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# NUCLEAR ARMS AND INTERNATIONAL LAW

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*International law and the dilemma of lex imperfecta*

Following the adoption of the Kellogg-Briand Treaty in 1928,[1] recourse to war "as an instrument of national policy"[2] has been increasingly outlawed by the international community. According to Article III of the Treaty, the prohibition of the international use of force was meant to be *universal*; the original signatories envisaged "adherence by all the other Powers of the world." With the creation of the United Nations in 1945 and the eventual accession of almost all states to the organization, this objective has virtually been accomplished. According to Article 2(4) of the UN Charter, there is no more general, unqualified *jus ad bellum*. The right to use force is limited to cases of self-defense under Article 51 of the Charter (with the notable exception of collectiv*e* action according to Article 42). Not surprisingly, the respective government agencies were all re-baptized as "ministry of defense" instead of "ministry of war."

Thus, *self-defense* – individual as well as collective – is the only case where the question of the use of nuclear arms may come up. Like all other uses of force between states, acts of self-defense must conform to the norms of international humanitarian law. These include, first and foremost, the principles of *distinction* (between civilian and military targets or objects)[3] and of *proportionality*. This sets a very high threshold. Because of their physical nature, it excludes virtually <u>all</u> uses of nuclear arms. Nonetheless, international law regarding the use of nuclear arms has remained a field of legal ambiguity. In a Dissenting Opinion in the case of the 1996 "Advisory Opinion" of the International Court of Justice on the *Legality of the Threat or Use of Nuclear Weapons*,[4] Justice Schwebel (United States) mentioned two hypothetical exceptions for so-called tactical (low-yield) nuclear charges in specific situations.[5] As we shall see below, the Court as a whole – in a narrow vote decided by the casting vote of the President – further contributed to the doctrinary confusion about the status of nuclear arms in international law.[6]

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[1] The Treaty entered into force on 24 July 1929.
[2] Article I of the Treaty.
[3] E.g. *Protocols Additional to the Geneva Conventions of 12 August 1949, Additional Protocol of 1977*, Article 48: "… the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives."
[4] International Court of Justice, "Legality of the Threat or Use of Nuclear Weapons." Advisory Opinion of 8 July 1996. *I.C.J. Reports 1996*, p. 226.
[5] Schwebel mentions two hypothetical cases: (a) "the use of a nuclear depth-charge to destroy a nuclear submarine that is about to fire nuclear missiles," and (b) the use of nuclear weapons "to destroy an enemy army situated in a desert." (*Dissenting Opinion of Vice-President Schwebel*. International Court of Justice, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion of 8 July 1996, pp. 320-321.)
[6] *Op. cit.*, section "Normative inconsistencies and contradictions."

The only two cases of a detonation of nuclear bombs so far – by the United States against essentially civilian targets in Japan[7] – occurred before the provisions of modern humanitarian law were adopted. However, the Hague Conventions of 1899 and 1907[8] were in force in 1945. Recalling the "laws of humanity" and the "dictates of the public conscience," the Conventions unambiguously state that "the right of belligerents to adopt means of injuring the enemy is not unlimited" (Article 22).[9] Article 23 of both conventions specifies in detail the proscribed uses of force, of which those described in paragraphs (a), (b), (e), and (g) would clearly also apply to the use of nuclear arms.[10] The destruction of two major cities, Hiroshima and Nagasaki, was not a tactical, but a strategic use of nuclear arms, aimed at breaking the will of the Japanese people and ending the war by means of large-scale terror, while saving lives of American soldiers. (This may be the most drastic case to date where one can demonstrate that the end does not justify the means.) No one was ever held accountable in a court of law.[11] The principles of criminal responsibility defined by the Nuremberg and Tokyo War Crimes Tribunals[12] were not applied to judge the leaders and personnel of the victorious armies. The Indian Judge at the Tokyo Tribunal, Radhabinod Pal, and the Chief Justice of the Supreme Court of the United States at the time, Harlan Fiske Stone, succinctly explained why such tribunals could not be considered courts of law in the strict sense.[13]

Whereas, in 1945, no *specific* regulations existed concerning the use of nuclear arms, the Articles of the above-mentioned Hague Conventions nevertheless should

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[7] Hiroshima: 6 August 1945; Nagasaki: 9 August 1945.

[8] *Convention* (II) *with Respect to the Laws and Customs of War on Land* (29 July 1899); *Convention* (IV) *respecting the Laws and Customs of War on Land* (18 October 1907). – The Conventions were preceded by the (First Geneva) *Convention for the Amelioration of the Condition of the Wounded in Armies in the Field* of 22 April 1864.

[9] In a philosophical reflection on the nature of war, P.-J. Proudhon very clearly made this point already in 1869: "… le choix des armes n'est pas chose indifférente. Il y a matière à règlement et définition." (*La Guerre et la paix – Recherches sur le principe & la constitution du droit des gens*. Paris: Librairie internationale, 1869. Livre III: "La guerre dans les formes," ch. VI: "Critiques des opérations militaires, des armes, de l'espionnage, des ruses de guerre," p. 3.)

[10] These include the prohibition "to kill or wound treacherously individuals belonging to the hostile nation or army" and to employ arms "calculated to cause unnecessary suffering."

[11] In 2022, there were renewed calls for the creation of an international public court, similar to the (Bertrand) "Russell Tribunals," to address the issue of criminal responsibility. Cf. a proposal by Alexander Panor, former Ambassador of Russia to Japan: "Why US Nuking of Hiroshima and Nagasaki Should be Legally Assessed by Int'l Court." Ekaterina Blinova, *Sputnik News*, 25 October 2022.

[12] For details, cf. Köchler, *Global Justice or Global Revenge? International Criminal Justice at the Crossroads*. Vienna/New York: Springer, 2004, pp. 149ff.

[13] Cf. "Judgment of Mr. Justice Pal, Member from India," in: B. V. A. Röling and C. F. Rüter (eds.), *The Tokyo Judgment: The International Military Tribunal for the Far East (I.M.T.F.E.), 29 April 1946 – 12 November 1948*, Vol. II. Amsterdam: University Press Amsterdam, 1977, p. 629. – Alpheus Thomas Mason, *Harlan Fiske Stone: Pillar of the Law*. New York: Viking Press, 1956, p. 715.

have been applied. In the Preamble to the Conventions, the High Contracting Parties made it clear that they "do not intend that unforeseen cases should, in the absence of a written undertaking, be left to the arbitrary judgment of military commanders." This exactly was the rationale for the drafting of the Conventions' provisions concerning "Means of injuring the enemy, sieges, and bombardments." However, similar to other proclamations of guiding principles of law such as the Universal Declaration of Human Rights of 1948, the Hague Conventions lack provisions for their implementation. They say nothing about what would happen if obligations under the Conventions were not fulfilled. In that regard, the Hague Conventions are a classical case of *lex imperfecta*.[14]

In several respects, this also seems to be the predicament of the regulations adopted by the international community in the last few decades concerning nuclear arms. The treaties are faced with major dilemmas, namely: **normative contradictions**; **unenforceability**; **confusion between law and morality**; and **irrelevance**. As is not surprising in a matter affecting the supreme interests of any state, relative to the use of the most powerful weapons in human history, geostrategic considerations in the drafting and interpretation of the documents may have been at the origin of these dilemmas. Two judicial pronouncements (on which we shall comment below in more detail) have made this more than obvious. The first relates to the International Court of Justice (ICJ). The seeming cluelessness of the Court in its Advisory Opinion of 1996 as to whether or not the use of nuclear arms would be legal in an extreme case of self-defense is typical of the confusion in international law when the *ultima ratio regis* is involved or invoked. The second is France's "interpretive declaration" upon ratification of the Rome Statute of the International Criminal Court (1998), aiming to exclude jurisdiction of the Court over crimes committed by means of nuclear arms.

*Normative inconsistencies and contradictions*

The 1996 Advisory Opinion of the International Court of Justice on *Legality of the Threat or Use of Nuclear Weapons*[15] has made obvious a potential contradiction, or incompatibility, between two domains of international law, namely the general rules of war, including a state's right to use force in self-defense against an armed attack (according to Article 51 of the UN Charter), and the principles of international

[14] Cf. a case-related definition of the term in the *Yearbook of the International Law Commission 1968*, Vol. I: *Summary records of the twentieth session, 27 May – 2 August 1968*. New York: United Nations, 1969, 958th meeting – 20 June 1968, Mr. Ustor, Para. 53, p. 91.
[15] *Loc. cit.*

humanitarian law (*jus in bello*). In 1994, the General Assembly of the United Nations put the following forthright question before the Court: "Is the threat or use of nuclear weapons in any circumstance permitted under international law?"[16] In decision (2)(E) of its Opinion (1996), the Court stated, "the threat or use of nuclear weapons *would generally be* contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law." (Emphasis H.K.) With the use of the subjunctive form and the subsequent admission that it cannot conclude "definitively" whether the threat or use of nuclear weapons would be lawful or not "in an extreme circumstance of self-defence, in which the very survival of a State would be at stake,"[17] the Court has created more confusion than clarity.[18]

The ambiguity could have been avoided if the Court would have acknowledged that *any* international use of force must be in conformity with the basic rules of humanitarian law. Why should, in a case of self-defense, the applicability of those rules be in doubt? Would the Court also have hesitated when it comes to the use of chemical or biological arms? The ICJ should have been cognizant of the fact that the principles of the Hague Conventions still apply, and in particular the provision of Article 22. It should also have paid attention to the (already mentioned) "basic rule" (Article 48) of Part IV of the 1977 Protocols Additional to the Geneva Conventions of 1949 concerning the mandatory distinction at all times between the civilian population and combatants.[19] The obligation applies irrespective of whether certain weapons are banned under specific conventions or not. In his Dissenting Opinion, Justice Schwebel rightly pointed to Lauterpacht's position according to which there "is not the slightest relation between the content of the right to self-defence and the claim that it is above the law and not amenable to evaluation by law."[20]

The problem of incompatibility between the two normative areas – self-defense as part of the laws of war on the one hand, and the principles of international

[16] United Nations, General Assembly, resolution adopted at the 90th plenary meeting on 15 December 1994.
[17] *I.C.J. Reports 1996*, p. 266, Article 105(2)(E).
[18] It is to be recalled that the decision was taken with the casting vote of the President.
[19] Fn. 3 above.
[20] Sir Hersch Lauterpacht, *The Function of Law in the International Community*. Oxford/New York: Oxford University Press, 2011 (first published in 1933), Part III, ch. 15: "Judicial Determination of the Right of Self-defence," p. 188.

humanitarian law on the other[21] – can only be resolved if international law, *in general*, is understood as rooted in fundamental human rights, similar to how the domestic legal order must be in conformity with human rights norms in order to be legitimate.[22] The indecisiveness and ambiguity in the Advisory Opinion of the ICJ resembles the Janus-faced character of attitudes vis-à-vis the first use of nuclear arms in 1945, against civilian targets. How to justify obvious acts of war crime, or crimes against humanity, potentially also genocide, in the name of self-defense? How to defend the indiscriminate killing of hundreds of thousands of civilians in the name of higher strategic goals (such as putting an early end to the war or saving the lives of one's soldiers)? We are faced here with complex legal and moral dilemmas to which the ICJ has no answers. The legal ambiguity has also not been dispelled by the recently adopted Treaty on the Prohibition of Nuclear Weapons (TPNW),[23] and for one simple reason: The prohibition is irrelevant as long as the nuclear powers and states that have chosen to be covered by the "nuclear umbrella" of one of those powers do not accede to the Treaty.

The United Nations Security Council early on contributed to the doctrinary confusion when apparently implicitly endorsing the rationale of a so-called "nuclear umbrella." In a resolution preceding the indefinite extension of the Treaty on the Non-proliferation of Nuclear Weapons (1995),[24] the Council "welcomed" the intention "expressed by certain States" (i.e. nuclear powers) to provide support to any non-nuclear-weapon State Party to the NPT "that is a victim of an act of, or an object of a threat of, aggression in which nuclear weapons are used."[25] This can be interpreted as being equivalent to United Nations approval of a commitment to collective self-defense by means of nuclear arms, which again points into the direction of a doctrine that puts the norm of self-defense apart from the principles of international humanitarian law. In a similar vein, the United States has recently declared that it will make full use of its

[21] Concerning the dichotomy between the international law applicable in armed conflict and the principles of international humanitarian law see also the Separate Opinion of Judge Fleischhauer (Germany), *I.C.J. Reports 1996*, p. 305.
[22] Cf. Köchler, *The Principles of International Law and Human Rights: The Compatibility of Two Normative Systems.* Studies in International Relations, Vol. V. Vienna: International Progress Organization, 1981.
[23] Adopted on 7 July 2017, in force since 22 January 2021.
[24] For details of the legal status of the Treaty, see below ("Unenforceability").
[25] Resolution 984 (1995), adopted by the Security Council at its 3514th meeting, on 11 April 1995.

military capabilities, including "nuclear defense," to defend Japan and South Korea, both non-nuclear states.[26]

The legal inconsistencies, even absurdities, in matters related to the status of nuclear arms in international law have become especially obvious in an "interpretive declaration" which France deposited upon ratification of the Rome Statute of the International Criminal Court. In the declaration, France argues that the jurisdiction of the International Criminal Court over war crimes, in particular intentional attacks against the civilian population, is limited to instances where non-nuclear weapons are used. According to France, the Rome Statute "can neither regulate nor prohibit the possible use of nuclear weapons (…), unless nuclear weapons (…) become subject in the future to a comprehensive ban and are specified in an annex to the Statute."[27] It is obvious that this *de facto* "reservation" of France[28] makes the jurisdiction of the Court over war crimes utterly meaningless – namely, if crimes committed by use of the most devastating weapons are excluded. In the 9th session of the Assembly of States Parties to the Rome Statute (2010), Mexico suggested that Article 8 Para. 2(b) of the Statute should be amended so as to include the use or threat of use of nuclear weapons as a war crime.[29] This was rejected by the Review Conference in 2010. In their session in New York in 2017, the States Parties however amended Article 8 to include weapons which use biological agents or toxins, and other especially injurious weapons.[30] This makes the omission of, indeed "exception" for, the most destructive and inhumane arms mankind has ever invented even more scandalous. Putting the use of nuclear arms effectively outside or above international law is an example of "legal isolationism" that exclusively serves the interests of nuclear powers. In that regard, the approach in the above mentioned Advisory Opinion of the ICJ seems to be similar to that of France's "interpretive declaration." That the Treaty on the Prohibition of Nuclear Weapons has in the meantime entered into force (in 2017) does in no way change the situation as

[26] "US vows full military defense of allies against North Korea." Mari Yamaguchi, Associated Press, *AP News*, 26 October 2022.
[27] *Multilateral treaties deposited with the Secretary-General – Treaty I-XVIII – 10*: "Rome Statute of the International Criminal Court, Rome, 17 July 1998," at untreaty.un.org.
[28] Under Article 120 of the Rome Statute, reservations to the Statute are not permitted.
[29] International Criminal Court / Assembly of States Parties, Tenth session, New York, 12-21 December 2011, *Report of the Working Group on Amendments*, ICC-ASP/10/32, Annex II: "Mexico / Amendment to article 8 of the Rome Statute of the International Criminal Court regarding the use of nuclear weapons." *Position Paper*, pp. 13-16.
[30] It is to be noted that these amendments are only binding upon the States Parties that have ratified them.

long as the nuclear powers do not accede to it. A ban proclaimed by the nuclear "have-nots" is not a "comprehensive" ban in the meaning of the French declaration.

Another problem of legal consistency relates to the question whether the policy of nuclear deterrence, pursued by the nuclear powers, is compatible with the prohibition of the threat of force under Article 4(2) of the United Nations Charter. It is argued, in terms of realpolitik, that the fear of "mutual assured destruction" (MAD), which is the rationale of nuclear deterrence, has ensured that nuclear weapons have not been used since 1945.[31] Some analysts of international relations even see a benefit of "nuclear peace," which, in their assessment, may result from the balance of power between nuclear-armed countries.[32] However, if a strategic posture of "deterrence" can be interpreted as "threat" under the UN Charter, it is obvious that such a policy would be illegal,[33] as stated also by the ICJ in its 1996 Advisory Opinion: "If the envisaged use of force is itself unlawful, the stated readiness to use it would be a threat prohibited under Article 2, paragraph 4 [of the UN Charter / H.K.]."[34] Thus, everything depends on whether the use of nuclear arms is illegal *in principle* or not, a question on which, as we have seen, the Court's position is ambiguous. One might, however, still ask whether the element of *mutuality* of deterrence negates the quality of "threat."

*Unenforceability*

The above-described antagonisms and contradictions further illustrate the strange legacy of *lex imperfecta* that has been typical of the evolution of international norms in the matter of nuclear arms. The Treaty on the Non-Proliferation of Nuclear Weapons (NPT)[35] was the first example of indecisiveness – or lack of commitment – of the international community when it comes to norms restricting the use of the most powerful weapon. At the time of its adoption, with the possible exception of Israel, only today's permanent members of the Security Council[36] were in the possession of nuclear arms. According to Article IX (3) of the treaty, the entry into force required ratification

[31] On the "logic" of the concept in terms of power politics cf. Köchler, "Power and World Order," in: *Zeit-Fragen*, Special Edition, Zurich, February 2022, pp. 1-4.
[32] For a critical review cf. Robert Rauchhaus, "Evaluating the Nuclear Peace Hypothesis: A Quantitative Approach," in: *Journal of Conflict Resolution*, Vol. 53, Issue 2 (April 2009), pp. 151-160.
[33] For a general evaluation of the controversy using the position of the UK as an example, see Brian Drummond, "UK Nuclear deterrence policy: an unlawful threat of force," in: *Journal on the Use of Force and International Law*, Vol. 6, Issue 2 (2019), pp. 193-241.
[34] Advisory Opinion, *I.C.J. Reports 1996*, Para. 47, p. 246.
[35] Signed on 1 July 1968 and entered into force on 5 March 1970.
[36] Only in 1971 was the People's Republic of China admitted to the United Nations, thus assuming its place as a permanent member in the Security Council.

by three major nuclear powers at the time, the United States, the Soviet Union and the United Kingdom, as depositaries of the treaty. Article VI obliges all Parties "to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament." It further requires all Parties to the Treaty to negotiate "a treaty on general and complete disarmament under strict and effective international control." According to the language of Article VI, these are binding legal obligations. The Article does not merely state an abstract goal. However, in the more than half-century since the treaty's entry into force, no "effective" measures towards nuclear disarmament have been undertaken. Technically, as of today, all nuclear weapon states that are party to the Treaty are in non-compliance with Article VI as far as "nuclear disarmament" is concerned. The crux lies in the absence of enforcement mechanisms in the treaty, which gives the statement of obligations in the treaty the character of a mere exhortation. This makes the NPT a classical case of *lex imperfecta* and raises doubts about the legal validity of the entire disarmament régime. Norms without corresponding mechanisms of enforcement are not legal norms in the strict sense.[37] Unenforceability has indeed been a predicament of a large part of international law up to the present day.

The situation is somewhat different with another international agreement in the field of nuclear disarmament, the Comprehensive Nuclear-Test-Ban Treaty (CTBT), adopted on 10 September 1996. Article V – "Measures to Redress a Situation and to Ensure Compliance, including Sanctions" – authorizes the Conference of States Parties to the Treaty to "recommend" to States Parties "collective measures which are in conformity with international law" (Para. 3). This may include, by implication, enforcement action by the United Nations Security Council under Chapter VII of the UN Charter.[38] Article IV – "Verification" – sets out detailed procedures for an international monitoring system and on-site inspections. According to Article II, a Comprehensive Nuclear-Test-Ban Treaty Organization (CTBTO) is to be established in Vienna, Austria, and a Technical Secretariat and an International Data Centre are to be set up for this purpose at the seat of the organization. All technical arrangements are already in place at the "Provisional Secretariat" at the United Nations compound in Vienna. There is one

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[37] Cf. also Hans Kelsen's definition of legal norms: *Pure Theory of Law* [*Reine Rechtslehre: Einleitung in die rechtswissenschaftliche Problematik*, 1934]. Trans. Max Knight. Berkeley / Los Angeles / London: University of California Press, 1967, esp. chapter I/6/c ("The Law as a Coercive Normative Order"), pp. 44ff.

[38] It would nonetheless be an "imperfect" procedure of enforcement because of the veto privilege of the Council's permanent members, all of them nuclear powers.

flaw, however. The Organization does not yet exist. The treaty has not entered into force since adopted in 1996, more than a quarter century ago. In terms of realpolitik, this was the price that had to be paid for an agreement that, once in force, would actually be enforceable, i.e. would be more than *lex imperfecta*. According to Article XIV, the treaty will only enter into force after 44 specifically listed states have ratified it. These are countries that, prior to the adoption of the treaty, operated nuclear power reactors or nuclear research reactors, a formula that includes all nuclear weapon states, whether declared or undeclared. Of these, eight states – China, Egypt, India, Iran, Israel, North Korea, Pakistan, and the United States – have not yet ratified the treaty. Common sense dictates that states mastering nuclear technology must be party to a treaty banning all nuclear tests. The adjective "comprehensive" would make no sense otherwise. In view of realpolitik, however, it also means that the CTBT will most likely not enter into force in the foreseeable future.

The dilemma generally reflects the problem faced by law in the web of international power politics, and particularly so when the strategic interests of nuclear powers, perpetually suspicious of each other, are at stake: A treaty that is drafted as a system of rules that are *meant to be enforced* (even if procedures might potentially be blocked by permanent members in the Security Council) will not be allowed to enter into force – simply because that treaty might be, albeit minimally, <u>more</u> than *lex imperfecta*.

*Irrelevance*

The case is even more problematic – in terms of legal validity – with the most recent agreement under United Nations auspices, the Treaty on the Prohibition of Nuclear Weapons (TPNW).[39] Under the heading "Prohibitions," the treaty provides that each State Party "undertakes never under any circumstances to (…) develop, test, produce, manufacture, otherwise acquire, possess, or stockpile nuclear weapons or other nuclear explosive devices."[40] The wording of the prohibition could not be more categorical or comprehensive. However, unlike the CTBT, the TPNW does not contain any provisions for enforcement at all. In the *hypothetical* case that nuclear weapon states would accede to the treaty, Article 4 ("Towards the total elimination of nuclear weapons") obliges those states to "destroy" their nuclear weapons "as soon as possible"

[39] Adopted on 7 July 2017 and entered into force on 22 January 2021.
[40] Article 1(1)(a).

and further stipulates that they must fulfill this obligation “not later than a deadline to be determined by the first meeting of States Parties” (Para. 2). The first meeting has taken place in Vienna from 21-23 June 2022. However, in contravention to Article 4 Para. 2, the States Parties did not decide on any deadline; instead, they chose to defer the matter, vaguely promising to “[e]laborate during the intersessional period on the specific requirements of extension requests” for the destruction of nuclear weapons.[41] That, quite obviously, the States Parties did not treat their own contractual obligation seriously seems to be typical of the entire project of the TPNW.

The treaty will remain *irrelevant* as long as nuclear weapon states and those who benefit from “nuclear sharing” – such as NATO members Belgium, Germany, Italy, the Netherlands, and Turkey – do not accede to it. The treaty’s commitment to “Universality” – drafted in Article 12 as “goal of universal adherence of all states to the Treaty” – is nothing else than a noble promise to lobby states to join it. At the same time, the commitment to universality is also squarely undermined by the provision of Article 17 that grants each State Party the right to withdraw from the treaty “if it decides that extraordinary events related to the subject matter of the Treaty have jeopardized the supreme interests of its country” (Para. 2). The opting-out clause appears in line with the earlier mentioned caveat in the Advisory Opinion of the International Court of Justice regarding an “extreme circumstance of self-defence.” Article 17 also renders the word “never” in Article 1(1)[42] meaningless. Withdrawal, under self-defined conditions, from a treaty that is aimed at the *total* elimination of nuclear arms – ”a world free of nuclear weapons,” in the words of the preamble – negates the *raison d’être* of the treaty itself. It is to be recalled that the Kellogg-Briand Pact of 1928 – “Treaty between the United States and other Powers providing for the renunciation of war as an instrument of national policy” – has no opt-out clause. Admittedly, opt-out clauses, referring to “extraordinary circumstances” and “supreme interests,” can be found in other disarmament treaties, e.g. the Treaty on the Non-Proliferation of Nuclear Arms, Article X(1), or the Chemical Weapons Convention, Article XVI(2). The difference in quality between the opt-out clauses in these treaties and in the TPNW, in our assessment, lies in the *universal* aspiration of the TPNW and in

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[41] *First Meeting of States Parties to the Treaty on the Prohibition of Nuclear Weapons*, TPNW/MSP/2022/CRP.7, 22 June 2022, “Draft Vienna Action Plan,” Ch. II, Action 17, p. 3/8.
[42] “Each State Party undertakes never under any circumstance to …”

its focus on an *existential* issue of humankind – similar to the purpose of the Briand-Kellogg Pact.

In strategy and construction, the TPNW appears as an idealist, almost illusionist undertaking. While the CTBT cannot enter into force without ratification by nuclear states and states capable of nuclear technology[43] (which is an approach partly similar to that of the NPT),[44] the TPNW entered into force without ratification by any nuclear state. How should "prohibition" of nuclear weapons in a strictly legal sense, not as mere moral exhortation, have any meaning at all if it is not applicable to the very states that possess nuclear weapons – not to mention the general absence of enforcement mechanisms in the treaty? A futile declaration of "nuclear abstinence" by non-nuclear states will not in any way contribute to a nuclear-free world, the proclaimed goal of the TPNW. If nuclear states do not accede to the treaty, its adoption will effectively have been an exercise in *Gesinnungsethik* ("ethics of conscience")[45] as the Government of Germany pointed out in the debates preceding the adoption of the treaty. According to the German position, such a treaty will be *counterproductive* in terms of the goal of effective nuclear disarmament.[46]

Thus, in spite of the States Parties' "recognizing," in the Preamble, the importance of a "legally binding prohibition of nuclear weapons," the treaty hovers in a strange realm between law and morality. In the **absence** of any enforcement provisions and in the conspicuous **absence** (non-ratification) of the states that actually possess nuclear arms or benefit from a "nuclear umbrella," the TPNW borders on irrelevance. Though, in the Preamble, the States Parties declare themselves "determined" to act towards the "irreversible, verifiable and transparent elimination of nuclear weapons," the operative provisions of the treaty, as we have seen, fall far short of that goal.

In remarkable contrast to the more precise – and less flowery – language of the NPT or the CTBT, the wording of the TPNW, in certain passages, seems more to be

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[43] As we have explained above, the price for *relevance* of the treaty (CTBT) is the unforeseeability of its entry into force. The reverse is true in the case of the TPNW: *irrelevance* of the treaty is the consequence of its entry into force without the ratification by nuclear states.

[44] The entry into force of the NPT required the ratification by three major nuclear powers at the time (see above).

[45] This is a term introduced by Max Weber who distinguishes *Gesinnungsethik* from *Verantwortungsethik* (ethics of responsibility): *Politik als Beruf*. Munich / Leipzig: Duncker & Humblot, 1919.

[46] Source: *Süddeutsche Zeitung*, 8 July 2017, www.sz.de/1.3578289, "Atommächte boykottieren Atom-Ächtung," by Tobias Matern. Cf. also, Jan Techau, "Sollte Deutschland dem nuklearen Verbotsvertrag beitreten? Nein!" in: *VEREINTE NATIONEN*, Berlin, Issue 2/2020, p. 63.

focused on peculiar ideological issues than on the treaty's real purpose. For example, the States Parties "recognize" that "the equal, full and effective participation of both women and men is an essential factor for the promotion and attainment of sustainable peace and security." Consequently, they declare themselves "committed to supporting and strengthening the effective participation of women in nuclear disarmament."[47] The Draft Vienna Action Plan adopted at the First Meeting of the States Parties goes one step further, emphasizing the "gender-responsive nature of the TPNW" – whatever this may mean in the case of the prohibition of nuclear arms – and establishing a "Gender Focal Point" to support the implementation of the "gender provisions" of the Treaty.[48] By confusing legal and ideological issues, the treaty actually does disservice to the cause of global nuclear disarmament.[49]

*Conclusion: Legality vs. morality?*

In reality, the 2017 Treaty on the Prohibition of Nuclear Arms – as a document of moral encouragement directed at the nuclear states – does not go beyond what the General Assembly of the United Nations had already achieved by way of its *Declaration* of 24 November 1961 on the "prohibition of the use of nuclear and thermo-nuclear weapons."[50] As the delegate of Tunisia, one of the sponsors of the resolution, said, the Declaration "was intended as a moral condemnation of nuclear war."[51] By its very nature, the resolution was not legally binding but set out the arguments in favor of a legally binding convention on the prohibition of nuclear arms. It stated the basic principles in terms of law and justice. Referring to earlier legal documents, in particular the Saint Petersburg Declaration of 1868[52] and the Hague Conventions of 1899 and 1907, the General Assembly used the argument of analogy to stress the importance of

[47] Preamble.

[48] *Op. cit.*, p. 8/8, Action 47 and 48, respectively. Article 6 of the Treaty ("Victim assistance and environmental remediation") demands "age- and gender-sensitive assistance." Nowhere else, except in the Preamble, does the treaty refer to gender issues.

[49] Especially the wording of Chapter II of the *Draft Vienna Action Plan* – "Towards the elimination of nuclear weapons" – reveals an irritating degree of verbosity and lack of professionalism (in comparison to the language and style of disarmament documents related to other treaties). Para. 7 of the Plan states a series of platitudes. "Action" no. 18 (in Para. 8) is described in a fog of words rarely encountered in UN documents: "Commit their best efforts to advancing progress on nuclear disarmament verification, while recognizing that verification is not an end in itself, nor a substitute for nuclear disarmament, but a positive enabler for progress on disarmament." This, in our assessment, is another hint at the – unfortunate – irrelevance of the TPNW.

[50] Resolution 1653 (XVI), adopted at the 1063rd plenary meeting.

[51] Quoted according to: Institute of International Law, *Yearbook*, Vol. 61, Part I (Session of Helsinki 1985). Paris: Editions A. Pedone, 1985, p. 142.

[52] *Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight*. Saint Petersburg, 29 November / 11 December 1868.

the prohibition of nuclear arms. It emphasized that the use of nuclear weapons "would bring about indiscriminate suffering and destruction to mankind and civilization to an even greater extent than the use of those weapons declared by the aforementioned international declarations and agreements to be contrary to the laws of humanity and a crime under international law."[53] The General Assembly also made the important point that the use of nuclear weapons "is a war directed not against an enemy or enemies alone but also against mankind in general, since the peoples of the world not involved in such a war will be subjected to all the evils generated by the use of such weapons."[54] The General Assembly also stressed that the use of nuclear weapons is "contrary to the spirit, letter and aims of the United Nations and, as such, a direct violation of the Charter of the United Nations," as it is also "contrary to the rules of international law and to the laws of humanity."[55] The UN member states categorically declared that any State using nuclear weapons "is to be considered as violating the Charter of the United Nations, as acting contrary to the laws of humanity and as committing a crime against mankind and civilization."[56]

Although, with a delay of several decades, the General Assembly's call for convening a "special conference for signing a convention on the prohibition of the use of nuclear and thermo-nuclear weapons"[57] has been heeded,[58] we are nowhere near a truly legally binding prohibition. All legal instruments to date are either not yet in force, lack ratification by relevant states, or are otherwise in a state of *lex imperfecta*. Unlike as hoped for by the General Assembly in 2016[59] and later claimed as fact by the UN Office for Disarmament Affairs,[60] the Treaty on the Prohibition of Nuclear Weapons – for the reasons we have given above – lacks provisions for enforcement.

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[53] *Loc. cit.*

[54] Operative Para. 1(c).

[55] Paras. 1(a) and (b).

[56] Para. 1(d). – It is to be noted that of the nuclear powers at the time, the United States, the United Kingdom and France voted against the resolution. It was adopted by a vote of 55-20, with 26 abstentions, notably including those of Austria, Finland and Sweden.

[57] Operative Para. 2.

[58] On the basis of Resolution 71/258, adopted at the 68th plenary meeting on 23 December 2016, the General Assembly convened a conference in New York in 2017, which eventually adopted the Treaty on the Prohibition of Nuclear Weapons.

[59] Resolution 71/258: "*The General Assembly* (…) *Decides* to convene in 2017 a United Nations conference to negotiate a *legally binding instrument* to prohibit nuclear weapons, leading towards their total elimination." (Emphasis H.K.)

[60] "Treaty adopted on 7 July 2017 – Background information," at https://un.org/disarmament/tpnw/index.html, visited on 14 October 2022.

The state of affairs will not change in the foreseeable future. Due to the *nature of power* and the deep *mistrust* it creates between countries,[61] nuclear states will not accede to any treaty that obliges them to abandon their dubious privilege. That the international community, first and foremost the General Assembly of the United Nations, has repeatedly stressed *jus cogens* aspects concerning the illegality of the threat or the use of nuclear arms, declaring both as "contrary to the laws of humanity" and "a crime against mankind and civilization,"[62] has no impact in terms of the enforceability of the existing treaties, and the least so of the TPNW. As matters stand now, with only 68 states having ratified the treaty and those states whose interests are specially affected by the treaty – the nuclear powers – staying away, there is also no chance that the norm of prohibition might attain the status of customary international law.[63]

What remains is a striking *antagonism between law and morality*. Also, there is an inescapable *vicious circle between power and law*: The law, to be effective, would need to be enforced by those – namely the permanent members of the UN Security Council – who, as nuclear powers, are not prepared to make it enforceable. Thus, the belief in a universally valid prohibition of nuclear arms will remain wishful thinking for the indefinite future.

In the meantime, as in the old days of power politics, resort to nuclear arms may remain the *ultima ratio regis*, justified – even by reference to an Advisory Opinion of the ICJ – as a tool of desperate self-defense.[64] In the realm of power politics – the strange netherworld where "right" and "wrong" lose distinction – a nuclear arsenal may still be seen as ultimate "ace in the hole,"[65] granting a country the status of a superpower and offering a country's leader one last additional option.

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[61] Cf. John Mearsheimer, *The Tragedy of Great Power Politics*. Updated edition. New York: W.W. Norton & Company, 2014.
[62] Resolution 1653 (XVI).
[63] For details, see Gail Lythgoe, "Nuclear Weapons and International Law: The Impact of the Treaty on the Prohibition of Nuclear Weapons." *EJIL:Talk!*, *European Journal of International Law | Blog*, 2 December 2020, www.ejiltalk.org.
[64] Cf. our comments above on the Advisory Opinion of 1996.
[65] In the era of the Cold War, the phrase was apocryphally attributed to President John F. Kennedy. During the Cuban Missile Crisis in October 1962 he supposedly referred to the 10th Missile Squadron at Malmstrom Air Force Base, Montana, as "first ace in the hole." (General John A. Shaud and Dr. Dale L. Hayden, "The Success of our ICBM Force: Capability, Commitment, and Communication," in: *High Frontier – The Journal for Space & Missile Professionals*, Vol. 5, No. 2, February 2002, p. 4.) See also, Greg Ogletree, "The 'Hole' Story," in: *Association of Air Force Missileers Newsletter*, Vol. 18, No. 2, June 2010, pp. 7-10.

Notwithstanding the utter failure of the international community to develop a consistent and enforceable set of rules to eliminate mankind's most destructive weapon, today's nuclear powers should pay attention to a wisdom from the past – a maxim expressed by the rulers of the 19th century. On the proposition of the Imperial Cabinet of Russia, the signatories of the Saint Petersburg Declaration of 1868 stated that "the progress of civilization should have the effect of alleviating as much as possible the calamities of war"[66] – a call that preceded and inspired the development of international humanitarian law in the 20th century. Unfortunately, the progress of arms technology in the 20th century has led the world ever further away from that noble goal. Exactly the opposite of what the powers envisaged in 1868 is true for nuclear arms. Also, unlike as in the cases of other types of arms of mass destruction,[67] the international community has so far proven incapable to agree on any meaningful legal measure towards complete nuclear disarmament. The status of nuclear arms is regulated in large part by a body of norms that may be characterized as *lex simulata*.[68] The field is left to moral exhortations – as noble and well intentioned as they may be.

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[66] *Op. cit.* (fn. 52 above), first sentence of the Preamble. – The Declaration was signed by Austria-Hungary, Bavaria, Belgium, Denmark, France, United Kingdom (for the British Empire), Greece, Italy, the Netherlands, Portugal, Prussia, the North German Confederation, Russia, Sweden-Norway, Switzerland, the Ottoman Empire, and Württemberg.

[67] E.g., *Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare* (Geneva Protocol) (1925); *Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects* (1981, entered into force on 2 December 1983); *Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and their Destruction* (CWC) (1993, entered into force on 29 April 1997); *Convention on Cluster Munitions* (CCM) (2008, entered into force on 1 August 2010).

[68] I am borrowing here a term from W. Michael Reisman who describes "an exercise in *lex simulata*" as "the enactment of a statute that would seem to deal with the problem but would prove unenforceable or unenforced …" (*Folded Lies: Bribery, Crusades, and Reforms*. New York: The Free Press, 1979, p. 171.)