

# Protecting the Right to Life From Nuclear Weapons

By SHI Bei

FICHL Policy Brief Series No. 22 (2014)

## 1. Seventy Years of Remembrance

We are approaching the seventieth anniversary of the nuclear bombing of Hiroshima and Nagasaki, history's first and only nuclear attacks, both of which had devastating consequences for people, society and environment.<sup>1</sup> The memory of those man-made catastrophes has united people in reaction and fear, creating a resolve that humanity must never again suffer such disasters. As we take stock, we may wish to reflect on how strong our resolve is to give effect to that unity.

In Northeast Asia, for example, people live with a threat of use of nuclear weapons or their testing. In South Asia an increasingly fragile and nuclear-armed Pakistan does still not enjoy stable relations with India. For how long will young Chinese, Koreans, Indians, Japanese and Pakistanis tolerate living with such threats beclouding their future?

This brief suggests that the use or threat of use of nuclear weapons is likely to be a grave violation of the right to life or the fundamental value or *Rechtsgut* underlying that right.<sup>2</sup> Such conduct may also constitute crimes against humanity. It argues that States, international organizations, non-governmental organizations ('NGOs') and individuals should take this threat more seriously and work to prohibit nuclear weapons.

## 2. What Nuclear Weapons Do, and the Law Does Not

Compared to conventional weapons, nuclear weapons have three distinct characteristics. First, by nature they cannot responsibly discriminate between civilians and military targets, in violation of a basic principle of inter-

national humanitarian law.<sup>3</sup> Second, when used, they normally cause mass destruction, triggering catastrophic consequences that may even be more devastating than those of chemical and bacteriological weapons. Third, they have long-lasting effects.<sup>4</sup> People in Nagasaki and Hiroshima still live in the shadow of nuclear weapons.

Almost half a century later, the International Court of Justice ('ICJ') considered these characteristics when formulating its advisory opinion on the UN General Assembly's question whether the threat or use of nuclear weapons is permitted under international law.<sup>5</sup> It recognised that the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, in particular the principles of humanitarian law, while it found itself unable in the circumstances to conclude definitely whether the threat or use of nuclear weapons would be unlawful in extreme circumstances in which the very survival of a State would be at stake.<sup>6</sup>

Indeed, there is no explicit rule of international law that universally prohibits the use of nuclear weapons. We only have a non-proliferation treaty,<sup>7</sup> conventions abolishing the use of nuclear weapons in certain regions of the world,<sup>8</sup> and treaties not yet in force regulating nucle-

<sup>3</sup> See Elliot L. Meyrowitz, 'The Laws of War and Nuclear Weapons', *Brooklyn Journal of International Law*, Vol. 9, 1983, p. 227.

<sup>4</sup> See Samuel Glasstone and Philip J. Dolan (eds.), *The Effects of Nuclear Weapons*, Third Edition, United States Government Printing, 1977, p. 6.

<sup>5</sup> See *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, ICJ Reports 1996, p. 243, para. 35 (<http://www.legal-tools.org/doc/691b47/>).

<sup>6</sup> *Ibid.*, p. 266, para. 105.

<sup>7</sup> See 1968 Treaty on the Non-Proliferation of Nuclear Weapons (<http://www.legal-tools.org/doc/e13a51/>).

<sup>8</sup> See 1967 Treaty for the Prohibition of Nuclear Weapons in Latin America and the Caribbean (<http://www.legal-tools.org/doc/43991a/>); 1995 Treaty on the Southeast Asia Nuclear Weapon Free Zone (<http://www.legal-tools.org/doc/b5518d/>); and 1996 African Nuclear Weapon Free Zone Treaty (<http://www.legal-tools.org/doc/267fd0/>).

<sup>1</sup> See Thazha Varkey Paul, *The Tradition of Non-Use of Nuclear Weapons*, Stanford University Press, 2009, p. 1.

<sup>2</sup> Theoretically, there is the possibility that small tactical nuclear weapons are used against military targets far away from civilians, a scenario which – because of the risks and complex factual preconditions involved – we exclude from the further analysis in this brief.

ar tests.<sup>9</sup> Nevertheless, the UN Charter's prohibition against the use or threat of use of force – except in self-defence or as authorized by the Security Council – includes nuclear weapons. And when there is an armed conflict, international humanitarian law rules (such as those on distinction, proportionality and unnecessary suffering) apply to use of nuclear weapons. The steady rise of the right to life as a core value of our common international society<sup>10</sup> highlights the incompatibility of the use of nuclear weapons with peremptory norms of international law.

### 3. Weapons in Violation of Peremptory Norms

Article 38(1) of the ICJ Statute identifies three sources of international law,<sup>11</sup> with no formal hierarchy among them.<sup>12</sup> They are subordinate to peremptory norms of international law (*jus cogens*) which, according to Article 53 of the 1969 Vienna Convention on the Law of Treaties,<sup>13</sup> is a rule recognised by the international community as a whole as a norm from which derogation is not permissible. Importantly, a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm.<sup>14</sup>

#### 3.1. The Right to Life as Peremptory Norm

The right to life is one of a few peremptory norms of international law. Article 3 of the 1948 Universal Declaration of Human Rights stipulated that “everyone has the right to life, liberty and security of the person”, embedded in an instrument that as such does not have binding legal force, although some of its provisions are now customary international law. Correspondingly, Article 6(1) of the 1966 International Covenant on Civil and Political Rights (‘ICCPR’) says that “[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life”. Pursuant to Article 4(2), there can be no derogations from Article 6(1). The peremptory nature of the right to life has been confirmed by the UN Human Rights Committee’s Gen-

eral Comment No. 14,<sup>15</sup> based on the practice of States Parties. Moreover, several judicial bodies have acknowledged the peremptory nature of the right to life in decisions.<sup>16</sup>

#### 3.2. Conduct Related to Nuclear Weapons as Crimes Against Humanity

Core international crimes are inherent and essential, just as the right to life. Crimes against humanity originate in the laws of humanity, which are deeply rooted in the international community, considered already in The Hague Regulations of 1899 and 1907 on war. The later judicial practices in and after the Nuremberg and Tokyo trials recognize that the most destructive international crimes can extend beyond the context of war.<sup>17</sup> The London Charter and other subsequent instruments that refer to crimes against humanity reflect the universal condemnation of such crimes<sup>18</sup> and that perpetrators should not go unpunished. Crimes against humanity not only affect the immediate victim, but the international community as a whole, so the punishment of the perpetrators is accepted by the international community as well.<sup>19</sup> Against this background, the prohibitions against crimes against humanity and genocide can safely be considered peremptory norms of international law.

According to Article 7(1) of the Statute of the International Criminal Court, crimes against humanity means any of the ten listed acts when committed as part of a widespread or systematic attack directed against a civilian population, with knowledge of the attack. The use – and in some cases, threat of use – of nuclear weapons

<sup>9</sup> See 1963 Treaty Banning Nuclear Weapons Tests in the Atmosphere, in Outer Space and Under Water (<http://www.legal-tools.org/doc/0d5ead/>); 1974 Treaty Between the USA and the USSR on Limitation of Underground Nuclear Weapon Tests (<http://www.legal-tools.org/doc/ef23f8/>); and 1976 Treaty Between the United States of America and the Union of Soviet Socialist Republics on Underground Nuclear Explosions for Peaceful Purposes (<http://www.legal-tools.org/doc/cc979a/>).

<sup>10</sup> The term ‘international society’ is borrowed from Philip Allott’s important writings, for example, *Health of Nations: Society and Law Beyond the State*, Cambridge University Press, 2002, p. xi.

<sup>11</sup> See Ian Brownlie, *Principles of Public International Law*, Seventh Edition, Oxford University Press, 2008, p. 5.

<sup>12</sup> See Stephen Hall, *Principles of International Law*, Third Edition, Butterworth, 2011, p. 31.

<sup>13</sup> Text available at <http://www.legal-tools.org/doc/6bfcd4/>.

<sup>14</sup> *Ibid.*

<sup>15</sup> See ICCPR General Comment No.14 (*Nuclear weapons and the right to life (Art. 6)*), Human Rights Committee, para. 1 (<http://www.legal-tools.org/doc/d8b88c/>). The Committee observed that the right to life is the supreme right from which no derogation is permitted even in time of public emergency.

<sup>16</sup> See *supra* note 4: “The Court observes that the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one’s life applies also in hostilities”. See also *Al-Adsani v. the United Kingdom* [GC], No. 35763/97, ECHR 2001-XI (<http://www.legal-tools.org/doc/9c81a2/>); and *Villagran Morales v. Guatemala* (the ‘Street Children’ case), Inter-American Court of Human Rights (Ser. C) No. 77 (26 May 2001) 309, p. 21 (<http://www.legal-tools.org/doc/32ef2e/>).

<sup>17</sup> See H. Jagusch, *Süddeutsche Juristenzeitung*, 1949, columns 620 *et seq.*; see also R. Lange, *Süddeutsche Juristenzeitung*, 1948, columns 655 *et seq.*

<sup>18</sup> See M. Cherif Bassiouni, *Crimes Against Humanity: Historical Evolution and Contemporary Application*, Cambridge University Press, 2011, p. 263.

<sup>19</sup> See *Prosecutor v. Erdemović*, ICTY, Appeals Chamber, Judgment of 7 October 1997, Joint Separate Opinion by Judges McDonald and Vohrah, para. 21 (<http://www.legal-tools.org/doc/f91d89/>).

satisfies several of the listed acts,<sup>20</sup> and it may in itself amount to an attack against the civilian population.<sup>21</sup>

The fact that State leaders who order the use or threat of use of nuclear weapons can be held accountable under international law regardless of their official position, shows how the rise of international criminal law has strengthened the role of law *vis-à-vis* potential use of nuclear weapons. Nevertheless, the clarity of the language of criminalization also exposes gaps in the international legal regulation of such weapons.

### 3.3. State Sovereignty Cannot Justify the Use of Nuclear Weapons

National security, deterrence, and State defence – known pretexts for the need of nuclear weapons – derive from the notion of State sovereignty. Interestingly, State sovereignty does *not* translate into any peremptory norm of international law. It is actually not a *jus cogens* principle. As stated above, one essential feature of the superior peremptory norms is that the community of States as a whole agrees that they cannot be derogated from.<sup>22</sup> There are, however, many examples when State immunity was waived or State sovereignty divided or transferred to other States.<sup>23</sup> Professor Schwarzenberger observed: “None of the rules of international customary law governing the principle of sovereignty constitute international *Jus Cogens*”.<sup>24</sup>

Therefore, State sovereignty – however important as a political force in countries that are seeking to find their place in the world – cannot supersede the interests of our common international society. State sovereignty can never serve directly or indirectly as a justification for the use or threat of use of nuclear weapons.

### 3.4. Other Conduct Than Use or Threat of Use of Nuclear Weapons

As regards the conduct of possessing, acquiring or developing nuclear weapons, their harmfulness may not reach the level of core international crimes. The Human Rights Committee’s opinion in its General Comment No. 14 – that “the production, testing, possession, deployment and use of nuclear weapons shall be recognized as

crimes against humanity” – is probably too broad, lacking the specificity which international criminal law requires.<sup>25</sup> Crimes against humanity are among the most severe international crimes, hence the high threshold of application. The argument could nevertheless be made in certain circumstances that conduct mentioned by the Committee amounts to international wrongful acts, due to the indiscriminate, long-lasting and exceptionally destructive nature of nuclear weapons. This is a line of reasoning that should be revisited by new generations of international lawyers, who grow up and are formed in times quite different from the 1950’s-70’s.

The deliberate transfer or facilitation of transfer of nuclear weapons (technology) to unstable actors in conflict areas would seem to be a special case, which may well be covered by some of the international modes of liability and crimes against humanity combinations.

## 4. Ultimate *De Lege Ferenda*: Towards an International Society Where the Right to Life is Protected From Nuclear Weapons

### 4.1. Leadership by States

In order to protect the right to life from nuclear weapons, the will and commitment of States will be decisive, especially that of nuclear States. In order to genuinely relinquish nuclear weapons and prevent new States from acquiring and testing them, existing nuclear States should take the lead in gradually eliminating their nuclear arsenals. If implemented, such leadership could more likely prepare the ground for a wider global compact in which emerging nuclear States would be persuaded to give up their nuclear development programmes. The public interest underpinning such a common objective far exceeds the complexity of the undertaking and the particular interests of any individual State or Government.

### 4.2. Effective International Organization

The Organization for the Prohibition of Chemical Weapons (‘OPCW’) won the 2013 Nobel Peace Prize for its “extensive work to eliminate chemical weapons”.<sup>26</sup> By that time, the OPCW has verified the destruction of approximately 80% of the world’s known stockpiles of chemical weapons, with programmes established to destroy most of the rest.

The OPCW’s success begs the question why nuclear weapons – which are far more lethal – are stuck in a non-proliferation treaty (that is not very effective on disarmament).

<sup>20</sup> This may not be the case in the hypothetical scenario referred to in *supra* note 2.

<sup>21</sup> To be such an “attack”, the use or threat of use of nuclear weapons must meet the criteria of “widespread” and “systematic”. See Willem-Jan van der Wolf, *Crimes Against Humanity and International Criminal Law*, International Courts Association, p. 215.

<sup>22</sup> See Hans Kelsen, *Principles of International Law*, 1952, p. 408; see also Michael B. Akehurst, ‘Custom as a Source of International Law’, *British Yearbook of International Law*, 1974, p. 47.

<sup>23</sup> See Malcolm N. Shaw, *International Law*, Sixth Edition, Cambridge, 2008, pp. 211-212.

<sup>24</sup> See George Schwarzenberger, ‘International *Jus Cogens*’, *Texas Law Review*, Vol. 43, p. 455.

<sup>25</sup> See ‘Evolution of Substantive International Criminal Law Through Specialized International Criminal Tribunals and the ICC’, *American Journal of International Law*, Vol. 94, p. 276; Editorial, *Journal of International Criminal Justice*, Vol. 5, Issue 3, July 2007, p. 582.

<sup>26</sup> See Alan Cowell, ‘Chemical Weapons Watchdog Wins Nobel Peace Prize’, *New York Times*, 11 October 2013.

ment and silent on use), with no dedicated international organization to implement effectively the principles of non-proliferation and disarmament, to inspect nuclear tests (that are technically less complicated to inspect due to the nature of radioactivity), and to gradually eliminate nuclear weapons.

Granting the 2013 Nobel Peace Prize to the OPCW entails much more than the award itself. It affirms the important role of international organizations in eliminating weapons of mass destruction, be it chemical or nuclear weapons. It reminds us that weapons of mass destruction are an unacceptable threat to international peace and security, and that joint efforts by States and international organizations are needed to reduce and ultimately remove this threat. The lack of a strong international organization – beyond the International Atomic Energy Agency – dedicated to giving effect to international law on nuclear weapons represents a gap in the international legal order.

#### 4.3. Concerted Action by Non-Governmental Organizations

International and regional NGOs enjoy wide-reaching international presence, trust and resources, with established capacity to gather facts also on the nuclear weapons situation around the globe. Through their reports on human rights issues, several NGOs could stimulate awareness of the need to address the threat of nuclear weapons more effectively, had they chosen to do so.<sup>27</sup> Comparing with impressive (and unrelated) NGO mobilization to save, for example, whales, we are left somewhat puzzled. The contrast begs questions about accountability for the financial priorities and extent of deeper independence *vis-à-vis* donors and Governments in several international NGOs. Does not Human Rights Watch have a mandate relevant to nuclear weapons?

If American NGOs are unwilling or incapable of properly taking the lead, perhaps the time has come to develop Chinese and Indian NGOs with a global agenda, reflecting concerns and aspirations of individuals in these two highly populated countries, forging co-operation with suitable partners, for example in Europe, such as the International Law and Policy Institute and its Nu-

<sup>27</sup> The important work done by actors such as the International Campaign to Abolish Nuclear Weapons (ICAN) should be significantly reinforced by other civil society actors.

clear Weapons Project.

#### 5. Realism and Initiative

Nuclear weapons pose the greatest single threat to the fundamental right to life. International law lacks an adequate response to this threat. A realistic risk assessment suggests that nuclear States, non-nuclear States, international organizations, NGOs and individuals should consider the gradual relinquishing of nuclear weapons, by that pursuing the common interest of an international society that respects the right to life. Such is the voice of common sense. But who would realistically take the initiative to strengthen the international legal regulation of nuclear weapons in this way?

Will China and India – two States with a neighbourhood of perceived nuclear weapons risks, and a shared sense that they have not provided enough input at earlier stages of the development of international law – take the lead on this issue? The new generation of Chinese and Indian international lawyers should give this matter due attention when they come together in consultation and multilaterally. We have soon spent 15% of the 21<sup>st</sup> century, often referred to as their century. The seventieth anniversary of Hiroshima and Nagasaki offers an opportunity for States and NGOs to show initiative to explicitly prohibit nuclear weapons.

*SHI Bei (HSBC China, Legal and Compliance Department), a qualified lawyer in China, holds an LL.M. and a Diploma in international law from Peking University Law School, and an LL.B. from Southwest University of Political Science and Law. TOAEP thanks the anonymous peer reviewers for their work and Professor Gro Nystuen for comments. Work on this policy brief was completed on 17 July 2014. ISBN 978-82-93081-94-4.*

PURL: <http://www.legal-tools.org/doc/1b0954/>.