part of customary international law and is consequently binding upon all states in the international community. The provision applies in times of peace (*jus ad bellum*),<sup>75</sup> and does not refer to any specific weapon. It is thus applicable to any use of force, regardless of the weapons employed.<sup>76</sup> From this follows that nuclear weapons are within the scope of the prohibition of the use of force.

For the purpose of this analysis, it is not necessary to discuss more in detail what the term ‘force’ includes. It is deemed safe to assume that the threat or use of nuclear weapons is within the scope of the prohibition since the use of nuclear weapons without question constitutes ‘armed force’. A discussion on the inclusivity of the term would be unfruitful in

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<sup>75</sup> Shaw, pp. 854–855.

<sup>76</sup> Nuclear Weapons Advisory Opinion, para 39.

this chapter, as most questions regarding the term refer to whether or not the term ‘force’ includes force such as economic force, not armed force.<sup>77</sup>

Relevant to this subject is that for an act to be a violation of the prohibition of the use of force, the force has to be directed against the territorial integrity or political independence of another state.<sup>78</sup> In the case *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*,<sup>79</sup> the ICJ concluded that the essence of international relations can be found in the respect by independent states of each other’s territorial sovereignty.<sup>80</sup> In a situation where one state threatens or uses nuclear weapons against another state’s territory, it would consequently be a violation of the prohibition of the use of force. It is also safe to assume that such use of nuclear weapons against another state’s territory would also be a use of force directed at the political independence of said state.

If an attack with nuclear weapons is directed at another state’s territory or political integrity it is a violation of the prohibition of the use of force. The prohibition is also generally considered to be a *jus cogens* norm, meaning that it does not permit derogation, neither by consent nor by treaty.<sup>81</sup> Thus, all states, including those states that have not ratified the UN Charter are bound by it. However, there are in fact several exceptions to the prohibition of the use of force. For example, a lawful use of force can be found in Article 42 of the UN Charter, which states that the Security Council may take military enforcement measures in conformity with Chapter VII of the UN Charter. Furthermore, Article 51 of the UN Charter recognizes the inherent right of individual or collective self-defence if an armed attack occurs. This means that even if an attack with nuclear weapons in times of peace would be a violation of the prohibition of the use of force at first glance, there are circumstances where derogations from the prohibition are allowed. In the upcoming section, this analysis will examine nuclear weapons in relation to the right to self-defence.

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<sup>77</sup> Shaw, pp. 855-856.

<sup>78</sup> Shaw, p. 857.

<sup>79</sup> Hereinafter referred to as the Nicaragua case.

<sup>80</sup> The Nicaragua case, para 109-110.

<sup>81</sup> Torp Helmersen, p. 2-3.

## 4.2 The Use of Nuclear Weapons and the Right to Self-defence

The right to self-defence can be found both in article 51 of the UN Charter and in customary international law.<sup>82</sup> Article 51 of the UN Charter states as follows:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

There have been extensive debates on how far-reaching the right to self-defence truly is. Some writers have argued that article 51 in conjunction with article 2(4) of the UN Charter is exhaustive, while some uphold that the opening phrase of the article ‘nothing in the present Charter shall impair the inherent right of... self-defence’ provides that there exists a right of self-defence in customary international law that is more far-reaching than article 51 of the UN Charter, which only refers to situations where an armed attack has already occurred.<sup>83</sup> Areas widely debated in regard to the scope of the right to self-defence are anticipatory and preventive self-defence and self-defence in response to attacks by non-state actors.<sup>84</sup> As it is not considered directly relevant to the purpose of this analysis, the debate on whether an armed attack must have occurred in order for a state to lawfully use self-defence will not be further examined. Neither will this thesis further discuss issues of self-defence relating to non-state actors or collective self-defence.

As can be seen in article 51 of the UN Charter, the right to self-defence does neither mention anything about in what manner self-defence can be exercised nor does it state what weapons are allowed. To resort to self-defence, however, a state has to manage to exhibit that it has been the victim of an armed attack; a concept that is linked to the use of force opposing article 2(4) of the UN Charter, but not identical. The state seeking to resort to force in self-defence

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<sup>82</sup> Shaw, p. 862.

<sup>83</sup> Shaw, p. 862.

<sup>84</sup> For further analysis on the response to an imminent threat (anticipatory self-defence), preventive self-defence and self-defence in response to attacks by non-state actors, see Shaw pp. 884-868.

bears the burden of proof,<sup>85</sup> and also has to show that it has been intentionally attacked. This was expressed by the ICJ in the Oil Platforms (Iran v. US) case<sup>86</sup>, where the United States in 1987 and 1988 attacked and destroyed Iranian offshore oil production installations. The attack and destruction of said oil platforms were, according to the United States, an act of self-defence in response to two attacks by Iran.<sup>87</sup> The Court, however, concluded that none of the attacks from Iran appeared to have been aimed specifically and deliberately at the United States.<sup>88</sup>

How serious an attack must be in order to justify resorting to self-defence can be difficult to define. In the Nicaragua case, the ICJ distinguished “the most grave forms of the use of force (those constituting an armed attack) from other less grave forms”<sup>89</sup>, which was also reaffirmed in the Oil Platforms case.<sup>90</sup> Nevertheless, it can undeniably still be incredibly difficult to define this more strictly.<sup>91</sup> Furthermore, for a state to exercise its right to self-defence lawfully, a use of force in self-defence must be reported to the UN Security Council.<sup>92</sup>

Assuming that all the above-mentioned requirements for a use of force in self-defence to be lawful are fulfilled, could that a state use nuclear weapons in self-defence? The state seeking to resort to force in self-defence must abide by certain limitations. The concepts of necessity and proportionality are at the heart of self-defence in international law,<sup>93</sup> and ICJ stated in the Nicaragua case that there was a ‘specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in international law’.<sup>94</sup> In the Advisory Opinion the ICJ gave to the UN General Assembly on the Legality of the Threat or Use of Nuclear Weapons,<sup>95</sup> it was stressed that ‘the submission of the exercise of the right of self-defence to the conditions of necessity and proportionality is a rule of customary international law’.<sup>96</sup> Hence, a state using nuclear

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<sup>85</sup> Shaw, p. 862–863.

<sup>86</sup> Hereinafter referred to as the Oil Platforms case.

<sup>87</sup> The Oil platforms case, para 23-25.

<sup>88</sup> The Oil platforms case, para 64.

<sup>89</sup> The Nicaragua case, para 191.

<sup>90</sup> The Oil platforms case, para 51.

<sup>91</sup> Shaw, pp. 863.

<sup>92</sup> Article 51 of the UN Charter.

<sup>93</sup> Shaw, pp. 868.

<sup>94</sup> The Nicaragua case, para 176.

<sup>95</sup> Hereinafter referred to as the Nuclear Weapons Advisory Opinion.

<sup>96</sup> Nuclear Weapons Advisory Opinion, para 41.

weapons as a means for self-defence must take both necessity and proportionality into consideration. In relation to nuclear weapons, both of these components are undeniably relevant. This raises the question; what is proportional and necessary?

In relation to proportionality *ad bellum*, one might wonder if proportionality in this context relates to the damage that might be caused, or if it relates to the quantum of force to which the response in self-defence is intended. In the case of the latter alternative being true, the use of nuclear weapons in response to the prior use of nuclear weapons becomes less problematic from a legal standpoint.<sup>97</sup> However, the most likely scenario where a state would use nuclear weapons in self-defence is probably not one where it is a response to a nuclear weapon attack. Thus, we must examine proportionality more thoroughly. The Geneva Academy of International Humanitarian Law and Human Rights, a postgraduate joint centre between the University of Geneva and the Graduate Institute of International and Development Studies conducting academic legal research and policy studies,<sup>98</sup> claims that there are two requirements with respect to the proportionality calculation. Firstly, the force used in self-defence ought to be assessed in light of the accomplishment of defensive purposes. Secondly, the amount of force used in self-defence should not be obviously excessive. The second requirement, however, does not require the amount of force used in self-defence to be exactly proportionate to the offensive force.

Necessity *ad bellum* regulates that the circumstances in which a state resorting to self-defence may use force lawfully. This is usually defined as a circumstance when there are no reasonable alternatives to using force.<sup>99</sup> Generally it appears established that necessity *ad bellum* requires a state to only use force as a last resort. It seems, however, as though a state does not have to exhaust all peaceful measures. Only relevant alternatives that are reasonable are required to be shown unavailable. What relevant alternatives are reasonable or unreasonable highly depends on the particular circumstances. Hence, they have to be assessed on a case-by-case basis.<sup>100</sup>

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<sup>97</sup> Shaw, p. 857.

<sup>98</sup> Geneva Academy of International Humanitarian Law and Human rights: "Mission", <<https://www.geneva-academy.ch/the-academy/about-us/mission>>, visited 16 May 2021.

<sup>99</sup> Geneva Academy of International Humanitarian Law and Human Rights: "Nuclear Weapons Under International Law: An Overview", October 2014, p 8, <<https://www.geneva-academy.ch/joomlatools-files/docman-files/Nuclear%20Weapons%20Under%20International%20Law.pdf>>, visited 24 March 2021.

<sup>100</sup> Hayashi, pp. 17-19.



In the Nuclear Weapons Advisory Opinion, proportionality gained a larger focus than necessity.<sup>101</sup> It is thus somewhat difficult to establish the Court's view of whether the use of nuclear weapons in self-defence could ever be seen as necessary. Some argue that the state acting in self-defence must only use nuclear weapons in a situation where other, conventional weapons, are ineffective. This position implies that using nuclear weapons in self-defence must meet the requirement of necessity twice; the first being that using force, with whatever weapon, must be the last resort, and the second being that using nuclear weapons must be the last resort among all weapons.<sup>102</sup> Promoters of this view seem to assume that there is an inherent absence of symmetry if the defensive force involves nuclear weapons and the offensive force 'only' consisted of conventional weapons.<sup>103</sup> Nagendra Singh, President of the International Court of Justice from 1985 to 1988,<sup>104</sup> and Edward McWhinney, Professor of International Law and Past President of Institut de Droit International<sup>105</sup> both hold that the quantum of force has to be strictly proportionate to the necessity of repelling an attack. This would mean that the defensive force involving nuclear weapons to repel an attack with conventional weapons would exceed the scope of the right of self-defence, since the quantum of force used would be out of proportion to the force *necessary* to repel the attack.<sup>106</sup>

Nobuo Hayashi, Associate Senior Lecturer at the Centre for International and Operational Law at the Swedish Defence University<sup>107</sup> does not agree with the abovementioned views. Hayashi claims that there is no reason that a defending state's conventional weapons will be ineffective simply because the attacking state used nuclear weapons. Whatever conventional weapons are at the disposal of the defending state may very well prove ineffective in repelling a massive conventional invasion. According to Hayashi, the attempts of applying a requirement of double necessity for nuclear weapons is merely a logical strain that appears as specific assertions are made to nuclear weapons in an attempt to overcome the perceived limitations of jus ad bellum's weapons neutrality.<sup>108</sup> Considering these uncertainties, or perhaps lack of consensus on the matter, this analysis will in its assessment of necessity ad

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<sup>101</sup> See for example Nuclear Weapons Advisory Opinion, para 42-43.

<sup>102</sup> Hayashi, p. 25.

<sup>103</sup> Singh & McWhinney, p. 100.

<sup>104</sup> Singh & McWhinney, front matter.

<sup>105</sup> UN Audiovisual Library of International Law: "Mr. Edward McWhinney" <<https://legal.un.org/avl/faculty/McWhinney.html>>, visited 1 May 2021.

<sup>106</sup> Singh & McWhinney, p. 100.

<sup>107</sup> Swedish Defence University: "Nobuo Hayashi", <<https://www.fhs.se/sc/profile-page.html?identity=400.aa44b1740d51053b1d601>>, visited 28 March 2021.

<sup>108</sup> Hayashi, pp. 25-26.

bellum be cautious about applying a requirement of double necessity on defensive force with nuclear weapons. With that said, it could still be argued that such a requirement, whether legally correct or not, would in fact be reasonable, considering the devastating effects that nuclear weapons could have.

In addition to an act of self-defence having to be proportional and necessary, there is another factor to take into consideration. In Nuclear Weapons Advisory Opinion, the ICJ did not only state that the use of force in self-defence, in order to be lawful, must be both necessary and proportionate,<sup>109</sup> but that it also must meet the requirements of the law applicable in armed conflict. According to the Court, the proportionality principle may not in itself exclude the use of nuclear weapons in self-defence in every scenario but an act of self-defence must also abide by international humanitarian law.<sup>110</sup> The Court stated, by seven votes to seven and the President casting the decisive vote, that it follows from the requirements mentioned in the Advisory Opinion that the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict (*jus in bello*). In particular, the Court stated that such a threat or use would generally be contrary to the principles and rules of international humanitarian law, an area of law that will be further examined in Chapter 4.3. Nevertheless, the Court also stated that it could not conclude definitely 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’.<sup>111</sup> This statement seems to imply that the legitimacy of an *ad bellum* cause may justify the use of nuclear weapons in violation of *jus in bello*, if the circumstances of self-defence are extreme and a state’s survival is at stake. The statement also seems to imply that in such extreme situations, a use of force involving nuclear weapons may be lawful *ad bellum* even if it were to lack necessity and/or proportionality. This would mean that in circumstances extreme enough, the extremeness potentially ‘rights’ or ‘repairs’ even the absence of necessity and proportionality that would otherwise render the use of nuclear weapons unlawful *ad bellum*.<sup>112</sup>

In conclusion, the right to self-defence is limited by the requirements of proportionality and necessity to a certain extent. Both components could be seen as safeguards in their attempt to

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<sup>109</sup> Nuclear Weapons Advisory Opinion, para 41.

<sup>110</sup> Nuclear Weapons Advisory Opinion, para 42.

<sup>111</sup> Nuclear Weapons Advisory Opinion, para 105.

<sup>112</sup> Hayashi, p. 28.

prevent arbitrary or excessive acts of self-defence. Even though it is not entirely clear, or perhaps rather subjective, whether or not an act of self-defence involving nuclear weapons ever could be seen as proportional and/or necessary, such an act still has to meet the requirements of IHL. Although IHL will be further examined in the upcoming Chapter 4.3, one could already assume that such an obligation further limits the possibilities of lawful use of nuclear weapons in self-defence, based on the Court's findings. It is, however, difficult to speculate about the impact of the Court's disclaimer. If the interpretation of the disclaimer presented above is valid and true, the prospects of nuclear weapons being completely unlawful as a means or method of self-defence are bleak, as not much seem to limit the use in certain extreme situations where a state's survival is at stake.

### **4.3 The Use of Nuclear Weapons and International Humanitarian Law**

When examining the legality of using nuclear weapons, not only the rules applicable in times of peace (*jus ad bellum*) may be considered directly relevant. International humanitarian law (IHL) are rules applicable during armed conflict (*jus in bello*). An armed conflict can either be international or non-international in character and consists of all cases of declared war or any other armed conflict between two or more of the High Contracting Parties.<sup>113</sup> The International Tribunal for the Former Yugoslavia (ICTY) generated in the Tadić Case<sup>114</sup> a test to determine whether a situation should be considered an armed conflict. According to the test, a certain intensity of force is required, as well as a certain level of organisation of the parties involved. Finally, the parties involved also have to accept and apply the basic principles of IHL.<sup>115</sup>

In the Nuclear Weapons Advisory Opinion, the Court reviewed a number of treaties limiting the possession, testing and proliferation of nuclear weapons and did not find any specific or comprehensive norm that prohibits nuclear weapons, either in customary or in conventional humanitarian law.<sup>116</sup> With the lack of any specific prohibition of nuclear weapons, the Court had to examine the existence of any limitation of their use under the general principles of

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<sup>113</sup> Geneva Convention (I-IV), Common Article 2.

<sup>114</sup> The Tadić Case concerned the president of the local board of the Serb Democratic Party in Kozarac, Duško Tadić having committed crimes against humanity, grave breaches of the Geneva Conventions and violations of the customs of war, see *Prosecutor v. Tadić*, 7 May 1997, para 6-9.

<sup>115</sup> *Prosecutor v. Tadić*, 7 May 1997, para 562.

<sup>116</sup> Nuclear Weapons Advisory Opinion, para 52.

international humanitarian law.<sup>117</sup> In its examination, the Court referred specifically to ‘cardinal principles’ such as the principle of distinction, the prohibition on indiscriminate weapons and the prohibition of weapons designed to cause unnecessary suffering.<sup>118</sup> These principles will be further analysed in this section. For the purpose of this analysis, the principles of proportionality and precaution are also deemed relevant to consider.

The only legitimate object which states should seek to accomplish during war is to weaken the military forces of the enemy.<sup>119</sup> Consequently, attacks aimed directly at civilians are prohibited, as they are of no military reward. The principle of distinction is aimed at the protection of the civilian population and civilian objects and establishes a distinction between combatants and non-combatants.<sup>120</sup> The principle of distinction was first expressed in Article 48 of Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (from now on referred to as Additional Protocol I). Article 48 of Additional Protocol I (Basic Rule) regulates that Parties to a conflict must at all times distinguish between civilian population and combatants, as well as between civilian objects and military objectives. Operations shall only be directed against military objectives. In Articles 50 and 52(2) of Additional Protocol I there are further detailed provisions that more closely define civilian objects and military objectives and also clarify under what circumstances military objects may be targeted. The principle of distinction is customary international law according to Rule 1 of the Customary International Humanitarian Law Study (CIHL Study) by the International Committee of the Red Cross (ICRC).<sup>121</sup> To intentionally attack civilians or civilian targets is also a war crime in the Rome Statute.<sup>122</sup>

The principle of distinction does, as stated, only permit attacks on military objectives. Military objectives are defined as ‘limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage’.<sup>123</sup> It thus becomes apparent that attacks, whether nuclear weapons are used or not, aimed directly at civilians are prohibited under the principle of distinction.

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<sup>117</sup> Nuclear Weapons Advisory Opinion, para 75.

<sup>118</sup> Nuclear Weapons Advisory Opinion, para 78.

<sup>119</sup> Saint Petersburg Declaration, 11 December 1868, preamble.

<sup>120</sup> Nuclear Weapons Advisory Opinion, para 78.

<sup>121</sup> Henckaerts & Doswald-Beck, Customary International Humanitarian Law, Vol. I, p. 3.

<sup>122</sup> Articles 8(2)(b)(i)-(ii) and 8(2)(e)(i)-(ii) of the Rome Statute.

<sup>123</sup> Article 52(2) of Additional Protocol I.

Furthermore, an attack on an area where civilians are present, such as a town or village, must also be considered prohibited under the principle of distinction, even if such an attack could be considered of military benefit.

The principle of proportionality is closely connected with the principle of distinction. The principle of proportionality is central to IHL and expressed *inter alia* in Article 51(5)(b) of Additional Protocol I. Article 51(5)(b) prohibits attacks constituting indiscriminate attacks due to an expectation of excessive damage to civilians or civilian objects in relation to the concrete and direct military advantage anticipated. This principle thus requires for attacks to be proportionate but does not provide an absolute prohibition on civilian losses, civilian injuries or damage to civilian objects. The damage to civilians or civilian objects can simply not be excessive.<sup>124</sup> The principle of proportionality as expressed in Article 51(5)(b) of Protocol I is part of customary international law.<sup>125</sup> Excessive attacks also constitute a war crime in the Rome Statute.<sup>126</sup>

Closely linked to the principle of distinction and the principle of proportionality is the prohibition on indiscriminate weapons. This prohibition is expressed in Article 51(4) of Additional Protocol I and entails that states must never use weapons that are not capable of distinguishing between civilians and military targets. The Article defines indiscriminate attacks as those not directed at a specific military objective, those which employ a method or means of combat that cannot be directed at a specific military objective, or those which employ a method or means of combat that have an effect which cannot be limited as required by the Protocol in question. Both the principle of proportionality and the principle of distinction are at the core when determining whether a weapon is indiscriminate. Following from Article 51(4) prohibiting indiscriminate weapons, attacks that are contrary to the principle of proportionality or the principle of distinction are considered indiscriminate and are thus prohibited. In relation to nuclear weapons, the question is whether or not said weapons can be used in accordance with the principles of proportionality and distinction, or if they are in fact inherently indiscriminate. Pertaining to this subject, some have argued that modern nuclear weapons have the capability of distinguishing between civilians and combatants and that they thus are compatible with the principle of distinction. In the written

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<sup>124</sup> Kolb, pp. 80-81.

<sup>125</sup> Henckaerts & Doswald-Beck, Customary International Humanitarian Law, Vol. I, p. 37.

<sup>126</sup> Article 8(2)(b)(iv) of the Rome Statute.

proceedings to the Nuclear Weapons Advisory Opinion, the Legal Adviser to the Foreign and Commonwealth Office of the UK stated:

Modern nuclear weapons are capable of far more precise targeting and can therefore be directed against specific military objectives without the indiscriminate effect on the civilian population which the older literature assumed to be inevitable.<sup>127</sup>

Others claim that conventional weapons are just as likely as nuclear weapons to cause damage to both civilians and combatants, depending on the proximity of the civilians to the military target.<sup>128</sup> However, that nuclear weapons are capable of being directed against specific military objectives is today a rather uncontroversial position. There is in fact very little that suggests that delivery mechanisms for nuclear weapons are not, or cannot be, accurate.<sup>129</sup> Nevertheless, when determining whether nuclear weapons can be used in accordance with the principles of distinction and proportionality or if they are in fact inherently indiscriminate, it is not only of interest whether the weapon can be directed at a specific target. The effects of nuclear weapons should also be considered. It is not entirely undisputed that the indiscriminate test of a weapon under IHL covers both weapons that cannot be directed at a specific target and those with indiscriminate effects.<sup>130</sup> The Court used the words ‘weapons that are incapable of distinguishing between civilian and military targets’<sup>131</sup>, instead of using a narrower language, such as ‘weapons that cannot specifically target a military objective’. This position seems to be supported by both the US and the UK in their written statements to the ICJ, as they both refer to the effects of nuclear weapons, claiming that the effect can in fact be discriminate.<sup>132</sup> Even though the evidence supporting this position is perhaps not overwhelming, I consider it strong. This analysis will thus also consider the effects of nuclear weapons in the analysis of whether the weapons are inherently indiscriminate.

An important issue to consider in the examination of the effects of nuclear weapons is the question of whether the effects are capable of being controlled. The ICJ noted in the Nuclear Weapons Advisory Opinion that nuclear weapons, by their very nature, ‘releases immense quantities of heat and energy’, as well as ‘powerful and prolonged radiation’. The Court

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<sup>127</sup> Letter dated 16 June 1995, p. 52.

<sup>128</sup> Chatham, p. 44.

<sup>129</sup> Casey-Maslen, p. 111.

<sup>130</sup> Casey-Maslen, p. 109.

<sup>131</sup> Nuclear Weapons Advisory Opinion, para 78.

<sup>132</sup> Letter dated 16 June 1995, p. 52; Letter dated 20 June 1995, p. 23.

went on to note that the immense quantities of heat and energy are ‘vastly more powerful than the damage caused by other weapons’ and that the radiation is said to be ‘peculiar to nuclear weapons’. Additionally, the Court stated that ‘*the destructive power of nuclear weapons cannot be contained in either space or time*’.<sup>133</sup> This seems to imply an inability to control the effects of nuclear weapons. How uncontrollable the effects of nuclear weapons are, however, depends on several factors. Factors to consider are the size and type of nuclear weapon used as well as if it is ground- or underwater-burst. Such factors also include whether the weapon is detonated in the air or at high altitude, as a nuclear weapon detonated in the air (a so-called air burst) produces less fallout than a similar explosion near the ground. Furthermore, the effects can also depend on both terrain and climate. Worth noting is that the effects can still be highly unpredictable even when such factors are known.<sup>134</sup>

As previously mentioned, the principle of proportionality is essential in determining whether or not a weapon is inherently indiscriminate. According to this principle, the damage to civilians or civilian objectives cannot be excessive.<sup>135</sup> What constitutes as ‘excessive’ however, is not further defined in Additional Protocol I. Consequently, it is rather difficult to define. In the Commentary on the Additional Protocols to the Geneva Conventions, the ICRC stated that in some situations there will be no room for doubt as to the disproportion between losses and damages caused and the military advantages anticipated. In other situations, however, there may in fact be reason for hesitation, and in such situations the interests of the civilian population should prevail.<sup>136</sup> The ICRC refutes the position that even when civilian losses and damage are very high, it can be justified if the direct military advantage is of great importance. The ICRC states that such a position is ‘contrary to the fundamental rules of the Protocol’, and in particular to the Basic Rule in Article 48 of Additional Protocol I, which expresses the principle of distinction.<sup>137</sup> According to the ICRC there is no justification in the Protocol for attacks that cause extensive civilian losses and damages, and that ‘incidental losses and damages should never be extensive’.<sup>138</sup> Yoram Dinstein, Professor Emeritus at Tel Aviv University and President of the United Nations Association of Israel,<sup>139</sup> claims that the

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<sup>133</sup> Nuclear Weapons Advisory Opinion, para 35.

<sup>134</sup> Casey-Maslen, p. 106.

<sup>135</sup> Casey-Maslen, p. 115.

<sup>136</sup> Sandoz et al., para 1979.

<sup>137</sup> Article 48 of Additional Protocol I.

<sup>138</sup> Sandoz et al., para 1980.

<sup>139</sup> Dinstein, *The Recent Evolution of the International Law of Armed Conflict: Confusions, Constraints and Challenges*, p. 701.

damage to civilians is excessive when the disproportion is not in doubt. Unlike the ICRC however, Dinstein claims that extensive civilian casualties are not always excessive in relation to the concrete and direct military advantage anticipated.<sup>140</sup>

Even though it might be difficult to establish the exact measurements of what makes an attack excessive, it is still of value to examine the nature of nuclear weapons in light of the principle of proportionality. An example frequently used in the discussion of nuclear weapons is one where an attack in which nuclear weapons are directed at a submarine.<sup>141</sup> Another example is an attack that targets a military objective in a sparsely populated area, such as a desert, in conditions of no wind. The use of a low-yield weapon against such objectives could possibly cause no damage to civilian objects or inflict few or no civilian casualties, while it may have a significant anticipated military advantage.<sup>142</sup> Since the principle of proportionality does not provide an absolute prohibition on civilian casualties or damage to civilian objects, such an attack could perhaps be proportionate. Such an attack could perhaps also be compatible with the principle of distinction. As previously stated, however, the effects of nuclear weapons highly depend on several factors which are hard to foresee. If the effects were to affect civilians the attack could easily become indiscriminate. For certain is that fallout will occur at the place of detonation, while factors such as a change of wind might cause the particles to travel far from ground zero and affect civilians, ‘changing the game entirely’. It is thus difficult to say for certain that such an attack would be compatible with principles of proportionality and distinction. By contrast, it is also difficult to say for certain that such an attack could *never* be compatible with these principles. Consequently, I do not consider it possible to with certainty claim that nuclear weapons are inherently indiscriminate.

If we accept that there are in fact extraordinary situations where the use of nuclear weapons would not be contrary to the principles of proportionality and distinction and that nuclear weapons are not inherently indiscriminate, states still have to take precautions in their planned attacks. The principle of precaution is expressed in Additional Protocol I and can be viewed as an extension of the principle of distinction, as it imposes upon the parties to the conflict to take precautions in their military operations. Article 57(2)(a)(i) of Additional Protocol I states that those who plan or decide upon an attack shall do everything feasible to verify that the

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<sup>140</sup> Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, pp. 131-132.

<sup>141</sup> See for example Dissenting Opinion of Vice-President Schwebel, p. 98.

<sup>142</sup> Casey-Maslen, pp. 118-119.



targeted objects are not civilians or civilian objectives and not subject to special protection. The Article specifies that objects to be attacked shall be military objectives. Moreover, Article 57(2)(a)(ii) of Additional Protocol I states that all feasible precautions shall be taken in the choice of means and methods of an attack, with the intent to avoid, and in any event to minimize, incidental loss of civilian life, injury to civilians and damage to civilian objects. In taking this precaution, the range and precision of the weapon should be taken into account.<sup>143</sup> Additionally, if there is an alternative weapon available that could bring an equivalent military advantage, the weapon resulting in the least loss of civilian lives, civilian injuries and damage to civilian objectives should be used.<sup>144</sup> What the term ‘feasible’ entails is not further specified in Additional Protocol I. However, in the Amended Protocol II to the 1980 Convention on Certain Conventional Weapons (CCW) the following definition is presented:

Feasible precautions are those precautions which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations.<sup>145</sup>

Pertaining to nuclear weapons, the most relevant provision is the one stipulating that feasible precautions shall be taken in the choice of means and methods of an attack.<sup>146</sup> From this follows not only that the weapon resulting in the least incidental damage should be used, but also that any attack using a weapon that is expected to cause excessive civilian harm is unlawful.<sup>147</sup> As the ICRC stated, however, the principle of precaution is not a rule that in itself implies any prohibition of specific weapons.<sup>148</sup> Nevertheless, it does impose further limitations on the possibility of lawful use of nuclear weapons. Even if a proposed use of nuclear weapons is not contrary to the principles of distinction and proportionality, and thus not inherently indiscriminate, an additional evaluation has to be made of whether alternative, less destructive weapons may be of the same military benefit.

The aforementioned principles of IHL all relate to the protection of the civilian population and civilian objects. However, there are regulations in IHL aiming to protect combatants. Such regulations include the prohibition of weapons designed to cause unnecessary suffering

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<sup>143</sup> Sandoz et al., para 2200.

<sup>144</sup> Casey-Maslen, p. 122.

<sup>145</sup> Article 3(10) of the Amended Protocol II.

<sup>146</sup> Article 57(2)(a)(ii) of the Additional Protocol I.

<sup>147</sup> Casey-Maslen, p. 123.

<sup>148</sup> Sandoz et al., para 2201.

(the unnecessary suffering rule), which can be found in Article 35(2) of Additional Protocol I. This provision stipulates that it is prohibited to employ weapons, projectiles and materials and methods of warfare that cause superfluous injury or unnecessary suffering. Article 35(2) can be viewed in the light of Article 35(1) of Protocol I, which states that parties to an armed conflict are not unlimited in their choice of means or methods of warfare. The prohibition is aimed at combatants of an armed conflict and is designed to limit their suffering.<sup>149</sup> What constitutes superfluous injury or unnecessary suffering, however, is not entirely clear. It has been considered that the degree of injury or suffering caused by the weapons should be substantially disproportionate in relation to the direct military benefit.<sup>150</sup> Furthermore, it is worth noting that the prohibition of superfluous injury does not aim to prohibit a certain *type* of injury from a medical standpoint. Instead, necessity and proportionality are more likely to constitute criteria for the lawfulness of using a specific weapon. An injury could either be excessive due to it being unjustifiable in relation to military necessity or if the injuries caused by the weapon is in disproportion to the military advantages anticipated.<sup>151</sup> Moreover, the term 'suffering' can be even more difficult to define, due to its somewhat subjective nature. Here, the military necessity should be weighed against the psychological and emotional effects of those whom the weapon affects.<sup>152</sup> The prohibition of weapons designed to cause unnecessary suffering is part of international customary law and is considered a war crime under the Rome Statute.<sup>153</sup>

The wording of the unnecessary suffering rule acknowledges that necessary suffering to combatants is in fact lawful in armed conflict. To assess whether the suffering is necessary or unnecessary, a balancing between humanitarian and military considerations has to be done. As previously stated, such an act of balancing is hard to define in concrete terms.<sup>154</sup> In relation to nuclear weapons, it may thus be more fruitful to examine whether this particular rule includes an obligation of considering alternative weapons. Another word for 'necessary' is 'unavoidable', and Dinstein claims that the prohibition of superfluous injury or unnecessary suffering depends upon a distinction of avoidable and unavoidable injuries or suffering. According to Dinstein, this does in fact require a comparison between the weapon in question

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<sup>149</sup> Anastassov, page 71.

<sup>150</sup> O'Connor, p. 142.

<sup>151</sup> O'Connor, pp. 140–141.

<sup>152</sup> Oeter, p. 125-126.

<sup>153</sup> Henckaerts & Doswald-Beck, Customary International Humanitarian Law, Vol. I, p. 237; Article 8(2)(b)(xx) of the Rome Statute.

<sup>154</sup> O'Connor, pp. 142-143.

and other alternatives. In determining if a suffering is necessary, states must assess whether an alternative weapon would cause or inflict less injury or suffering, and also whether the effects of the alternative weapons are adequately effective.<sup>155</sup> Christopher Greenwood, Judge of the ICJ,<sup>156</sup> also holds this position as he stated:

The essence of the unnecessary suffering principle is that it involves a comparison between different weapons in determining whether the injuries and suffering caused by a particular weapon are necessary.<sup>157</sup>

If this requirement of considering alternative weapons is applied to nuclear weapons, it is hard to envision a situation where the use of nuclear weapons in armed conflict would not be contrary to the unnecessary suffering rule. Furthermore, some commentators on the unnecessary suffering rule consider the temporal aspect of the effects of nuclear weapons a possible violation of the prohibition. If not only the immediate effects of nuclear weapons must be considered necessary from a military point of view, but also the medium- and long-term effects, one could argue that such use would in fact be contrary to the rule. This argument is based on the fact that there is no military advantage to the user of nuclear weapons in surviving combatants developing cancer or other diseases long after the attack.<sup>158</sup>

Apparent from the discussions above is that all of these principles of international humanitarian law are expressed in Additional Protocol I. Some states, however, have questioned the applicability of Additional Protocol I to nuclear weapons. Both France and the UK submitted reservations upon the ratification of Additional Protocol I, where they expressed their understanding that nuclear weapons were not within the scope of the Protocol.<sup>159</sup> In the Nuclear Weapons Advisory Opinion, the Court did not respond specifically to such claims about the Protocol's applicability to nuclear weapons but did state that these principles of IHL are merely an expression of the pre-existing customary law.<sup>160</sup> Furthermore, these reservations were aimed specifically against the 'new rules' of the Protocol, such as the

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<sup>155</sup> Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, p. 60.

<sup>156</sup> UN Audiovisual Library of International Law: "Judge Sir Christopher Greenwood", <<https://legal.un.org/avl/faculty/Greenwood.html>>, visited 15 May 2021.

<sup>157</sup> Greenwood, p. 197.

<sup>158</sup> O'Connor, p. 146.

<sup>159</sup> UK, Reservation to 1977 Additional Protocol I, 28 January 1998, para (a); France, Reservation to 1977 Additional Protocol I, 11 April 2001, para 2.

<sup>160</sup> Nuclear Weapons Advisory Opinion, para 84.

provisions regulating issues of the environment.<sup>161</sup> These ‘new rules’ will be further examined in Chapter 4.5. The abovementioned principles, however, are binding upon all states. Based on what has been presented, I would like to argue that the use of nuclear weapons is rarely, if ever, consistent with the principles of distinction and proportionality. I will, however, not go as far as stating that they never *can* be. I will thus not conclude that they are inherently indiscriminate. What can be said, is that the principle of precaution and the unnecessary suffering rule provide further limitations beyond the principles of distinction and proportionality. Although nuclear weapons are not inherently indiscriminate, it becomes apparent when considering these principles and rules of IHL that possibilities for lawful use of nuclear weapons are, at the very least slim. I would even like to go as far as to argue that they are in fact non-existent.

#### **4.4 The Use of Nuclear Weapons and Human Rights Law: The Right to Life**

Even though nuclear weapons in a legal context are mostly discussed in the light of *jus ad bellum* and *jus in bellum*, human rights law (HRL) is also directly relevant to the subject. Human rights treaties oblige states to guarantee that violations do not occur, including through positive preventive measures. Of significance is that most states have incorporated international human rights standards in their constitutions and national legislation. Human rights treaty bodies are obligated to, by the virtue of their mandate, apply the human rights found within the particular treaties that they are required to monitor, and they have not hesitated to do so in cases concerning armed conflict hostilities. Violations of human rights law are also subjected to the scrutiny of UN Charter bodies, such as the Human Rights Council, the UN General Assembly and the UN Security Council. Including human rights law in the discussion of nuclear weapons is thus highly relevant.<sup>162</sup> For the purpose of the present analysis, this chapter will focus on the right to life as reflected in Article 6 of the International Covenant of Civil and Political Rights (ICCPR). The choice to focus on this specific provision is deemed reasonable considering that the Article has been discussed by the Court in the Nuclear Weapons Advisory Opinion in relation to some proponents having argued that the use of nuclear weapons is not compatible with the right to life.<sup>163</sup>

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<sup>161</sup> Casey-Maslen, p. 92.

<sup>162</sup> Doswald-Beck, Human rights law and nuclear weapons, p. 435.

<sup>163</sup> Nuclear Weapons Advisory Opinion, para 24-25.

Today it is essentially uncontroversial to state that human rights law continues to apply, alongside international humanitarian law, during armed conflict situations.<sup>164</sup> The ICJ stated in the Nuclear Weapons Advisory Opinion that it had observed that the protection of the ICCPR does not cease in times of war, with exception of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency.<sup>165</sup> The statement that human rights obligations continue to apply during wartime is also supported by many human rights treaties themselves, as they often directly refer to war and states of emergency. There are, however, a few states that on occasion have contested that anything other than IHL applies in armed conflict. The most noteworthy of these states include the United States and Israel. These states have not been unswerving in their views and the United States has since stated that ICCPR continues to apply in armed conflict for matters within its scope of application.<sup>166</sup> So, what is the ICCPR's scope of application?

The ICCPR must be put in the light of its possible application, as it applies to all persons in a state's 'territory and subject to its jurisdiction'.<sup>167</sup> As stated by both the treaty body that monitors the ICCPR (UN Human Rights Committee<sup>168</sup>) and by the ICJ this includes areas where a state has jurisdiction outside the national territory.<sup>169</sup> This is relevant in regard to the use of nuclear weapons since the use of such weapons is more likely to be targeted at another state's territory than a state's own territory.<sup>170</sup> Besides ICCPR, the European Convention on Human Rights (ECHR), the American Convention on Human Rights (ACHR) and the Arab Charter on Human Rights (AChHR) also specify that they apply to all people within a state's jurisdiction. The treaty bodies concerned have specified that they have interpreted the term 'jurisdiction' to cover persons or areas over which a state has 'effective control'.<sup>171</sup> The question then is whether or not the detonation of a nuclear weapon outside a state's national territory, or in a place where it does not have physical control of people or an area of land or sea, can amount to 'effective control'?

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<sup>164</sup> Doswald-Beck, Human rights law and nuclear weapons, p. 436.

<sup>165</sup> Nuclear Weapons Advisory Opinion, para 25.

<sup>166</sup> Doswald-Beck, Human rights law and nuclear weapons, p. 436.

<sup>167</sup> Article 2(1) of the ICCPR.

<sup>168</sup> Hereinafter referred to as simply the Human Rights Committee.

<sup>169</sup> See the Wall Case, para 108 & UNHRC Lopez Burgos v. Uruguay para 12.1 and 12.3

<sup>170</sup> Doswald-Beck, Human rights law and nuclear weapons, p. 439.

<sup>171</sup> Doswald-Beck, Human rights law and nuclear weapons, p. 440.

It has been suggested in several cases that human rights law does apply extraterritorially. For instance, in a case where Cuban military planes had attacked a civilian plane over international water, the International American Commission on Human Rights (IACoHR) applied the American Declaration on the Rights and Duties of Man. The Commission found that the action by the Cuban military planes was within Cuba's jurisdiction because the effect of attacking the plane 'placed the civilian pilots under their authority'<sup>172</sup>. In regard to the ICCPR, the Human Rights Committee has consistently held that the ICCPR can have extraterritorial application, evidently signifying its understanding that a state's jurisdiction extends beyond its territorial boundaries.<sup>173</sup> This assumption would thus result in human rights law potentially being relevant in a case of a nuclear weapon attack.

In the Nuclear Weapons Advisory Opinion, the ICJ did not touch on the subject of human rights law's applicability extraterritorially. Instead, the Court seemed to assume that human rights law would in principle apply in the case of a nuclear attack and instead focused on the interpretation of the right to life in relation to IHL. It was pointed out that some of the proponents on the illegality of the use of nuclear weapons had argued that such use would violate the right to life as ensured in Article 6 paragraph 1 of the ICCPR.<sup>174</sup> Article 6 paragraph 1 of the ICCPR states:

Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

In principle, as reaffirmed by ICJ, the right to life must be respected even in armed conflict. However, the Court also added that the test of what an arbitrary deprivation of life is falls to be determined by the applicable *lex specialis*, namely the law applicable in armed conflict. Whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life in violation of Article 6 ICCPR can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the ICCPR itself.<sup>175</sup> The Court has since the aforementioned statement made further pronouncements on the relationship between IHL and HRL, for example in its Advisory

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<sup>172</sup> IACoHR, *Alejandro and others v. Cuba (Brothers to the Rescue case, Case No. 11.589, Report No. 86/99, para 25.*

<sup>173</sup> Cerone, pp. 1-5.

<sup>174</sup> Nuclear Weapons Advisory Opinion, para 24.

<sup>175</sup> Advisory Opinion Nuclear Weapons, para 25.

Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (from now on referred to as the Wall Case). In this case, the Court stated as follows:

As regards to the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; other may be exclusively matters of human rights law; yet others may be matters of both of these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.<sup>176</sup>

This statement has since been repeated in the Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)<sup>177</sup>, which concerned the actions of Uganda in the territory it occupied in the Democratic Republic of the Congo (DRC). The statement in this case, however, did not include the words ‘as *lex specialis*’.<sup>178</sup> According to Louise Doswald-Beck, Professor at the Graduate Institute for International Relations in Geneva and Director of the University Centre for International Humanitarian Law,<sup>179</sup> the statement from the Court is general and gives no suggestion as to which branch of law is preferred in any situation.<sup>180</sup> In the DRC v. Uganda case, the Court simply listed the IHL and human rights treaties binding the two states and applied their provisions equally.<sup>181</sup> Worth noting, however, is the fact that the Court since the Nuclear Weapons Advisory Opinion seems to have retreated somewhat from its initial proposal of IHL always taking priority over HRL. On the subject of the relationship between IHL and HRL it is also worth mentioning that human rights treaty bodies have on occasion made reference to IHL in the interpretation of HRL. In these situations, however, reference has always been made to support human rights protection, and not to limit it.<sup>182</sup> Any argument that IHL is required to be the basis of assessment in cases brought before the human rights treaty bodies is rejected instantly. The concerned treaty bodies have instead argued that they only refer to IHL as *tool* to help interpret the human rights concerned.<sup>183</sup> In the General Comment No. 36 to Article 6,

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<sup>176</sup> The Wall Case, para 106.

<sup>177</sup> Hereinafter referred to as the DRC v. Uganda case.

<sup>178</sup> DRC v. Uganda case, para 216.

<sup>179</sup> Doswald-Beck, The right to life in armed conflict: does international humanitarian law provide all the answers?, p. 881.

<sup>180</sup> Doswald-Beck, Human rights law and nuclear weapons, p. 437.

<sup>181</sup> DRC v. Uganda case, para 218.

<sup>182</sup> Doswald-Beck, Human rights law and nuclear weapons, p. 438.

<sup>183</sup> Doswald-Beck, Human rights law and nuclear weapons, p. 436-437.

the Human Rights Committee stated that rules of IHL may be relevant for both the interpretation and application of Article 6, but that the two areas of law are complementary, not mutually exclusive.<sup>184</sup>

The wording of Article 6 paragraph 1 ICCPR, and in particular the use of the term ‘arbitrarily’ suggests that there are deprivations of life that may be non-arbitrary and that the right to life is thus not an absolute right. This seems to be the view of the Court,<sup>185</sup> and this position is also held by the Human Rights Committee.<sup>186</sup> The Court appears to hold the position that what constitutes a non-arbitrary deprivation of life in an armed conflict is a deprivation of life that is in conformity with the rules of IHL. The Human Rights Committee seems to share this view, as it has specified that a use of lethal force that is consistent with IHL and other applicable international law norms is generally not arbitrary. Consequently, lethal force that is inconsistent with IHL, is also a violation of Article 6 ICCPR.<sup>187</sup> Could this then mean that the use of nuclear weapons in some instances could constitute such a non-arbitrary deprivation of life?

In a Dissenting Opinion to the Nuclear Weapons Advisory Opinion, ICJ Judge Weeramantry argued that the use or threat of use of nuclear weapons is illegal in any circumstances whatsoever and claimed that the threat or use of nuclear weapons violates the fundamental principles of international law and that it contradicts the humanitarian concerns which are the basis of humanitarian law.<sup>188</sup> Furthermore, Judge Weeramantry noted the argument that the right to life is not an absolute right. However, he continued by stating that by using a weapon that could potentially result in one million or one billion fatalities, ‘human life becomes reduced to a level of worthlessness that that totally belies human dignity as understood in any culture’. Judge Weeramantry went on to argue that the deliberate act by a state, such as the threat or use of nuclear weapons, is incompatible with the state’s recognition of the respect for basic human dignity, on which world peace depends. It is also incompatible with the respect for the commitments that follow from being a Member State to the United Nations.<sup>189</sup> As is stated in the preamble to the UN Charter:

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<sup>184</sup> UN Human Rights Committee, General Comment No. 36, para 64.

<sup>185</sup> See for example Nuclear Weapons Advisory Opinion, para 25.

<sup>186</sup> UN Human Rights Committee, General Comment 36, para 10.s

<sup>187</sup> UN Human Rights Committee, General Comment no. 36, para 64.

<sup>188</sup> Dissenting Opinion of Judge Weeramantry, p. 433.

<sup>189</sup> Dissenting Opinion of Judge Weeramantry, p. 507.



We the People of the United Nations Determined (...) to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small.

Hence, Judge Weeramantry appeared to be convinced that the threat or use of nuclear weapons is incompatible with human rights law, and in particular incompatible with the right to life. This view is also held by the Human Rights Committee, as they have questioned if a threat or use of nuclear weapons can be compatible with the right to life under any circumstances. In General Comment 6 to Article 6 of ICCPR, the Human Rights Committee stated that states have the ultimate duty to prevent wars, acts of genocide and other acts of mass violence resulting in the arbitrary loss of life. Furthermore, every action a state takes in the direction of preventing war, especially thermonuclear war, and to fortify international peace and security would constitute the most important condition and guarantee for the safeguarding of the right to life.<sup>190</sup> E contrario, this statement could be interpreted as a state taking action in instigating war, especially thermonuclear war, would be an act against the safeguarding of the right to life. Furthermore, in General Comment 36, the Human Rights Committee specified its view on nuclear weapons, as it stated that the threat or use of weapons of mass destruction, *in particular nuclear weapons*, is incompatible with the respect for the right to life.<sup>191</sup>

Thus, the Human Rights Committee appears to argue that a deprivation of life that is consistent with IHL is generally non-arbitrary, but a deprivation of life through the use of nuclear weapons is always arbitrary, due to the weapon's indiscriminate effects. This could be viewed as a somewhat far-reaching conclusion, as I have concluded that it is not possible to conclude that nuclear weapons are inherently indiscriminate. However, there are other rules and principles of IHL, which through an overall assessment may have the same result as the Human Rights Committee points out, but on the basis of different considerations. This will be further discussed in the legal analysis of Chapter 4.6 of this thesis.

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<sup>190</sup> UN Human Rights Committee, General Comment 6, para 2.

<sup>191</sup> UN Human Rights Committee, General Comment No. 36, para 66.

## 4.5 The Use of Nuclear Weapons and International Environmental Law

When discussing nuclear weapons and the effect of their usage, it is natural in today's political climate to consider the environment. In the Nuclear Weapons Advisory Opinion from 1996, the ICJ referred to the devastating effects nuclear weapons could have on the environment.<sup>192</sup> Including the environment in the discussion of the use of nuclear weapons is thus not new. Still, it is highly relevant.

In the Nuclear Weapons Advisory Opinion, the Court concluded that the characteristics of nuclear weapons make their usage potentially catastrophic and that their destructive power cannot be contained in either space or time. From the material before the Court, it was found that nuclear weapons have the potential to destroy all civilization, as well as the entire ecosystem of the planet.<sup>193</sup> As previously presented in this thesis, nuclear explosions release long-lasting radiation.<sup>194</sup> According to the Court, such release of radiation would result in harmful and widespread effects for health, agriculture, natural resources and demography. Furthermore, a nuclear explosion would also be a serious concern to future generations as well as the future environment, food and marine ecosystem.<sup>195</sup>

Adjacent to the Nuclear Weapons Advisory Opinion, some states argued in the proceedings that the principal purpose of environmental treaties and norms applies to the protection of the environment in times of peace. These states also held that these treaties did not mention nuclear weapons and that interpreting the provisions as prohibiting the use of nuclear weapons would be destabilizing to the rule of law and to confidence in international negotiations. The Court stated that it is part of the body of international law relating to the environment that states are obliged to ensure that activities within their own jurisdiction and control respect the environment of other states or of areas beyond national control.<sup>196</sup> This position is expressed in Principle 21 of the Stockholm Declaration of 1972 and Principle 2 of the Rio Declaration of 1992. None of these two instruments are formally binding as they are diplomatic conference declarations, but they include provisions that at the time of their adoption were

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<sup>192</sup> Nuclear Weapons Advisory Opinion, para 35.

<sup>193</sup> Nuclear Weapons Advisory Opinion, para 35-36.

<sup>194</sup> See Chapter 2.2.

<sup>195</sup> Nuclear Weapons Advisory Opinion, para 35-36.

<sup>196</sup> Nuclear Weapons Advisory Opinion, para 27-29.

considered to reflect customary international law. Furthermore, the Rio Declaration, adopted twenty years after the Stockholm declaration, reaffirmed and built upon its predecessor, reinforcing the normative significance of both instruments. Today there is no question that the identical principles constitute part of general international law.<sup>197</sup> This was also expressively endorsed by the Court in the Nuclear Weapons Advisory Opinion.<sup>198</sup>

Pertaining to treaties protecting the environment and their applicability in armed conflict, the Court stated that the issue at hand was not whether the treaties are applicable during armed conflict, but instead whether or not obligations following from them were intended to totally restrain states during armed conflict. In examining this issue, the Court did not consider such treaties to have the intention to deprive states of their right to self-defence. However, states do have to take environmental considerations into account in the assessment of what is both necessary and proportionate in the pursuit of legitimate military objectives.<sup>199</sup> The conviction that the environment is one of the elements in determining whether or not an act of self-defence is necessary and proportionate is supported by Principle 24 of the Rio Declaration, which states as follows:

Warfare is inherently destructive of sustainable development. States shall therefore respect international law providing protection for the environment in times of armed conflict and cooperate in its further development, as necessary.

It is probably safe to assume that if one state were to detonate a nuclear explosion upon another state's territory, it would be a violation of the political commitments included in Principle 2 of the Rio Declaration and Principle 21 of the Stockholm Declaration. However, as stated by the Court, this does not deprive states of their right to self-defence and does not prohibit the use of nuclear weapons.<sup>200</sup> It does mean, however, that environmental considerations have to be taken into account when determining the proportionality and necessity of an action. This conclusion may raise the question of whether or not there actually is any situation where the use of nuclear weapons can be considered proportional from an environmental standpoint?

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<sup>197</sup> Handl, Günther: "Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration, 1972) and the Rio Declaration on Environment and Development, 1992", pp. 3-4, UN Audiovisual Library of International Law, <[https://legal.un.org/avl/pdf/ha/dunche/dunche\\_e.pdf](https://legal.un.org/avl/pdf/ha/dunche/dunche_e.pdf)>, visited 30 March 2021.

<sup>198</sup> Nuclear Weapons Advisory Opinion, para 29.

<sup>199</sup> Nuclear Weapons Advisory Opinion, para 30.

<sup>200</sup> Nuclear Weapons Advisory Opinion, para 30.

Beyond the abovementioned Principles, there are other rules of international environmental law to which the use of nuclear weapons seems contrary. Some worth noting can be found in IHL, and more specifically, in the 1977 Additional Protocol I to the four 1949 Geneva Conventions (Additional Protocol I). Additional Protocol I was intended to reaffirm and develop international humanitarian law,<sup>201</sup> and amongst the Protocol's 102 Articles, two provisions explicitly refer to the protection of the environment during international armed conflict. These two provisions are part of the 'new rules' of Additional Protocol I,<sup>202</sup> and can be found in Articles 35(3) and Article 55, which state as follows:

**Article 35(3)**

It is prohibited to employ methods or means of warfare which are intended or may be expected, to cause widespread, long-term and severe damage to the natural environment.

**Article 55**

1. Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition to the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.
2. Attacks against the natural environment by way of reprisals are prohibited.

Article 35(3) relates to the protection of the intrinsic value of the environment (so-called an ecocentric provision) and Article 55 seeks to protect the environment as a civilian object, due to its importance for health and the survival of the civilian population (so-called an anthropocentric provision). The two Articles both prohibit means and methods of warfare that are either intended or expected to cause widespread, long-term *and* severe damage to the natural environment and they both include a cumulative damage threshold. Since the Additional Protocol I does not include any specification on the definitions of the terms 'widespread, long-term and severe', they should be interpreted in accordance with the general rules of treaty interpretation as reflected in Article 31 and 32 of the VCLT. This includes determining the ordinary meaning of these terms, which perhaps is not a simple or especially objective undertaking. One could argue though, that they do seem to include a certain level of seriousness, and that the interpretation of these terms should be done in accordance with

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<sup>201</sup> Koppe, p. 251.

<sup>202</sup> Koppe, p. 255.

current views on environmental damage and current standards of international environmental law.<sup>203</sup>

When determining the importance of the abovementioned Articles of Addition Protocol I, it is worth mentioning that not all nuclear states are parties to the Protocol. As stated in Chapter 4.3, claims have also been made that the Protocol in question does not apply to nuclear weapons.<sup>204</sup> What could be argued, however, is that the provisions do not in any way specifically mention nuclear weapons, but simply refer to ‘means and methods of warfare’. Hence, it would arguably seem logical to assume they include all means and methods of warfare. The division in the international community on whether the Protocol applies to nuclear weapons became especially apparent as the UK and France made declarations upon signature and/or ratification of the Protocol, stating their understanding that the Protocol only applied to conventional weapons,<sup>205</sup> and thus not nuclear weapons. These declarations could be viewed as constituting reservations in accordance with Article 2(1)(d) of the VCLT, which states that a ‘reservation’ means ‘a unilateral statement, however phrased or named, made by a state when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or modify the legal effect of certain provisions of the treaty in their application to that state’. A state may not, however, make a reservation if it is incompatible with the object and purpose of the treaty.<sup>206</sup> The object and purpose of a treaty must be established by finding the ‘essence’ of the treaty and the ‘essence’ of a treaty can be found in the title of the treaty, the preamble, a particular article, preparatory works or its general architecture.<sup>207</sup> The essence of the law of armed conflict, including Additional Protocol I, is the mitigation of the disasters of war in general, and the protection of the victims of armed conflict in particular. No state, however, has yet made any objections to the legality of the reservations for being incompatible with the purpose and objective of the Protocol.<sup>208</sup> I would like to argue, however, that it is against the objectives of the Protocol to exclude the use of a weapon as destructive as nuclear weapons. Assuming that both Articles apply, the use of nuclear weapons could be argued to be an act contrary to both provisions. Nonetheless, this will logically depend on the kind of nuclear explosion (above or below surface). It will also

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<sup>203</sup> See for example art. 31(3) of the VCLT.

<sup>204</sup> Koppe, p. 254.

<sup>205</sup> UK, Reservation to 1977 Additional Protocol I, 28 January 1998, para (a); France, Reservation to 1977 Additional Protocol I, 11 April 2001, para 2.

<sup>206</sup> See Article 19(c) of the VCLT.

<sup>207</sup> Pellet, pp. 447–451.

<sup>208</sup> Koppe, p. 256.

depend on what kind of nuclear weapon is used, in what environment it is used and the weather at the time of the explosion.<sup>209</sup> Nevertheless, it is hard to envision a scenario where an explosion of a nuclear weapon during armed conflict would *not* cause widespread, long-term and severe damage to the environment. This damage is without doubt foreseeable, which both provisions require it to be. I would thus like to argue that these provisions must be taken into account by the Parties to the Protocol, including France and the UK, and that taking them into account entails an extensive limitation on the possibilities of lawful use of nuclear weapons.

Regarding the Articles 35(3) and 55 of the Additional Protocol I, it is also worth examining whether these provisions are of a customary nature. In the CIHL Study by the ICRC, Rule 45 states that ‘the use of methods or means or warfare that are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment is prohibited’ and that ‘destruction of the natural environment may not be used as a weapon’.<sup>210</sup> Clearly, the first sentence of Rule 45 seems to reflect the provisions in Articles 35(3) and 55 of Additional Protocol I. These provisions were new at the time of their adoption, but since then a significant practice has emerged that gives a customary nature to the prohibition, according to the ICRC. Causing widespread, long-term and severe damage to the environment is an offence in several states, and this practice does not only include states that are parties to the Protocol.<sup>211</sup> The claim by the ICRC that the prohibition is of a customary nature is not undisputed, though.<sup>212</sup> As mentioned, several states do not agree with its applicability to nuclear weapons, and the ICJ has also rejected in the Nuclear Weapons Advisory Opinion that both provisions had customary counterparts.<sup>213</sup> Due to a lack of consensus on this issue, the customary nature of the provisions in Articles 35(3) and 55 of Additional Protocol I and the possible effect of the prohibition being a customary rule will not be further examined.

Besides Rule 45 of the CIHL Study, the Rules 43C and 44 are immediately relevant to the environment and nuclear weapons. Rule 43C states as follows:

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<sup>209</sup> Koppe, p. 257.

<sup>210</sup> Henckaerts & Doswald-Beck, Customary International Humanitarian Law, Vol. I, pp. 151.

<sup>211</sup> Henckaerts & Doswald-Beck, Customary International Humanitarian Law, Vol. II, pp. 879-898.

<sup>212</sup> Anastassov, page 79.

<sup>213</sup> Nuclear Weapons Advisory Opinion, para 31.

The general principles on the conduct of hostilities apply to the natural environment:  
Launching an attack against a military objective which may be expected to cause incidental damage to the environment which would be excessive in relation to the concrete and direct military advantage anticipated is prohibited.<sup>214</sup>

The existence of a prohibition in customary law as reflected in Rule 43C is generally accepted in practice.<sup>215</sup> As can be deduced from the wording of the Rule, it concerns proportionality. Hence, the question of whether the damage is excessive will depend on the military advantage anticipated. If a military target is highly valuable, the destruction of it may be justified as collateral damage. On the contrary, the destruction of a military target that is not highly valuable would not be justifiable as collateral damage. The prohibition on excessive collateral damage thus always entails an assessment of factors, and the application of the test will depend on the particular circumstances of every case. Rule 44 of the CIHL Study states:

Methods and means of warfare must be employed with due regard to the protection and preservation of the natural environment. In the conduct of military operations, all feasible precautions must be taken to avoid, and in any event to minimize, incidental damage to the environment. Lack of scientific certainty as to the effects on the environment of certain military operations does not absolve a party to the conflict from taking such precautions.<sup>216</sup>

The ICRC has identified the development of a duty of care for the environment as reflected in Rule 44 from a variety of sources. Such sources include treaties and other international instruments and state practice, particularly expressed in military manuals and in statements within international organisations and conferences.<sup>217</sup> Moreover, a number of states have affirmed or implied that there is in fact a duty of care for the environment during armed conflict.<sup>218</sup> While the first sentence of Rule 44 implies the presence of general duty to care for the environment during armed conflict, the second sentence reflects the general principle of prevention. The general principle of prevention constitutes a principle of international environmental law, as recognized by the ICJ.<sup>219</sup> Rule 44 also states that lack of scientific certainty in regard to effects on the environment of certain military operations does not absolve a party to the conflict from taking such precautions, which reflects the precautionary

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<sup>214</sup> Henckaerts & Doswald-Beck, Customary International Humanitarian Law, Vol. I, pp. 143.

<sup>215</sup> Henckaerts & Doswald-Beck, Customary International Humanitarian Law, Vol. I, pp. 145-146.

<sup>216</sup> Henckaerts & Doswald-Beck, Customary International Humanitarian Law, Vol. I, p. 147.

<sup>217</sup> Henckaerts & Doswald-Beck, Customary International Humanitarian Law, Vol. II, pp. 860-871.

<sup>218</sup> Koppe, p. 264.

<sup>219</sup> See for example the Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay), para 101.

principle.<sup>220</sup> Rule 44 is not weapon specific and I would thus like to argue that it applies to the use of nuclear weapons. In order to conclude if a use of nuclear weapons is consistent with this rule, one must establish to what extent a state has taken precautions and minimize incidental damage to the environment. It follows from this provision that states must assess the potential environmental harm, and if necessary, cancel the use of nuclear weapons to avoid or minimize damage to the environment.<sup>221</sup> Arguably, this assessment should include considerations whether other, less harmful weapons could be used with similar military achievements and less damage to the environment. I believe that such considerations would in most scenarios result in a conclusion that there are in fact other weapons that could be used.

## 4.6 Legal Analysis

As this chapter has examined the rules of jus ad bellum, IHL, HRL and international law, it is apparent that these areas of international law are both intricate and interconnected. It is thus considered necessary to dedicate this section to an overall assessment of how the examined rules and principles are related, in order to come to a conclusion on the legality of the use of nuclear weapons today. As this thesis has found that both self-defence and HRL are closely connected to IHL, it is considered logical to initiate this analysis with IHL.

I have in this thesis argued that the use of nuclear weapons is rarely, if ever, consistent with the principles of distinction and proportionality. I have, however, not been willing to go as far as concluding that the use of nuclear weapons can *never* be consistent with these principles. Scenarios where such use could potentially be consistent with these principles include an attack on a military objective in a sparsely populated area, such as the desert, or an attack on submarine, provided that it is considered a military objective. Nuclear weapons are thus not inherently indiscriminate, and not prohibited as a consequence of the prohibition of indiscriminate weapons. What can be said, is that the principles of precaution and the unnecessary suffering rule impose further limitations on the use of nuclear weapons, beyond the principles of distinction and proportionality. Precautions must be taken in the choice of means and methods of an attack to avoid, or at least minimize, incidental loss of civilian life, injury to civilians and damage to civilian objects. Due to the unreliable behaviour of secondary radiation, it is safe to assume that such assessments would prove difficult, even

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<sup>220</sup> Henckaerts and Doswald-Beck, Customary International Humanitarian Law, Vol. I, p. 147.

<sup>221</sup> Koppe, pp. 266-267.



with the use of a low-yield weapon. The principle of precaution also provides an obligation to consider alternative, less destructive weapons. Military objectives attacked that potentially would be in accordance with the principles of distinction and proportionality (desert or submarine), could most likely be neutralised with weapons that do not have as long-lasting and devastating effects as nuclear weapons. The principle of precaution thus considerably limits the possibilities of lawful use. Still, if we imagine such an extraordinary situation where there is no possibility of taking feasible precautions and the use is not contrary to the principles of distinction and proportionality, the unnecessary suffering rule still has to be considered. This rule also imposes an obligation to consider alternative weapons. Additionally, if the medium- and long-term effects of nuclear weapons are required to be considered pertaining to the necessity of such attack, the limits of possible lawful use become undeniable. As stated, there is no military advantage in combatants developing cancer or other diseases from being exposed to nuclear weapons. In considering all of these rules and principles, it is palpable that the prospects of lawfully using nuclear weapons are, at the very least, slim. As previously stated, I would even like to extend this conclusion even further, and state that such prospects are in fact non-existent.

Another area of law examined in this analysis is the area of *jus ad bellum*. As presented, the use of force against another state's territory or political independence, with whatever weapons, is generally considered unlawful under the prohibition of the use of force. The right to self-defence constitutes an exception to this rule. This right is limited by the principles of necessity and proportionality, and according to the ICJ, the principle of proportionality may not in itself exclude the use of nuclear weapons. Moreover, this analysis has concluded that there is not enough evidence to support that the use of nuclear weapons in self-defence must fulfil a so-called 'double necessity' requirement, which entails that the use of nuclear weapons has to be the last resort among all weapons. In the assessment of what is both necessary and proportionate, however, states have to take environmental considerations into account. Even though these principles might not in themselves exclude a lawful use of nuclear weapons in the exercising of the right to self-defence, they do pose as important limitations on the lawful use of nuclear weapons.

In addition to the fact that an act of self-defence must meet the requirements of necessity and proportionality, it also has to abide by international law applicable in armed conflict, and in particular IHL. As it has been argued in this chapter, the claim that the use of nuclear weapons

is lawful under IHL is not very strong. Consequently, the fact that the right to self-defence must be exercised in conformity with IHL thus seems to exclude the possibility of using nuclear weapons in self-defence. The ICJ did, however, make a disclaimer in the Nuclear Weapons Advisory Opinion, stating that it could not conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in 'extreme circumstances of self-defence, in which the very survival of a state would be at stake'. This could potentially mean that the extremeness of such situations rights or repairs even the absence of necessity and proportionality, and that the legitimacy of an *ad bellum* cause, in extreme situations, could justify the use of nuclear weapons in violation of *jus in bello*. In such extreme scenarios, not much seem to limit states in employing nuclear weapons in self-defence.

This chapter has in Section 4.4 analysed HRL, and in particular the right to life as stated in Article 6 of the ICCPR. It was there concluded that the right to life continues to apply during armed conflict and that human rights law in general is applicable extraterritorially. It was also concluded that HRL and IHL are complementary, not mutually exclusive. As presented, the Human Rights Committee has stated that a deprivation of life that is consistent with IHL, is generally not an arbitrary deprivation of life. *E contrario*, a deprivation of life that is contrary to the rules and principles of IHL is also an arbitrary deprivation of life, and thus a violation of Article 6 of the ICCPR. The Committee is, however, of the view that a deprivation of life using nuclear weapons is arbitrary, due to their indiscriminate effects and destructive nature. This position was also held by ICJ Judge Weeramantry. The Human Rights Committee and Judge Weeramantry thus seem to be of the view that nuclear weapons are inherently indiscriminate and that a deprivation of life through the use of nuclear weapons is *always* arbitrary, implying it would also be a violation of the rules and principles of IHL. This is contrary to my position in the matter, as I have concluded that nuclear weapons are not inherently indiscriminate. Nevertheless, I have argued that the realistic possibilities of lawful use of nuclear weapons under IHL are non-existent. This conclusion has been reached through an overall assessment of the rules and principles of IHL, and in large due to the obligations to consider alternative weapons. Considering that a deprivation of life that is not in conformity with IHL is generally arbitrary, I am of the belief that the taking of life through the use of nuclear weapons will constitute a violation of the right to life. Hence, my conclusion does not differ from the Human Rights Committee's, even though it is based upon different considerations than nuclear weapons being inherently indiscriminate. Furthermore, I would like to consider that the abovementioned arguments are also applicable to a deprivation of life

through the exercise of the right of self-defence, as this right also needs to abide by IHL. If a deprivation of life through the exercising of the right to self-defence is in violation of the rules and principles of IHL, it is also a violation of the right to life.

The final area of law examined in this analysis is international environmental law. As presented, Articles 35(3) and 55 of Additional Protocol I prohibit the use of methods and means of warfare that are intended or may be expected to cause widespread, long-term and severe damage to the environment. These provisions are part of IHL and have in this analysis been argued to be of significance when it comes to the use of nuclear weapons. It has been concluded that parties to the Protocol have to take these provisions into account, including France and the UK. Even though the cumulative damage threshold is high, I would like to argue that nuclear weapons should be expected to cause widespread, long-term and severe damage to the environment. Hence, these provisions seem to considerably limit the prospects of lawfully using such weapons. As Article 35(3) is an ecocentric provision protecting the intrinsic value of the environment, it should also limit the possibilities of using nuclear weapons in such hypothetical situations as an attack on a military objective in the ocean or in the desert.

I have in this chapter argued that all states, including all NWS, have to take Rules 43C and 44 of the CIHL Study into account, as they are of a customary nature. Rule 43C calls for an assessment of proportionality, which states that environmental damage (collateral damage) cannot be excessive. This has to be assessed on a case-by-case basis but could undoubtedly have an effect on the lawfulness of an attack, even in cases where the military objective is a submarine or located in the desert. Rule 44 of the CIHL studies requires a consideration of whether less harmful weapons could be used with similar military achievements, and with less damage to environment. This rule should even further limit the possibilities of lawful use of nuclear weapons, even in scenarios where a submarine or an objective in the desert is targeted.

Finally, Principle 21 of the Stockholm Declaration and Principle 2 of the Rio Declaration provide that states are obliged to ensure that activities within their own jurisdiction and control respect the environment of other states or of areas beyond national control. It remains unclear whether or not these principles apply in armed conflict. As stated, however, they do pose as an element in the assessment of both necessity and proportionality in the exercise of the right to self-defence. This analysis has concluded that the rules and principles of IHL

pertaining to the protection of civilians and combatants already should exclude the possibility of lawfully using nuclear weapons in self-defence. Arguably, these principles further support this view as they impose further limitations on lawfully employing nuclear weapons in self-defence.

In conclusion, these different branches of international law entail rules and principles that seem to preclude the lawful use of nuclear weapons. In any instance, the rules and principles are comprehensive and far-reaching, and even if one were to argue that there are in fact some hypothetical scenarios in which use of nuclear weapons would not be contrary to them, such scenarios would be so extraordinary that they could be claimed to be imaginary. Does this then mean that there exists a general prohibition of the use of nuclear weapons in customary international law? The rules and principles of IHL applicable to the use of nuclear weapons are indeed of a customary nature but arguing that this results in general prohibition of the use of nuclear weapons might be 'jumping the gun'. A general prohibition on nuclear weapons would have to satisfy certain requirements to become a customary rule on its own. Without this thesis examining such requirements in detail, simply put the existence of customary law arises when two things are at hand: a consistent pattern of state practice and *opinio juris*. State practice refers to a consistent pattern of state's behaviour, while *opinio juris* refers to the widespread perception among states that their action follows from applicable law.<sup>222</sup> In relation to the threat or use of nuclear weapons, it is in particular difficult to state that the *opinio juris* requirement is fulfilled, as state practice on this subject might depend on other considerations than the belief that there is a legal obligation to refrain from threatening or using nuclear weapons. Such consideration may include political considerations as well as questions of deterrence. Furthermore, one must not forget about the Court's disclaimer in relation to self-defence. This disclaimer suggests that nuclear weapons could be used in conformity with international under certain extreme circumstances. Arguing that there exists a general and absolute prohibition of the use of nuclear weapons is thus not very fruitful.

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<sup>222</sup> Linderfalk, pp. 28-29.

# 5 The Legality of Possessing Nuclear Weapons Under International Law

As can be seen from what has been presented in the chapters above, the legal frameworks surrounding the use of nuclear weapons leave little to no room for the lawful use of nuclear weapons. In Chapter 3 the conclusion was also made that possibilities of acquiring nuclear weapons under international law are considerably limited under the NPT. However, the NPT does not apply to states that are not party to the treaty and does not prohibit acquisition for those already in possession of nuclear weapons. Hence, one area of nuclear weapons remains to be examined, namely the possession of such weapons. In the following section, we will dive into established international law that regulates the possession of nuclear weapons today.

## 5.1 The Possession of Nuclear Weapons and the NPT

There are no legal instruments specifically governing the possession of nuclear weapons on a global scale in international law today. However, as the 1968 NPT prohibits the acquisition of nuclear weapons for an overwhelming majority of states, it also implicitly prohibits possession of nuclear weapons for these states.<sup>223</sup> The relevance of the NPT in relation to the possession of nuclear weapons is thus obvious. The NPT does, however, tolerate the possession of such weapons for a handful of states. Furthermore, states that are not parties to the treaty, whether NWS or NNWS, are not bound by the treaty.<sup>224</sup> As previously stated in Chapter 3.1, the NPT has also been referred to as a ‘reasonable success’, as it has limited the total number of NNWS.

In addition to having had an effect on the proliferation of nuclear weapons, the NPT also entails elements of disarmament.<sup>225</sup> The issues of disarmament could be argued as relevant to the subject of possession since they both relate to the ‘having and not having’ nuclear weapons. In the negotiations leading up to the adoption of the NPT, questions of how to

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<sup>223</sup> See for example Article II of the NPT.

<sup>224</sup> Goldblat, p. 257.

<sup>225</sup> See for example Article VI of the NPT.

construct a treaty with a language satisfactory to both the United States and the Soviet Union and providing the NNWS with adequate confidence in the efficiency of the non-proliferation obligations were raised.<sup>226</sup> This resulted in a debate on how to balance the different obligations of the Treaty. The NNWS requested something in return for surrendering the option to develop nuclear weapons, namely the access to peaceful nuclear energy and legally binding disarmament obligations for the NWS. The issue of legally binding disarmament obligations was considered particularly important, as the purpose of the Treaty was to bring the world closer to the full elimination of nuclear weapons. Hence, many NNWS considered these legal obligations to be at the very core of the treaty.<sup>227</sup> During the negotiations “the three aspects of nuclear disarmament mentioned most often by the NNWS were an agreement ending the production of fissionable materials (in nuclear parlance, the “cut-off”), a comprehensive test ban agreement, and an agreement halting the production of delivery systems”.<sup>228</sup>

The disarmament obligations of the NPT can be found in its Article VI, as it calls for good-faith negotiations relating to the cessation of the nuclear arms race and to nuclear disarmament, as well as a treaty on general and complete disarmament under strict and effective international control.<sup>229</sup> This Article has led to commentators suggesting that the non-proliferation regime will collapse if the states recognized by the NPT as NWS are not perceived as seriously committed to and making progress towards disarmament. Other commentators, however, argue that actions on disarmament by the NWS do not affect the factors that might lead to the further spread of nuclear weapons.<sup>230</sup>

Article VI of the NPT can be viewed in the light of the VCLT, in particular Articles 31 and 32 of the Treaty. According to Daniel H. Joyner, claims that in interpreting Article VI of the NPT according to Article 31(1) of the VCLT, the ordinary meaning of the NPT’s Article VI can be divided into three separate obligations. These obligations include that the Parties to the Treaty undertakes to pursue good-faith negotiations on (1) effective measures relating to cessation of the nuclear arms race at an early date, (2) on effective measures relating to nuclear disarmament, and (3) on a treaty on general and complete disarmament under strict and

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<sup>226</sup> Nystuen & Graff Hugo, p. 377.

<sup>227</sup> Nystuen & Graff Hugo, p. 378.

<sup>228</sup> Firmage, p. 734.

<sup>229</sup> Article VI of the NPT.

<sup>230</sup> Knopf, p. 92.

effective international control.<sup>231</sup> Hence, the obligation in Article VI is to pursue negotiations in good faith toward these three defined end results.

Christopher Ford, a former non-proliferation negotiator in the George W. Bush administration,<sup>232</sup> has argued that the text of Article VI suggests that negotiations on effective measures related to nuclear disarmament are only required to occur following and depending on negotiations of a treaty on general and complete disarmament. Such assertions have been based upon a paragraph in the preamble of the NPT, which states ‘...the elimination from national arsenals of nuclear weapons and the means of their delivery *pursuant* to a Treaty on general and complete disarmament’. This preamble has been interpreted as that measures relating to disarmament will only follow from a treaty on general and complete disarmament.<sup>233</sup> Joyner argues to the contrary, however. In interpreting a treaty, the preamble becomes an important factor mainly in determining the object and purpose of the treaty.<sup>234</sup> The preamble may also provide context to a treaty.<sup>235</sup> Nevertheless, using the preamble in order to contradict the ordinary meaning of the text by imposing a condition which cannot be found anywhere else in the text extends beyond the permissible uses of a preamble.<sup>236</sup> I concur with Joyner’s position in the matter.

The wording of obligation for the Parties to the Treaty to ‘undertake to pursue negotiations in good faith’ is applicable to all of the three separate obligations. According to Joyner, this obligation is not illusory, since the ordinary meaning of the phrase does not entail an obligation to *achieve* the subject of the negotiations.<sup>237</sup> The ICJ also commented on the interpretation of Article VI of the NPT in the Nuclear Advisory Opinion in 1996,<sup>238</sup> as it stated as follows:

“The legal import of that obligation goes beyond that of a mere obligation of conduct; the obligation involved here is an obligation to achieve a precise result – nuclear disarmament

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<sup>231</sup> Joyner, The legal meaning and implications of Article VI of the Non-Proliferation Treaty, p. 406.

<sup>232</sup> U.S.-China Economic and Security Review Commission, “Christopher A. Ford, Ph.D.”, <<https://www.uscc.gov/sites/default/files/Christopher%20A.%20Ford%20bio.pdf>>, visited 25 April 2021.

<sup>233</sup> Ford, pp. 403-404.

<sup>234</sup> Pellet, pp. 447-451.

<sup>235</sup> Article 31(2) of the VCLT.

<sup>236</sup> Joyner, The legal meaning and implications of Article VI of the Non-Proliferation Treaty, p. 407.

<sup>237</sup> Joyner, The legal meaning and implications of Article VI of the Non-Proliferation Treaty, p. 407.

<sup>238</sup> Nuclear Weapons Advisory Opinion, para 98-99.

in all its aspects – by adopting a particular course of conduct, namely, the pursuit of negotiations on the matter in good faith”.<sup>239</sup>

It can be deduced from this statement that the Court did find that the obligation established in Article VI is to *achieve* a precise result. Joyner, however, argues that the Court’s statement went beyond the ordinary meaning of the wording in Article VI. The ordinary meaning of Article VI merely suggests an obligation to undertake to pursue negotiations in good faith, in order to achieve a precise result. It does not, however, entail an obligation to *achieve* this result.<sup>240</sup> Furthermore, it has been argued that the Court interpreting Article VI of the NPT extended beyond the scope of the General Assembly’s request.<sup>241</sup> The Court has since not discussed Article VI, and the effect of the Court’s interpretation of the Article could thus be argued to remain unclear.<sup>242</sup> In the further discussion of Article VI, I will accordingly assume that the text does not imply an obligation to *achieve* the subject of the negotiations. However, the term ‘in good faith’ alludes to an obligation that is more far-reaching than simply going through negotiations ‘for the sake of it’.

The principle of good faith is an accepted general principle of international law and can be found in several areas of international law.<sup>243</sup> It is also explicitly referred to in Article 31(1) of the VCLT and is a fundamental component of treaty interpretation.<sup>244</sup> In relation to the NPT, the principle of good faith is applicable on two levels, namely good faith in interpreting the Treaty as a whole and good faith in interpreting the meaning of ‘good faith’ as stated in Article VI.<sup>245</sup> The obligation in Article 31(1) of the VCLT to interpret a treaty’s term in good faith entails, at the least, that the interpretation which gives a term some meaning or role should be preferred over one that does not. The interpretation that satisfies the aims of the treaty is also the preferred interpretation.<sup>246</sup> Considering that the NPT consists of three pillars, namely non-proliferation, transfer of the benefits of peaceful nuclear energy and disarmament, the terms of the NPT should be interpreted in a way that gives each Article a meaning and role in fulfilling these three aims.<sup>247</sup> The ICJ has several times applied the principle of good

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<sup>239</sup> Nuclear Weapons Advisory Opinion, para 99.

<sup>240</sup> Joyner, The legal meaning and implications of Article VI of the Non-Proliferation Treaty, p. 405.

<sup>241</sup> See for example Separate Opinion of Judge Guillaume, para. 13.

<sup>242</sup> Joyner, The legal meaning and implications of Article VI of the Non-Proliferation Treaty, p. 405.

<sup>243</sup> Joyner, The legal meaning and implications of Article VI of the Non-Proliferation Treaty, p. 408.

<sup>244</sup> Gardiner, p. 148.

<sup>245</sup> Joyner, The legal meaning and implications of Article VI of the Non-Proliferation Treaty, p. 408.

<sup>246</sup> Gardiner, p. 148.

<sup>247</sup> Joyner, The legal meaning and implications of Article VI of the Non-Proliferation Treaty, p. 408.



faith in its jurisprudence. In the North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands),<sup>248</sup> the ICJ considered the principle of good faith in interpreting an agreement concerning the delimitation of the continental shelf of the North Sea between Germany and the Netherlands.<sup>249</sup> The Court stated that the parties were obliged to enter into negotiations with an aim of achieving an agreement, not simply going through a formal process. Furthermore, the parties were established to be obliged to conduct themselves in a manner that made the negotiations meaningful, and thus not simply insist upon its own position without considering any modification to it.<sup>250</sup> As Joyner summarized the Court's jurisprudence in employing the principle of good faith, the principle comprises of an obligation to proactively, diligently, sincerely and consistently pursue negotiations.<sup>251</sup>

Joyner argues that the history of negotiating in relation to the NPT, the wording about disarmament in its preamble, and the interpretation of Article VI through the lens of the VCLT provides a nuclear disarmament obligation. This obligation is argued to be of equal weight as the treaty's non-proliferation and peaceful use provisions.<sup>252</sup> Jeffrey W. Knopf, Professor and Program Chair of Nonproliferation and Terrorism Studies at the Monterey Institute of International Studies,<sup>253</sup> is of a different understanding. Arguing that a strictly legal interpretation of the Article is insufficient, Knopf claims that Article VI has to be viewed as a political bargain. As non-nuclear-weapon states are of the belief that nuclear-weapon states, by the virtue of the NPT, has promised to pursue nuclear disarmament, the political expectations, as well as non-nuclear-weapon state's view of whether they are being met, will more likely determine state's behaviour in relation to Article VI of the NPT than any legal arguments. Furthermore, Knopf argues that the meaning and effect of Article VI of the NPT depends on the relationship between nuclear disarmament and non-proliferation, so-called 'the linkage hypothesis'.<sup>254</sup> Knopf argues that Article VI creates a solid foundation for linking nuclear non-proliferation to disarmament and that the Article reflects a perceived bargain, where part of the price to keep non-nuclear-weapon states adhering to the treaty is based on the expectation of progress toward nuclear disarmament by nuclear-weapon states.

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<sup>248</sup> From now on referred to as the North Sea Continental Shelf Cases.

<sup>249</sup> North Sea Continental Shelf Cases, 20 February 1969, para 2.

<sup>250</sup> North Sea Continental Shelf Cases 20 February 1969, para 85.

<sup>251</sup> Joyner, The legal meaning and implications of Article VI of the Non-Proliferation Treaty, p. 410.

<sup>252</sup> Joyner, The legal meaning and implications of Article VI of the Non-Proliferation Treaty, p. 417.

<sup>253</sup> Knopf, p. 92.

<sup>254</sup> Knopf, p. 93.

Article VI is, however, also part of a larger NPT agreement, and Knopf therefore argues that the relationship between disarmament and non-proliferation might not be sufficient if parties to the Treaty emphasize other elements of the bargain.<sup>255</sup>

Even though there are some different understandings of the meaning and effect of Article VI of the NPT, one could argue that a strictly legal interpretation does not preclude the option of also viewing Article VI as a political bargain. In seeing Article VI as a political bargain, not much suggests that the expectations of the NNWS of NWS pursuing disarmament are being met at the moment. Likewise, from a strictly legal standpoint, Joyner argues that actual state practice of the NWS in relation to the legal obligation of Article VI relating to nuclear disarmament shows that all of the NWS of the NPT are in non-compliance with the Article.<sup>256</sup> Hence, one could claim that the nuclear-weapon State Parties are failing to fulfil their obligations both in a legal and political sense. Both from a strictly legal standpoint and with the view of the Article as a political bargain, I believe that measures towards disarmament are essential in keeping the NNWS parties adhered to the Treaty.

Pertaining to the disarmament obligations of Article VI of the NPT it is also worth noting that there have been discussions surrounding the possibility of Article VI of the NPT having attained customary status. In the cases *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India; Marshall Islands v. Pakistan; Marshall Islands v. United Kingdom)*,<sup>257</sup> the Republic of the Marshall Islands (hereinafter ‘the Marshall Islands’) filed applications against the nine NWS, claiming that they were not fulfilling the obligations in relation to the cessation of the nuclear arms race at an early date and to nuclear disarmament. In its applications, the Marshall Islands had distinguished between those states (India, Pakistan and the United Kingdom) which had recognised the compulsory jurisdiction of the ICJ, following from Article 36(2) of the ICJ Statute, and those who had not. In respect of these states, the Marshall Islands proposed to base the jurisdiction on consent, which was not given. Consequently, the Court only considered the cases of India, Pakistan and the United Kingdom.<sup>258</sup> In relation to the United Kingdom, the Marshall Islands asserted that it had breached its obligations under Article VI

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<sup>255</sup> Knopf, pp. 96-97.

<sup>256</sup> Joyner, *The legal meaning and implications of Article VI of the Non-Proliferation Treaty*, p. 417.

<sup>257</sup> Hereinafter referred to as the Marshall Islands Cases.

<sup>258</sup> See Marshall Islands Cases.

of the NPT, to which both states are party.<sup>259</sup> Pertaining to India and Pakistan, which are not State Parties to the NPT, the Marshall Islands alleged that the obligations found in Article VI of the NPT are part of customary international law.<sup>260</sup> All cases three cases were dismissed before the Court, due to a lack of dispute, and thus also lack of jurisdiction for the Court in consistency with Article 36(2).<sup>261</sup> The question of Article VI of the NPT being of a customary rule was thus not further examined. Further analysis of Article VI of the NPT as a part of international customary law will not be undertaken in this thesis.

What can be deduced from this Chapter is that there are no legal instruments specifically governing the possession of nuclear weapons. The only obligations which are relevant to the possession of nuclear weapons are the obligations on the subject of disarmament in the NPT, which are not being met at the moment. What can be concluded is thus that there is no general and absolute prohibition on the possession of nuclear weapons in international law today.

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<sup>259</sup> Marshall Island Cases (Marshall Islands v. United Kingdom), para 11.

<sup>260</sup> Marshall Island Cases (Marshall Islands v. Pakistan; Marshall Islands v. India), para 11.

<sup>261</sup> Marshall Island Cases (Marshall Islands; v. United Kingdom), para 58; Marshall Island Cases (Marshall Islands v. Pakistan; Marshall Islands v. India), para 54.

# 6 The Impact of the TPNW

As this analysis has ventured through several different spheres of law in relation to the three identified aspects of nuclear weapons, acquisition, use and possession, it is in this chapter warranted to answer the question of what the impact the TPNW will have in each of these aspects. This will be done in the order of how the three aspects of nuclear weapons have been presented. Subsequently, Section 6.4 aims to examine the TPNW's scope of application in terms of whom it creates legally binding obligations for.

## 6.1 The TPNW and the Acquisition of Nuclear Weapons

The TPNW prohibits acquisition of nuclear weapons as its Article 1, as it obligates State Parties not to develop, test, produce, manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices. Article 1 of the Treaty also prohibits receiving the transfer of nuclear weapons or the control of such weapons, as well as allowing stationing, installation or deployment of any nuclear weapons or nuclear explosive devices. As was clarified in Chapter 3.1, acquisition is in large regulated by the NPT, which has been considered a 'reasonable success' in its limitation of the number of NWS and number of nuclear weapons. At first glance, it might thus seem as if though the TPNW is of little impact in this respect, considering that already established law imposes strict limitations on the acquisition of nuclear weapons. This analysis has, however, established some 'weaknesses' in the NPT's governance of acquisition. First of all, the NPT has not had much effect in preventing acquisition in relation to military alliances, such as NATO. Acquisition of nuclear weapons through military alliances is, however, prohibited under the TPNW, as the prohibition on acquisition is absolute.<sup>262</sup>

Furthermore, the language used in the NPT has to some extent been established as ambiguous. Both the NPT and the TPNW include the wording 'otherwise acquire', which could be viewed as a rather water-tight formulation. Questions have, however, been raised regarding the term 'manufacture' in the NPT, as there is disagreement of what the term entails. In the TPNW the wording is different, as Article 1 also includes developing, testing and producing. This

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<sup>262</sup> See Article 1 of the TPNW.

prohibition thus seems to extend beyond the dictionary, or ordinary, meaning of the term ‘manufacture’. If examining the term ‘developing’ in the light of Articles 31 and 32 of the VCLT, I would like to argue that the ordinary meaning is ‘to create or produce especially by deliberate effort over time’,<sup>263</sup> which appears to extend further back in the process of acquiring nuclear weapons than the dictionary meaning of ‘manufacture’.<sup>264</sup> This could give the TPNW significance in further defining what ‘acquisition’ entails, as well as providing a more comprehensive prohibition. What could be argued, however, is that Article 1 of the TPNW still leaves some room for discussions of a similar nature. Notably, the new Article does not mention anything in relation to planning, design research or capacity building. This could raise questions of at what point a state is viewed to produce or develop nuclear weapons. At the time of writing, however, such discussions are yet to be seen.

Another established ‘weakness’ of the NPT relating to the text is the lack of a definition of the term ‘nuclear weapon’. This has made it possible to interpret the prohibition as not preventing the acquisition of delivery systems without the warheads. As the TPNW does not provide any further definition of ‘nuclear weapons’ or ‘nuclear explosive devices’, little seems to have changed in this respect. Furthermore, this analysis has shed light on the fact that not all NWS have acceded to the NPT. Such states include India, Pakistan and Israel, which have acquired nuclear weapons post the entry into force of the NPT. Even though this analysis has yet to examine TPNW’s legal effect in terms of creating legally binding obligations, it is unavoidable not to mention that the Treaty has only been ratified by 54 states at the time of writing. It is thus apparent that the TPNW does not provide any solution to this specific issue at the moment.

In Chapter 5.1 of this analysis, the NPT was examined in relation to the possession of nuclear weapons, and in particular its Article VI. It was there stated that the NPT could be viewed as a political bargain, where the NNWS requested nuclear disarmament in return for them surrendering the option of acquiring nuclear weapons. As stated, such good faith negotiations that Article VI of the NPT call for, are yet to take place. Hence, one could argue that the failure of the NWS to fulfil this obligation, makes the Treaty somewhat vulnerable. As stated in Section 5.1, it has been suggested that the non-proliferation regime will collapse if NWS

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<sup>263</sup> See for example, Merriam-Webster: “Definition of Develop”, <<https://www.merriam-webster.com/dictionary/develop>>, visited 14 May 2021.

<sup>264</sup> See Chapter 3.1.

are not perceived as seriously committed to and making progress towards disarmament. This is not entirely unimaginable. While the TPNW undoubtedly also is of both a political and legal nature, it is not to be considered a political bargain in the same way as the NPT. This could thus mean that the TPNW and its prohibition on acquisition could be of significance in this aspect.

## **6.2 The TPNW and the Use of Nuclear Weapons**

Article 1 of the TPNW prohibits the use of force, as it states that ‘each State Party undertakes never under any circumstances to use or threaten to use nuclear weapons or other nuclear explosive devices’. As established in this analysis, a such pronounced and general prohibition does not exist in international law today. This analysis has, however, found that the possibilities of lawfully using nuclear weapons are in fact non-existent under IHL, as it provides comprehensive limitations and is applicable in most scenarios where there is a risk of nuclear weapons being used. This does not equate to a general and absolute prohibition, and the TPNW could thus not be argued to be a codification of already existing customary law.

Concluding that there is no general prohibition on the use of nuclear weapons arguably makes room for claiming that the TPNW could be of significant impact in this respect. First and foremost, such a pronounced and general prohibition could be of value as it leaves little room for different interpretations. Furthermore, even though there already exist important significant on the threat or use of nuclear weapons in international law, these principles and rules are complex, and their interconnections can be hard to pinpoint. A distinct and absolute prohibition could thus be of great significance, as it would offer better protection for human life and well-being as well as the environment.

Another aspect of the use of nuclear weapons relevant for the determination of the TPNW’s impact is the ICJ’s disclaimer relating to self-defence in extreme circumstances where a state’s survival is at stake. The TPNW provides an absolute and explicit prohibition on the use or threat of use of nuclear weapons and has thus changed the position in respect of the Court’s conclusion. At the time of writing, at least 54 states cannot, even in extreme situations where their survival is at stake, threaten to use or use nuclear weapons. As the TPNW does not

accept any reservations to its obligations under its Article 16, State Parties cannot exempt themselves from this obligation under any circumstances.

### 6.3 The TPNW and the Possession of Nuclear Weapons

Regulations on possession of nuclear weapons on a global scale are virtually non-existent. However, as the NPT has prohibited acquisition for non-nuclear State Parties, it has implicitly also prohibited possession for these states. With that said, the effect of this prohibition does not seem to be water-tight, as it has not fully prohibited acquisition in relation to military alliances, such as NATO. The TPNW, however, provides an absolute prohibition on the possession of nuclear weapons, and makes no exceptions when it comes to military alliances. The TPNW could thus be of significant impact in this respect.

The advent of the TPNW has, perhaps unsurprisingly, been a subject of debate. NWS have objected to the approach of the new Treaty and criticised it for undermining the NPT. Such claims are based on the view that the NPT and TPNW are two different regimes governing nuclear weapons with potentially conflicting obligations, and that the TPNW potentially disrupts the status quo.<sup>265</sup> Some commentators, however, have argued that TPNW could be viewed as a fulfilment of Article VI and VII of the NPT. It was in Chapter 5.1 of this thesis argued that Article VI of the NPT entails an obligation, at least for State Parties, to pursue negotiations in good faith on effective measures relating to the 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*. According to Gail Lythgoe, Associate Lecturer at the University of St Andrews, the TPNW could in fact be that Treaty, referred to in Article VI.<sup>266</sup> I find this argument interesting, as it raises the question of if the TPNW could not be that Treaty referred to in the mentioned Article, then what will? Moreover, the reference to such treaty on general and complete disarmament strongly suggests that the NPT has aspirations for a nuclear-weapons-free world. If the TPNW and the

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<sup>265</sup> Kmentt: "Can the NPT and the TPNW co-exist?" <<https://beyondnuclearinternational.org/2019/05/04/can-the-npt-and-the-tpnw-co-exist/>>, visited 5 May 2021.

<sup>266</sup> Lythgoe: "Nuclear Weapons and International Law: The Impact of the Treaty on the Prohibition of Nuclear Weapons", EJIL:Talk! Blog of the European Journal of International Law, 2 December 2020, <<https://www.ejiltalk.org/nuclear-weapons-and-international-law-the-impact-of-the-treaty-on-the-prohibition-of-nuclear-weapons/>> visited 15 February 2021.

NPT strife towards the same end goal, it seems unlikely that the TPNW would undermine the NPT.

Article VII of the NPT states that ‘Nothing in this Treaty affects the right of any group of states to conclude regional treaties in order to assure the total absence of nuclear weapons in their respective territories’. Article VII thus seems to discard the argument that the TPNW would undermine the NPT, as it appears to welcome more far-reaching Treaties. It also implies that obligations under the TPNW would take priority over the obligations in NPT.<sup>267</sup> What could be argued in regard to Article VII, however, is that TPNW is not a regional treaty, aiming to provide the absence of nuclear weapons in ‘respective territories’. It is rather impossible to dispute that the TPNW aims to have a global impact. In any case, the preamble of the TPNW reaffirms that the ‘full and effective implementation of the NPT, which serves as a cornerstone of the nuclear disarmament and non-proliferation regime, has a vital role to play in promoting international peace and security’. This further supports the notion that the two regimes can co-exist, and that the TPNW does not aim to undermine the NPT.

Pertaining to Article VI, it has in Chapter 5.1 been presented that some commentators have argued that good-faith negotiations on the subject of disarmament are only required to occur following and depending on negotiations of a treaty on general and complete disarmament. If the TPNW is that Treaty referred to in Article VI and the preamble of the NPT, such arguments would be rendered meaningless. Even those opposing that there is an obligation to conduct negotiations in good faith at this moment would then have to agree that now is the time.

To conclude, I would like to argue that the TPNW has to potential to have a significant impact on the subject of acquisition in several ways. I am also of the belief that TPNW and the NPT can co-exist, and that the TPNW is a fulfilment of the obligations found in Article VI of the NPT. However, this analysis has purposely avoided the subject of the TPNW’s legal effect in terms of creating legally binding obligations, and for what states. This is undeniably an

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<sup>267</sup> Lythgoe: “Nuclear Weapons and International Law: The Impact of the Treaty on the Prohibition of Nuclear Weapons”, EJIL:Talk! Blog of the European Journal of International Law, 2 December 2020, <<https://www.ejiltalk.org/nuclear-weapons-and-international-law-the-impact-of-the-treaty-on-the-prohibition-of-nuclear-weapons/>> visited 15 February 2021.



important, if not the most important, aspect of the new Treaty. Hence, the upcoming section aims to examine this particular subject.

## 6.4 For What States Does the TPNW Provide Legally Binding Obligations?

As already stated, the TPNW does not only prohibit the threat or use of nuclear weapons, but it also prohibits the acquisition and possession of said weapons. The provisions of the Treaty is thus far-reaching and comprehensive and could be of great significance. However, none of the NWS have yet signed or ratified the Treaty,<sup>268</sup> and one might therefore argue that, at least at first glance, the TPNW seems to change very little from a legal standpoint. Nevertheless, even though ‘only’ 54 states have become State Parties to the Treaty, 86 states have signed it. As the 54 State Parties are included in the number 86, that leaves 32 states that have only signed the treaty. These 32 states are clearly not bound by the Treaty as State Parties,<sup>269</sup> but as Signatory states they must not take any action that would undermine the Treaty’s object or purpose, in accordance with Article 18 of the VCLT. This obligation is also affirmed in the step-by-step guide to become a State Party to the TPNW, issued by the UN.<sup>270</sup> The first question then becomes what the object and purpose of the TPNW truly is. The object and purpose of a treaty must be established by finding the ‘essence’ of the treaty. In turn, the ‘essence’ of a treaty can be found in the title of the treaty, the preamble, a particular article, preparatory works or its general architecture.<sup>271</sup>

Considering that the TPNW is somewhat of a novelty, doctrine discussing its object and purpose is rather scarce. However, this fact should not prevent an attempt of developing at least a vague understanding of what the object and purpose of the TPNW might be. The title of the Treaty ‘Treaty on the Prohibition of Nuclear Weapons’ suggests an incentive to completely ban nuclear weapons in all aspects. This is reflected in several of the Articles of the Treaty, where Article 1 is the most palpable as it imposes a total prohibition on nuclear weapons for State Parties. Furthermore, the preamble of the Treaty emphasises the

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<sup>268</sup> ICAN: “Signature and ratification status”, <[https://www.icanw.org/signature\\_and\\_ratification\\_status/](https://www.icanw.org/signature_and_ratification_status/)>, Visited 18 February 2021.

<sup>269</sup> See for example Article 1 of the TPNW, which clearly refers to ‘State Parties’.

<sup>270</sup> UN Office for Disarmament Affairs: “Treaty on the prohibition of nuclear weapons”, <<https://www.un.org/disarmament/wmd/nuclear/tpnw/>>, p. 2, visited 12 April 2021.

<sup>271</sup> Pellet, pp. 447-51.

catastrophic consequences of the weapons and specifically expresses deep concern about the catastrophic humanitarian consequences that would result from any use of nuclear weapons. Additionally, the preamble recognizes the need to completely eliminate nuclear weapons, as it is the only way of guaranteeing that such weapons are never used again.<sup>272</sup> If interpreting the essence narrowly, one could claim that the object and purpose of the Treaty is to prevent the usage of nuclear weapons. This can be deduced from the sentence of the preamble which states that the only way of guaranteeing that nuclear weapons are never used again, is to eliminate them. I would, however, like to argue that the object and purpose of the Treaty is more far-reaching than that, with respect to its title and Article 1 of the Treaty. I consider the object and purpose of the treaty to be to abolish nuclear weapons with the aim of a nuclear-weapons-free world.

In determining what constitutes an act prohibited under Article 18, one has to consider that there must be a substantial gap between such act and the performance owed by the State Parties after ratifying the Treaty. During the time a state has only signed the Treaty but not yet ratified it, not every departure from the provisions of a Treaty will constitute a defeat of the Treaty's object and purpose. If that was the case, there would be no difference in the obligations of a State Party and a Signatory State. The threshold for violating the temporary obligation of Article 18 of the VCLT must thus be considerably higher than the threshold for violating the provisions of the Treaty once ratified. Additionally, the term 'defeating' suggests that it refers to acts of a much more severe nature than acts which are merely 'incompatible' with the object and purpose, as Article 19(c) of the VCLT regulating treaty reservations, requires. Defeating the object and purpose of a treaty may be defined as a situation where the following performance of the treaty or one of its provisions, is rendered meaningless.<sup>273</sup> In such situations, it is assumed that other states, had they been able to predict the undertaking of such acts, would not have concluded the Treaty under the same conditions.<sup>274</sup> Such acts include, but are not limited to, those that make it impossible to execute the obligations of the Treaty or render it inoperative. Moreover, states must not take any action that would prevent them from being capable of performing their obligations under the Treaty once a State Party.

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<sup>272</sup> Preamble of the TPNW.

<sup>273</sup> Dörr, pp. 257–259.

<sup>274</sup> Villiger, p. 242–256.

In accordance with Article 18 of the VCLT, Signatory States are ‘obliged to refrain from acts which would defeat the object and purpose’ of the Treaty. This suggests that the temporary obligation only requires passive conduct from the states bound by it. One could ask, however, if the protection of the object and purpose of a Treaty does not in some instances require a more active conduct in order to prevent the Treaty from turning meaningless. The meaning of the obligation for a state to ‘refrain’ from certain acts thus requires consideration on a case-by-case basis.<sup>275</sup>

In light of Article 18 of the VCLT, I would like to argue that the use of nuclear weapons by a Signatory State would undoubtedly defeat its object and purpose, as the catastrophic effects of nuclear weapons could very well render the Treaty inoperative. In any instance, the use of nuclear weapons would render the performance of the Treaty meaningless. Furthermore, in my view, the acquisition of nuclear weapons would defeat the object and purpose of the Treaty, as it would most likely constitute a situation where other states, had they predicted this undertaking, would not have concluded the Treaty under the same conditions.

Article 1 of the TPNW also prohibits owning, possessing or controlling nuclear weapons, and it could be argued that such activities are also against the objects and purpose of the Treaty. Owning, possessing or controlling nuclear weapons, however, is a significantly more passive activity than using or acquiring such weapons. Article 4(2) of the Treaty states that each State Party that owns, possesses or controls nuclear weapons or other nuclear explosive devices are obligated to immediately remove them from operational status and destroy them as soon as possible, however no later than a deadline which shall be determined by the first meeting of State Parties. Since a Signatory State is not bound by the Treaty’s provisions, Article 4(2) would not be applicable to it. However, this could be such a situation where the protection of the object and purpose of a Treaty requires a more active conduct in order to prevent the Treaty from becoming meaningless. I would thus like to consider that a Signatory State owning, possessing or controlling nuclear weapons is an act that would defeat the object and purpose of the Treaty, perhaps especially if there is no active plan of removing them. This is based on the belief that it is not entirely unlikely that this would constitute a situation where State Parties, had they been able to predict this undertaking, would not have concluded the Treaty under the same conditions.

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<sup>275</sup> Dörr, pp. 257–259.

Despite the fact that this analysis has concluded that the TPNW is legally binding for State Parties and limits the actions of Signatory States, the Treaty still has some apparent limitations. None of the NWS has yet signed or ratified the Treaty, and neither has any of the NATO-members. It could therefore be argued that the TPNW is of little impact in terms of creating legally binding obligations. However, on a more positive note, at the time of the Treaty's entry into force, it only had 51 State Parties. Since 22 January 2021, the Philippines, Comoros and Cambodia have ratified the Treaty, increasing the number of State Parties to 54.<sup>276</sup> Moreover, 122 states voted for the adoption of the TPNW, and it is thus not unlikely that the number will continue to grow. This is a development the United States seem concerned about, as they through a letter urged State Parties to withdraw from their instrument of ratification or accession to the TPNW, claiming they had made a 'strategic error'.<sup>277</sup> This supports the view that the Treaty could in fact have a significant impact, as it even raises concern for those opposing it and appear to have no plans of signing or ratifying it.

Pertaining to the impact of the TPNW in relation to it creating legally binding obligations, it is also worth noting that Article 12 of the Treaty obligates State Parties to encourage states that are not party to the Treaty to sign, ratify, accept, approve or accede to it. The goal of such encouragement is universal adherence of all States to the Treaty. What impact such obligation will or could have is hard to comment on at this moment, but it is safe to say that the more State Parties to the Treaty, the bigger the impact of this obligation.

Another aspect that could have an effect on the ratification of the TPNW is domestic politics and legislation. If the domestic politics and legislation were to shift in one of the NWS, it could undoubtedly have an effect on the nuclear policy worldwide. The most prominent prospect in this respect at the time of writing is perhaps the UK. The UK's nuclear weapons and submarines are all located in Scotland.<sup>278</sup> As the UK election results of 2021 have shown

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<sup>276</sup> International Campaign to Abolish Nuclear Weapons: "Signature and ratification status", <[https://www.icanw.org/signature\\_and\\_ratification\\_status](https://www.icanw.org/signature_and_ratification_status)>, visited 18 February 2021.

<sup>277</sup> PBS: "U.S urges countries to withdraw from U.N. treaty that would ban nuclear weapons", 20 October 2020, <<https://www.pbs.org/newshour/world/u-s-urges-countries-to-withdraw-from-u-n-treaty-that-would-ban-nuclear-weapons>>, visited 18 May 2021.

<sup>278</sup> Royal Navy: "HMNB Clyde", <<https://www.royalnavy.mod.uk/our-organisation/bases-and-stations/naval-base/clyde>>, visited 15 May 2021.

that Scotland is now divided in the middle on the independence question,<sup>279</sup> this could prove to become an actual issue for the UK. It was established in UK Parliamentary inquiries pertaining to the 2014 Scottish independence referendum, that there appear to be very few or no suitable alternatives to the current stationing in Scotland.<sup>280</sup> There also seems to be support of the TPNW in Scotland, as the First Minister of Scotland has confirmed the rejection of nuclear weapons and support for the new Treaty.<sup>281</sup> Notably, if Scotland were to become independent and join the TPNW, it would prohibit the further stationing of nuclear weapons in their territory.<sup>282</sup> This is all clearly merely speculations at this point, but it proves a strong point in the argument that domestic legislation could become important in terms of the TPNW's scope of application and impact.

Finally, in the discussion of the TPNW's scope of application it is unavoidable to not at least mention the prospects of the Treaty as a whole or some of its parts becoming customary international law. As only one-quarter of states have yet ratified the Treaty, it is obvious that there is no widespread practice of the Treaty's obligations yet. Furthermore, it would also prove difficult to verify that the states that have ratified the Treaty have done so in a belief that they are obligated to do so, in order to fulfil the requirement of *opinio juris*. Worth mentioning in this respect is also the persistent objector rule, which relates to the situation where a state consistently opposes to be bound by a customary rule.<sup>283</sup> Thus, to assess the prospects of the TPNW in part or in whole becoming customary law would merely be speculating at this moment. As it entered into force as recently as 22 January 2021, there is a lot to be seen in terms of what legal effect the Treaty will have and how and what impact it will have in the international community.

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<sup>279</sup> Curtice: "Elections reflected Britain's deep divisions over Brexit and Scotland's future", The Guardian, 10 May 2021, <<https://www.theguardian.com/politics/2021/may/10/elections-reflected-britains-deep-divisions-over-brexit-and-scotlands-future>>, visited 15 May 2021.

<sup>280</sup> Scottish Affairs Committee - Fourth Report, The Referendum on Separation for Scotland: Terminating Trident-Days or Decades?, UK Parliament, October 2012, para 60-64.

<sup>281</sup> Tudoreanu: "Scottish First Minister Confirms Rejection of Nuclear Weapons and Support for the Nuclear Ban Treaty", <<https://www.nuclearban.scot/scottish-first-minister-confirms-rejection-of-nuclear-weapons-and-support-for-the-nuclear-ban-treaty/>>, visited 16 May 2021.

<sup>282</sup> See Article 1 of the TPNW.

<sup>283</sup> Henriksen, p. 27-28.

## 7 Conclusion

This thesis has aimed to evaluate the impact of recent developments pertaining to nuclear weapons under international law. In order to do so, I have considered it necessary to first examine already established law. This has proven not to be a small task. This thesis has found that while there is no general and absolute prohibition on acquiring nuclear weapons in international law today, there are rules that impose significant limitations on the possibilities of acquiring nuclear weapons. The most central legal framework pertaining to the acquisition is the NPT, which has proven effective in preventing an increase in both the number of nuclear weapons and the number of NWS. It does, however, not provide a general and absolute prohibition, which the TPNW does. The TPNW leaves no room for proliferation between military alliances and in this aspect, the TPNW seems to be a progressive development of international law. The TPNW also offers possible clarifications on the term ‘manufacture’, as it entails additional terms that seem to reach further back in the process of acquiring nuclear weapons. Some ambiguities in relation to the interpretation of such terms remain, however. Furthermore, this analysis has concluded that the TPNW could be of value as it cannot be said to be a ‘political bargain’ in the same way as the NPT.

In the establishment of current international law concerning the legality of the use of nuclear weapons, this thesis has found that a general and absolute prohibition does not exist. There are extensive limitations, in particular found in IHL, that regulate the use of nuclear weapons in a way that ultimately excludes the possibilities of lawful use, as I have considered the circumstances where such use could potentially be consistent with IHL unrealistic. Notably, however, this thesis has not excluded the possibility of lawfully using nuclear weapons in extreme circumstances of self-defence. In this respect, the TPNW could be of significance as it offers a general and absolute prohibition. The TPNW does not permit any use, under any circumstances, no matter how extreme or extraordinary they may be. The explicit prohibition in the TPNW is also of significance as it both simplifies and clarifies, considering that the rules and principles governing the use under already established law are complex and interconnected. Such a prohibition undoubtedly suggests better protection for humans, the human environment and the natural environment.

I have in this analysis also found that there is not much that govern the possession of nuclear weapons beyond the new Treaty. The NPT does, however, implicitly prohibit possession for non-nuclear State Parties. In the discussions pertaining to the possession of nuclear weapons, this analysis has highlighted Article VI of the NPT and the obligation to pursue good-faith negotiations on the subject of disarmament. I have in this thesis argued that this provision is legally binding upon all State Parties, and that all nuclear-weapon-State Parties are in non-compliance with this obligation.

Concerning the possession of nuclear weapons, this analysis has presented that there are claims of the TPNW undermining the NPT. I have argued that such statements are incorrect and that the TPNW can in fact in some parts be seen as a fulfilment of the obligations in the NPT. In particular, Article VI of the NPT refers to good-faith negotiations on a treaty on general and complete disarmament under strict and effective international control. The TPNW could in fact be that Treaty. This would, as stated, also render the argument that good-faith negotiations only need to take place following and depending on negotiations on such Treaty meaningless. Furthermore, the reference to such Treaty on general and complete disarmament makes it impossible to dispute that even the NPT has had the aspiration of a world free of nuclear weapons.

Lastly, this thesis has aimed to determine the TPNW's legal effect in terms of creating legally binding obligations. On this subject, it has become evident that the TPNW has certain limitations, as only 54 states have yet ratified the Treaty. I have, however, argued that the Treaty entails obligations for Signatory States to refrain from acts that could defeat Treaty's object and purpose. I consider such acts to include acquiring, using and possessing nuclear weapons. Nevertheless, even with the obligations of Signatory States considered, it is unavoidable to acknowledge that the limitation of the Treaty's legal effect remains. This does not mean that the number of State Parties and Signatory States cannot grow. In fact, I have in this analysis argued that it is likely that more states will sign and ratify the Treaty in the future. I have also argued that domestic politics and legislation have an important role in determining what the full impact of the TPNW will be.

What can be said both concludingly and confidently is that the full legal effect and impact of the TPNW in large remains to be seen. It has the potential to be a progressive development of international law in many areas and with more states signing and ratifying the Treaty, it would

undeniably provide more comprehensive protection for both human life and the environment. As the discourse in the past decade has focused on the humanitarian consequences of the use of nuclear weapons, the TPNW very much seems to be a sign of the times. Consequently, I would like to contend, perhaps optimistically, that the TPNW is in fact a step in the of elimination of nuclear weapons, even if it may be a small one at this moment. As the political climate is changing and emphasis is put on both the humanitarian consequences and the environmental impact that further use would have, it seems as though the TPNW is a step in the right direction. It is safe to say that the new Treaty has not come unnoticed, and it will at the very least, contribute to a discourse focusing on the weapons' devastating effects. As the Treaty states in its preamble, the only way of guaranteeing that nuclear weapons are never used again is to eliminate them. I will thus leave you with the words which commenced this thesis, claiming and hoping that the TPNW is and will continue to be a step in that direction.

Today, every inhabitant of this planet must contemplate the day when this planet may no longer be habitable. Every man, woman and child lives under a nuclear sword of Damocles, hanging by the slenderest of threads, capable of being cut at any moment by accident or miscalculation or by madness. The weapons of war must be abolished before they abolish us.

- John. F. Kennedy.<sup>284</sup>

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<sup>284</sup> John F. Kennedy Presidential Library and Museum: "Address before the General Assembly of the United Nations, September 25, 1961" <<https://www.jfklibrary.org/archives/other-resources/john-f-kennedy-speeches/united-nations-19610925>>, visited 12 May 2021.



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