



How Reliance on Nuclear Weapons Erodes and Distorts International Law and Global Order*

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Abstract

Deployment of nuclear forces as an international security mechanism for prevention of major war is far removed from the world envisaged by the United Nations Charter in which threat or use of force is the exception, not the rule. Reliance on nuclear weapons has also distorted the development of major instruments of international humanitarian law and international criminal law, the 1977 Protocol I to the Geneva Conventions and the 1998 Rome Statute of the International Criminal Court. Awareness is deepening of the inherent incompatibility of reliance on nuclear weapons with an ever more entrenched normative framework stressing states' responsibilities to protect their populations against atrocities and to comply with international humanitarian law and the Rome Statute. International humanitarian law is a solid foundation for the emerging norm of non-use of nuclear weapons and for building a legal framework of a nuclear-weapons-free world that is universal in its approach.

The most serious problem arising from major powers' reliance on nuclear weapons is that one day, directly or indirectly, that posture probably will result in nuclear detonations as acts of state or non-state terrorism. Yet that terrifying risk has been flagged for decades without so far ending reliance on nuclear weapons under the label of "nuclear deterrence". Another approach is to examine the costs of reliance on nuclear weapons regardless of when or even whether they are again exploded in war or terrorism. There is damage to the environment, and harm to health. There is diversion of resources.

There are the debilitating psychological effects of living with the risk of apocalypse, and the moral corrosion of relying on a threat of annihilation for security. The first part of this paper addresses another cost: How reliance on nuclear weapons erodes and distorts a global public good – international order structured by international law. The second part turns the equation around and indicates how developing international law and institutions can contribute to the establishment of a world free of nuclear weapons.

"Sometimes, the most basic and simple truths are the ones that escape notice."

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1. The Erosive Effect of Nuclear Weapons on International Law and Global Order

1.1 Nuclear Weapons and the United Nations Charter

Sometimes, the most basic and simple truths are the ones that escape notice. Compare the security supposedly provided by reliance on nuclear weapons with the security system envisaged by the United Nations Charter. Consider again these Charter provisions:

Article 2(3): All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

Article 2(4): 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.

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The only exceptions to the prohibition on the threat or use of force are when the UN Security Council directs or authorizes force to maintain international peace and security, under Chapter VII, and the exercise of self-defense against an armed attack under Article 51.

Deployment of nuclear forces as an international security mechanism for prevention of major war is far removed from the world envisaged by the UN Charter in which threat or use of force is the exception, not the rule. International security allegedly provided by the permanent, ongoing threat of nuclear force, is the inverse of that world; it turns the UN Charter on its head. In its 1996 nuclear weapons advisory opinion, the International Court of Justice (ICJ) analyzed the UN Charter in relation to the legal status of “threat.”* However, the Court failed, though relevant arguments were made by the Philippines,¹ to consider the incompatibility of nuclear deterrence with the overall scheme and purposes of the Charter. It is past time to take up this fundamental question. To envision the peace and security of a world without nuclear weapons, as President Barack Obama memorably did in his April 2009 speech in Prague, we need only return to the vision — and the obligations — enshrined in the UN Charter.

Another key point relating to the UN Charter: Nuclear deterrence as now practiced is understood to involve major powers; other states are excluded and cannot acquire nuclear weapons. However, a just and therefore sustainable legal order requires that the same rules apply to all. One manifestation of the instability caused by the possession of nuclear weapons by some states but not others is the doctrine of preventive war. That doctrine was put into

* “Legality of Threat or Use of Nuclear Weapons,” Advisory Opinion of 8 July 1996, *International Court of Justice*, p. 226 (hereafter “Nuclear Weapons Advisory Opinion”), ¶¶ 47-48.

practice in the Iraq invasion and the Israeli strike on Syria and is raised with respect to Iran. Preventive war is contrary to the UN Charter, which permits use of force only in self-defense against actual or perhaps imminent attack or by authorization of the Security Council.²

Considering the subsequent rise of preventive war, the ICJ was prophetic in its 1996 opinion when it said:

*In the long run, international law, and with it the stability of the international order which it is intended to govern, are bound to suffer from the continuing difference of views with regard to the legal status of weapons as deadly as nuclear weapons.**

In short, major powers' reliance on nuclear weapons, and its corollary, preventive war to prevent proliferation, are profoundly corrosive of the UN Charter.

1.2 Nuclear Weapons and International Humanitarian Law

Reliance on nuclear weapons has also distorted the development of major instruments of international humanitarian law and international criminal law, the 1977 Protocol I to the Geneva Conventions and the 1998 Rome Statute of the International Criminal Court.

The story begins much earlier. In the years immediately following the US atomic bombings of Japanese cities, from 1945 to 1950, the International Committee of the Red Cross (ICRC) maintained strongly that the effects of nuclear weapons are incompatible with the protection of non-combatants in accordance with international law, and called for states to reach an agreement on the prohibition of such weapons.³

The major powers rebuffed the ICRC's call for a ban, and to make progress on other fronts, the ICRC basically went silent on the subject until its recent striking and important interventions. Protocol I is a comprehensive codification of the law of armed conflict governing the conduct of hostilities, a central part of what is now widely known as International Humanitarian Law (IHL). At the outset of its negotiation, the ICRC stated:

Problems relating to atomic, bacteriological and chemical warfare of subjects of international agreements or negotiations by governments, and in submitting these draft protocols [the ICRC] does not intend to broach these problems. It should be borne in mind that the Red Cross as a whole at several International Red Cross Conferences has clearly made known its condemnation of weapons of mass destruction and has urged governments to reach agreements for banning their use.⁴

As negotiated, in addition to prohibiting attacks upon civilians, Protocol I robustly prohibits indiscriminate means and methods of warfare. Thus it bans attacks "which cannot be directed at a specific military objective,"[†] attacks whose effects cannot be limited and consequently are of "a nature to strike military objectives and civilians or civilian objects without distinction,"[‡] and area bombing as practiced in World War II.[§] It also bans disproportionate attacks, those "which may be expected to cause incidental loss of civilian life ... which would

*Nuclear Weapons Advisory Opinion, ¶ 98.

† Article 51(4)(b).

‡ Article 51(4)(c).

§ Article 51(5)(a).

be excessive in relation to the concrete and direct military advantage anticipated.”* It additionally prohibits attacks “against the civilian population or civilians by way of reprisals.”† And it bans employment “of methods or means of warfare which are intended or may be expected, to cause widespread, long-term and severe damage to the natural environment.”‡

Nuclear weapons could not be used in compliance with Protocol I’s detailed prohibitions. However, citing the above-quoted ICRC statement, the United Kingdom, the United States, and some allied countries upon signing or ratifying denied the application of “new” rules contained in Protocol I to nuclear weapons.⁵ France took the extreme position of denying that any provision of Protocol I, whether or not it codifies customary law, applies to nuclear weapons.⁶ In its advisory opinion, the ICJ noted that “all states are bound by those rules in Additional Protocol I which, when adopted, were merely the expression of the pre-existing customary law.”§ Customary law is based upon state practice and legal opinions and is universally binding, regardless of whether a state is a party to a relevant treaty.

What do the United States and United Kingdom accept as pre-existing customary rules codified in Protocol I? Certainly the prohibition of attacks upon civilians, as well as a general rule – not necessarily as formulated in Protocol I — that collateral effects must be proportionate to the military advantage. However, at least the United States does not clearly accept the customary status of the various specific rules prohibiting indiscriminate attacks, and both reject the customary status of the prohibitions of reprisals and of widespread, severe, and long-term damage to environment. In their view, use of nuclear weapons could be compatible with the customary rules they do accept.

Without specific reference to Protocol I, in 1996 the International Court of Justice identified as customary one element of the general prohibition on indiscriminate attacks. The Court stated that a cardinal rule of IHL is that “States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets.”¶ That was a central basis for the Court’s conclusion that the use of nuclear weapons is “generally” contrary to international law.** States possessing nuclear weapons have subsequently accepted neither the Court’s formulation of the rule or its conclusion of “general” illegality.

The outcome of this exercise is that several states possessing nuclear weapons have claimed an exemption with respect to those weapons from important rules set forth in a major IHL instrument, Protocol I. Further, several states possessing nuclear weapons have not become parties to Protocol I, India, Pakistan, Israel, and the United States (the latter signed but has not ratified the instrument). At least for the United States, the desire to shield its reliance on nuclear weapons from the application of IHL has played a role in the failure to ratify; the perception seems to be that understandings and reservations may not suffice for this purpose.

Nuclear weapons continued to distort international law when the Rome Statute was

* Article 51(5)(b).

† Article 51(6).

‡ Article 35(3).

§ Nuclear Weapons Advisory Opinion, ¶ 84.

¶ Nuclear Weapons Advisory Opinion, ¶ 78.

** Nuclear Weapons Advisory Opinion, ¶ 105(2)E.

negotiated. The Statute provides that use of certain weapons, poison, poisonous gases and analogous materials, and expanding bullets, is per se a war crime. There was a very good case for inclusion as well of biological and chemical weapons. The Statute was negotiated on the basis that it reflects customary international law, and widely ratified conventions prohibit use and possession of those weapons. It is true that chemical weapons, and arguably biological weapons, are captured by the reference to poisonous gases and analogous materials, which is based on the 1925 Geneva Gas protocol. However, the Non-Aligned Movement states did not want to see biological and chemical weapons expressly included if nuclear weapons were not, and the nuclear-dependent countries of course absolutely refused to include nuclear weapons. So now, absurdly, use of poison, poisonous gases, and expanding bullets is a war crime, but not nuclear weapons, and not clearly biological and chemical weapons!

“Absurdly, use of poison, poisonous gases, and expanding bullets is a war crime, but not nuclear weapons, and not clearly biological and chemical weapons!”

The failure to specifically name nuclear weapons in the Rome Statute does not mean the Statute is inapplicable to use of those weapons. Under the general definitions of war crimes, crimes against humanity, and genocide, typical uses of nuclear weapons would be international crimes for which responsible individuals could be prosecuted assuming jurisdiction can be established. In view of this, France purported upon ratification to say that the Statute does not apply to nuclear weapons.⁷ That is a wholly implausible position. Also on ratification, the UK attempted to apply understandings it claimed, as discussed above, with respect to Protocol I.⁸ Other states possessing nuclear weapons have not become parties to the Rome Statute: Russia, China, India, Pakistan, United States, Israel, and North Korea. There are multiple reasons why these states, so reliant upon the potential use of military power, are cautious about the Rome Statute. But it seems likely that one of them is the incompatibility of the Statute with the use of nuclear weapons.

From the standpoint of most states and international lawyers, the nuclear powers' efforts to exempt and shield nuclear weapons from the application of IHL and international criminal law generally do not withstand scrutiny. Still, the efforts weaken the application of law to nuclear weapons, certainly *within* states possessing nuclear arsenals and their allies. The integrity of international law is also undermined; fundamental legal rules are supposed to apply to all states equally. When combined with the two-tier systems of the Nuclear Non-Proliferation Treaty and the Security Council, in each of which the Permanent Five have privileged positions, the overall effect of some states' possession of nuclear weapons and their defense of that possession against the demands of law is highly deleterious to the legitimacy and effectiveness of both international law and institutions.

2. The Contribution of International Law and Institutions to Establishment of a World Free of Nuclear Weapons

There are two sides to any relationship, and it is worth briefly considering how international law and institutions erode reliance on nuclear weapons and facilitate a transition to a nuclear-weapons-free world.

"If states have a responsibility to protect their own populations from atrocities, why should they be able to commit or threaten to commit atrocities against the populations of other states?"

One well understood point is that as the regime of prohibition and verified elimination of chemical weapons operates and endures, an example is set for nuclear disarmament.* And the bans, though far from universal, on cluster munitions and landmines pose the question, why not nuclear weapons?

It is also the case that there is a deepening awareness of the inherent incompatibility of reliance on nuclear weapons with an ever more entrenched normative framework stressing states' responsibilities to protect their populations against atrocities and to comply with international humanitarian law, the Rome Statute, human rights law, and the UN Charter. If states have a responsibility to protect their own populations from atrocities, why should they be able to commit or threaten to commit atrocities against the populations of other states? The Red Cross has played an important recent role in focusing normative attention on nuclear weapons and calling for their abolition, especially through an April 2010 speech by the ICRC President, Jacob Kallenberg,⁹ and a November 2011 resolution of the Red Cross/Red Crescent Movement.

Though its documents are adopted on a consensus basis and thus subject to approval by nuclear weapon states, the critique has now penetrated the NPT review process. In May 2010, the five-year NPT Review Conference for the first time expressed "deep concern at the catastrophic humanitarian consequences of any use of nuclear weapons" and reaffirmed "the need for all states at all times to comply with applicable international law, including international humanitarian law."

The NPT declaration reflects the increasing solidification of IHL at both the national and international levels. In the course of examining the application of IHL to nuclear weapons, the International Court of Justice referred to the decision of the Nuremberg International Military Tribunal.[†] That tribunal famously observed, "the very essence of the [Nuremberg] Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual state."[‡] Since the ICJ opinion, the principle of individual responsibility has been definitively embedded in international law by the Rome Statute. IHL is also becoming more and more integrated into military operations and training, in the United States and elsewhere.¹⁰

The content of IHL has also developed since the negotiation of Protocol I and the ICJ opinion. It has now been more than three decades since Protocol I was negotiated; it now

* The Model Nuclear Weapons Convention circulated by UN Secretary-General Ban Ki-moon in 2008 to UN member states is largely based on the Chemical Weapons Convention approach. It can be found at http://inesap.org/sites/default/files/inesap_old/mNWC_2007_Unversion_English_N0821377.pdf. The model convention was developed by the International Association of Lawyers Against Nuclear Arms (IALANA), the International Physicians for the Prevention of Nuclear War, and the International Network of Engineers and Scientists Against Proliferation. The Secretary-General is on record as saying that it is a "good starting point" for negotiations. UN Secretary-General address, "The United Nations and Security in a Nuclear-Weapon-Free World," October 24, 2008, East-West Institute conference, "Seizing the Moment," United Nations. <http://www.un.org/News/Press/docs/2008/sgsm11881.doc.htm> For an argument that there is a legal obligation under the Nuclear Non-Proliferation Treaty and other international law to commence multilateral negotiations on a nuclear weapons convention, see IALANA and International Human Rights Clinic at Harvard Law School, *Good Faith Negotiations Leading to the Total Elimination of Nuclear Weapons: Request for an Advisory Opinion from the International Court of Justice* (2009). <http://icnp.org/disarmament/2009.07.ICJbooklet.pdf> In that publication, the two organizations propose that the General Assembly request an advisory opinion from the ICJ on the legal requirements for compliance with the nuclear disarmament obligation.

† Nuclear Weapons Advisory Opinion, ¶ 80.

‡ *Judgment of 1 October 1946, in The Trial of German Major War Criminals: Proceedings of the International Military Tribunal sitting at Nuremberg, Germany, Part 22 (22 August 1946 to 1 October 1946): 447.*

has 172 parties. Rules it set forth, if not customary at the time, could have become so in view of state practice since then. In a major 2005 study, *Customary International Humanitarian Law*, the ICRC found the following rule, drawn from Protocol I, to be customary: the prohibition of attacks “of a nature to strike military objectives and civilians or civilian objects without distinction,” including those “which employ a method or means of combat the effects of which cannot be limited as required by international humanitarian law.”¹¹ While it is known as the guardian of IHL, the ICRC does not have the last word. Nonetheless, while nuclear powers could dispute the customary status of that and other specific rules prohibiting indiscriminate attacks at the time Protocol I was negotiated or when the ICJ opinion was released, that stance increasingly loses credibility.

The ICJ did not pass upon the customary status of the Protocol I prohibition of causing widespread, severe, and long-term damage to the environment, and the United States and United Kingdom when Protocol I was negotiated considered it a “new” rule not applicable to nuclear weapons. But the ICRC study found that this rule has become customary in nature in view of state practice, including US statements in non-nuclear contexts.¹² The ICJ also did not squarely address the lawfulness of reprisals. Here the ICRC study finds that in view of state adherence to Protocol I and other treaties, other state practice, and decisions of the International Tribunal for the Former Yugoslavia citing the imperatives of conscience and humanity, “there appears, at a minimum, to exist a trend” toward acknowledgement of the customary nature of the Protocol I prohibition of reprisals against civilians.¹³

The Vancouver Declaration, “Law’s Imperative for the Urgent Achievement of a Nuclear-Weapon-Free World,” draws on these developments in articulating the current application of IHL to nuclear weapons.¹⁴ Initiated by civil society and released in 2011, it was endorsed by many eminent international lawyers as well as leading former diplomats and officials.* It states that due to their uncontrollable effects nuclear weapons cannot be used in compliance with the above-mentioned and other rules protecting civilians, neutral states, and the environment against the effects of warfare. Regarding reprisals, it makes the judgment that law can now join with conscience to condemn them, stating:

Use of nuclear weapons in response to a prior nuclear attack cannot be justified as a reprisal. The immunity of non-combatants to attack in all circumstances is codified in widely ratified Geneva treaty law and in the Rome Statute of the International Criminal Court, which provides inter alia that an attack directed against a civilian population is a crime against humanity.

IHL is rooted in what the ICJ called “elementary considerations of humanity,”† and its rules apply to all states. It therefore is a solid foundation for the emerging norm of non-use of nuclear weapons‡ and for building a legal framework for a nuclear-weapons-free world that is universal in its approach. While foreclosure of rebuilding nuclear weapons could not be gua-

* The declaration was developed by the International Association of Lawyers Against Nuclear Arms and The Simons Foundation with the input of a conference held in Vancouver with the participation of international lawyers, ICRC representatives, and representatives of Austria, Switzerland, and Norway. A full list of signatories is available at <http://www.lenp.org/wcourt/Feb2011VancouverConference/signatories32211.pdf>. The author was one of the drafters.

† Nuclear Weapons Advisory Opinion, ¶ 79.

‡ Under the Obama administration, the United States is at least rhetorically contributing to establishment of a norm of non-use. The 2010 US Nuclear Posture Review Report states (p. ix): “It is in the U.S. interest and that of all other nations that the nearly 65-year record of nuclear non-use be extended forever.” That statement was reinforced later in 2010 when President Obama and Prime Minister Singh jointly stated their support for “strengthening the six decade-old international norm of non-use of nuclear weapons.” Joint Statement by President Obama and Prime Minister Singh of India, November 19, 2010. <http://www.whitehouse.gov/the-press-office/2010/11/08/joint-statement-president-obama-and-prime-minister-singh-india>

ranted until norms and institutions had become irreversibly established, such a world will have the great advantage of eliminating the terrifying risks posed by the current and ongoing deployment of nuclear forces. With one rule of non-possession for all, it will also be far more conducive than our present world of nuclear haves and have-nots to the development of a just and legitimate system of international law and institutions, which in turn will reinforce the durability of abolition of nuclear weapons.

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Notes

1. "Verbatim Record of Proceedings Before the International Court of Justice," *International Court of Justice* 9 November 1995, pp. 56-63. <http://www.icj-cij.org/docket/files/95/5937.pdf>
2. Peter Weiss and John Burroughs, "Weapons of mass destruction and human rights," *Disarmament Forum* no. 3 (2004): 26-28 <http://www.unidir.org/pdf/articles/pdf-art2139.pdf>
3. See "Bringing the era of nuclear weapons to an end," Statement of Jacob Kallenberg, President of the International Committee of the Red Cross, Geneva, April 20, 2010 (hereafter Kallenberg Statement). <http://www.icrc.org/web/eng/siteeng0.nsf/html/nuclear-weapons-statement-200410>
4. Quoted in Michael Bothe, Karl Josef Partsch and Waldemar A. Solf, *New Rules for Victims of Armed Conflict: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (Leiden: Martinus Nijhoff Publishers, 1982), 275.
5. See Julie Gaudreau, "The reservations to the Protocols additional to the Geneva Conventions for the protection of war victims," *International Review of the Red Cross* no. 849 (2003): 11-13.
6. *Id.*
7. United Nations Treaty Collection, Chapter XVIII, Penal Matters, 10. Rome Statute of the International Criminal Court. http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en
8. *Id.*
9. Kallenberg Statement: "Working towards the elimination of nuclear weapons," *Council of Delegates of the International Red Cross and Red Crescent Movement* November 26, 2011, Resolution 1. <http://www.icrc.org/eng/resources/documents/resolution/council-delegates-resolution-1-2011.htm>
10. See remarks of Professor Gary Solis in Lawyers Committee on Nuclear Policy and Global Security Institute, "Nuclear Weapons and International Humanitarian Law," report and transcript of a program of the Spring Meeting of the *International Law Section of the American Bar Association*, April 20, 2012, New York City: 13-16. <http://lcnp.org/pubs/ABA-2012.pdf>
11. Jean-Marie Henckaerts and Louise Doswald-Beck, International Committee of the Red Cross, *Customary Humanitarian International Law Vol. I* (Cambridge: Cambridge University Press, 2009), 40. <http://www.icrc.org/eng/resources/documents/publication/pcustom.htm>
12. *Id.* at 151-155.
13. *Id.* at 520-523; quotation at 523. See also Charles J. Moxley, Jr., John Burroughs, and Jonathan Granoff, "Nuclear Weapons and Compliance with International Humanitarian Law and the Nuclear Non-Proliferation Treaty," *Fordham International Law Journal* 34, no. 4 (2011): 661-667. <http://lcnp.org/wcourt/Fordhamfinaljoint.pdf>
14. See <http://www.lcnp.org/wcourt/feb2011VancouverConference/vancouverdeclaration.pdf> For commentary, see John Burroughs, "The Vancouver Declaration and the Humanitarian Imperative for Nuclear Disarmament" *Nuclear Abolition Forum* no. 1 (2011): 1-6 <http://www.abolitionforum.org/site/wp-content/uploads/2012/01/NAF-First-issue.online-version.pdf>