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The Treaty on the Prohibition of Nuclear Weapons in the Light of IHL: An Advancement in Nuclear Disarmament?

Abstract

Nuclear weapons have raised not only very important debates in the International Community since his own creation but also a big concern at that time and now. With the new TPNW as reference we can suggest a lot of questions as: Is the use of those weapons compatible with International Humanitarian Law? Could we think about that new international agreement as a decisive element to achieve the effective prohibition of nuclear weapons? Is it compatible with the previous regime? What problems could appear in there application? Does exist a general duty in order to barge nuclear disarmament?

Keywords

Nuclear weapons, TPNW, TNP, DIH.

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Introduction

The significance of the debate on the prohibition of nuclear weapons is of the utmost importance. Looking at the big picture, at the beginning of 2018, nine states—the US, Russia, the UK, France, China, India, Pakistan, Israel and North Korea—possessed approximately 1,4,465 nuclear weapons, of which 3,750 were deployed with operational forces. Some 2000 of these weapons were on high operational alert¹.

Although the idea of achieving an absolute ban on nuclear weapons, a goal pursued by the Treaty on the Prohibition of Nuclear Weapons (hereinafter referred to as the TPNW) seems distant but is hampered by the lack of participation of the countries that possess nuclear weapons, the importance of the debate on the prohibition of nuclear weapons and the risks inherent in the existence of this type of weaponry is growing².

In this context, this paper aims to answer a number of questions related to nuclear weapons, such as: Is the use of these weapons compatible with the provisions of IHL? Can the new treaty be seen as a decisive element in achieving the effective prohibition of nuclear weapons? is it compatible with the previous regime? what are the problems of implementation? is there a general obligation to negotiate nuclear disarmament? To this end, and after reviewing the main conferences on the impact of nuclear weapons, the different views on Article VI of the NPT and the obligation of States Parties to enter into negotiations for the cessation of the nuclear arms race will be analysed.

Having said this, reference will be made to the main reasons traditionally put forward on the subject of prohibition, and especially to the Advisory Opinion of the International Court of Justice (hereinafter ICJ) of 8 July 1996, in order to subsequently analyse the alleged obligation to negotiate in the light of a specific and paradigmatic case on the subject, such as that of the Marshall Islands.

Once the general framework of the issue has been obtained, a legal analysis of some of the relevant provisions of the TPNW in relation to the previous Treaty will be addressed, in order to try to determine the compatibility or incompatibility of both, as well as the problems posed by the new Treaty when it comes to achieving its main objective (especially in view of the different positions held by the main actors on the international scene).

¹ SIPRI yearbook 2018. Armaments, Disarmament and International Security. P. 10.

² Hernando Zamanillo, E. (2017). Legalidad, legitimidad e impacto humanitario de las armas nucleares en términos de seguridad: una relación conflictiva. *Revista Española de Derecho Militar*, no. 107, Escuela Militar de Estudios Jurídicos. P. 291.

Background. From NPT to TPNW

This chapter will analyse the main conferences adopted on the humanitarian impact of nuclear weapons, such as those of Oslo (March 2013), Nayarit (February 2014) and Vienna (December 2014), as well as the different theses adopted on the international scene that have advocated the need for evolution in relation to the provisions of Article VI of the Nuclear Non-Proliferation Treaty (hereinafter NPT). This Treaty is not configured as a disarmament treaty but is aimed, as its name suggests, at curbing the proliferation of this type of weapon. However, it has been considered in some quarters to be of a provisional nature, pending agreement by the nuclear-weapon states on total disarmament³.

Finally, and before referring to the different Conferences adopted on the subject, it should not be forgotten that the objectives of arms control in general, and therefore applicable to the NPT, have been identified as follows⁴:

- Reduce the likelihood of war by seeking to limit weapons developments and proliferation that could destabilise strategic relationships by encouraging pre-emptive strikes.
- Limit suffering and harm in the event of war.
- Reduce spending on armaments by economising on resources.
- Contribute to conflict resolution, reducing mistrust and helping to create a tension-free climate.

The Conferences on the Humanitarian Impact of Nuclear Weapons

In the first instance, it is worth highlighting, as a general background, the 1997 United Nations Conference on Disarmament, which resulted in disagreement between nuclear and non-nuclear countries on how to understand disarmament itself⁵. That said, three major conferences have been held to date on the humanitarian impact of nuclear weapons, all of them with the main objective of contributing to a world free of nuclear weapons and thus of the risks they pose to humanity as a whole.

3 Mc Cormack, T. (1997). *A non liquet on nuclear weapons - The ICJ avoids the application of general principles of international humanitarian law*. *International Review of the Red Cross*, vol. 22, no. 139, p. 84.

4 Frei, D. (1988). *El derecho internacional humanitario y el control de armamentos*. *Revista Internacional de la Cruz Roja*, vol. 13, no. 90, p. 521.

5 Asorey, E. (1998). *La Conferencia de Desarme de las Naciones Unidas en 1997*. *Política Exterior*, vol. 12, no. 62, p. 163.

The Oslo Conference

At the first of these (Norway, 2013) and under the title ‘*Conference on the Humanitarian Impact of Nuclear Weapons*’, presentations were given by a wide range of experts on the various effects caused by nuclear weapons detonations, as well as the humanitarian, environmental and developmental effects in the medium and long term.

In the opinion of the President of the Conference, key conclusions can be drawn from the discussions and presentations made:

- It is unlikely that any State or international body would be able to adequately address the immediate humanitarian emergency caused by a nuclear weapons detonation and provide sufficient assistance to those affected. Moreover, it would not be possible to establish these capacities even if one tried.
- Historical experience of the use and testing of nuclear weapons has demonstrated their devastating effects. Although political circumstances have changed, the destructive potential of these circumstances remains.
- The effects of a nuclear weapons detonation, regardless of its cause, will not be limited by national borders, but will precisely affect states and individuals in important ways, both regionally and globally.

The main purpose of the Conference was therefore to highlight the humanitarian consequences of a possible detonation of nuclear weapons. During the discussions, several states expressed their interest in further exploring the issue in ways that would ensure global engagement, broadening the discourse on the humanitarian impact of such weapons.

The Nayarit Conference

Nayarit (Mexico, 2014) hosted the second International Conference on the Humanitarian Impact of Nuclear Weapons, set up as a follow-up to the Oslo conference and aimed at discussing the long-term global consequences of any nuclear detonation. From a ‘modern’ perspective and including a wide range of issues, such as public health, humanitarian assistance, economics, the environment, climate change, etc.

The following main conclusions can be drawn from the discussions and presentations made by the various actors involved⁶:

- Beyond the obvious consequences, the socio-economic and environmental impact of a possible nuclear detonation should be highlighted.

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⁶ Only those that are new compared to those identified for the Oslo Conference are included.

- Public health risks (including hereditary risks) from radiation exposure should also be highlighted.
- Today, the risk from the use of nuclear weapons is growing globally because of proliferation, the vulnerability of nuclear control elements and the potential access to nuclear weapons by non-state actors (especially terrorist groups).
- The increased deployment of nuclear weapons at combat readiness levels increases the risk of accidental, inadvertent, unauthorised or intentional use.
- The damage that could result from the use of nuclear weapons, the negative impact of the mere possibility of a nuclear explosion and the vast resources allocated to the maintenance and modernisation of nuclear arsenals make the very existence of these weapons absurd, as well as contrary to human dignity.
- Awareness of the humanitarian impact of nuclear weapons is already changing perceptions in the nuclear weapons debate.
- The entry into force of the TPNW as a fundamental element of the nuclear disarmament and non-proliferation regime as a result of the 2015 NPT Review Conference, together with discussions regarding the humanitarian impact of nuclear weapons, are mutually reinforcing processes.
- The effective elimination of other types of weapons has been achieved only after they have been declared illegal, so this is the way to achieve a world free of nuclear weapons, consistent with the obligations of participants under international humanitarian law (hereinafter, IHL).
- Discussions on humanitarian impact should lead to the determination of states and civil society to arrive at new international standards and norms through a binding legal instrument.

The Vienna Conference

At the Vienna Conference (Austria, 2014), the issue of nuclear weapons was discussed from various legal perspectives, concluding that there is no general legal norm that universally prohibits the possession, transfer, manufacture or use of nuclear weapons. However, the experts stressed that new evidence accumulated in the last two years about the humanitarian consequences of nuclear weapons cast further doubt on the possibility that they could ever be used in accordance with international law, and more specifically international humanitarian law (hereafter IHL)⁷.

Of particular interest here is the fact that the Vienna Conference «*demonstrated that no State or international body could cope with the immediate humanitarian emergency*

⁷ See NPT/CONF. 2015/WP. 30 of 22 April 2015, para. 13.

*and long-term consequences caused by a nuclear detonation or provide adequate assistance to the victims*⁸», reinforcing the idea of the necessary elimination of nuclear weapons as the only possible guarantee against the humanitarian consequences of their use.

In any case, the growing participation in this type of international forum on the humanitarian impact of nuclear weapons should not go unmentioned, which reinforces the idea that there is a growing awareness of this issue in the international community as a whole.

The evolutionist thesis on Art. VI of the NPT

Under Article VI of the NPT, all States Parties to the NPT undertake to pursue negotiations for the cessation of the nuclear arms race and the adoption of a treaty on general and complete disarmament under strict and effective international control⁹.

It has been pointed out that progress on Article VI issues will give credibility to the Treaty and rectify the implementation imbalance between nuclear disarmament and nuclear non-proliferation. The «effective measures» required by Art. VI will also serve to provide the existing Treaty prohibitions with additional normative support¹⁰.

In the working paper presented in 2014 at the Preparatory Committee for the 2015 Review Conference, the New Agenda Coalition stressed that the NPT parties are long overdue to put into practice the multitude of commitments made to effectively implement Article VI of the NPT by taking practical steps to «*safeguard future generations from the catastrophic effects of a nuclear weapon detonation*».

The Coalition also made clear that, in its view, any of the options set out in the paper would serve to advance the implementation of Article VI, being compatible with the ultimate object and purpose of the Treaty and the development of effective nuclear disarmament measures being an obligation that would be incumbent on all States equally, not only on the nuclear-weapon States. There would in fact be no legal impediment to exploring these possibilities, even if the nuclear-weapon states chose not to engage. Thus, any of the options would have a positive policy impact, irrespective of the greater or lesser flexibility of the chosen instrument.

In the Coalition's view, the options should focus on two distinct legal approaches: the comprehensive convention/stand-alone ban treaty or the framework agreement of

8 *Idem*, para. II.

9 De Salazar, G. (2015). El Tratado de No proliferación de Armas Nucleares: los temas clave en la Conferencia de Examen en 2015. *UNISCI Discussion Papers* no. 38. Complutense University of Madrid. P. 156.

10 See NPT/CONF. 2015/WP. 9 of 9 March 2015.

mutually supportive instruments¹¹. Specifically, a distinction can be made between the following (a common feature of all of them being the need for verification and monitoring of irreversible disarmament associated with deadlines, either as an obligation or as a mere possibility)¹²:

- A comprehensive nuclear weapons convention, establishing general obligations, prohibitions and an effective basis for nuclear disarmament.
- A treaty banning nuclear weapons, setting out the essential prohibitions necessary to achieve and maintain a nuclear-weapon-free world. Such a treaty could also set out the practical arrangements required to carry out and monitor time-bound, irreversible and verifiable nuclear disarmament, although this would not be necessary.
- A framework agreement of mutually supportive instruments, with the same objective as outlined in the previous section. Such instruments would act together, within a legal framework to establish prohibitions, obligations and provisions essential to achieving nuclear disarmament.
- A hybrid or mixed arrangement, including elements of all or some of the above options, as well as any others deemed appropriate.

For its part and following the Preparatory Committee meeting in 2014, the UN General Assembly adopted resolution 69/37, in which it urged States Parties to the NPT to «at the 2015 Review Conference, consider options for the development of effective measures envisaged and required in accordance with Article VI of the Treaty»¹³.

In any case, it should not be lost sight of the fact that the very preamble of the TPNW recognises the NPT as the cornerstone of the disarmament and nuclear non-proliferation regime, with a vital role in the promotion of international peace and security through the development of Article VI of the NPT¹⁴.

The discussion between the various ways of achieving disarmament and elimination of nuclear weapons, and specifically the disquisition between «gradualism» and «abolitionism» (the latter advocated by Austria and Ireland) has also arisen within the European Union, which considers the NPT as the «cornerstone of the global nuclear non-proliferation system», the key to achieving nuclear disarmament in accordance with the oft-mentioned Article VI of the NPT. This is in keeping with the overriding objective of strengthening the nuclear non-proliferation system by promoting a bal-

¹¹ See NPT/CONF. 2015/WP. 30 (*Op. cit.*), para. 11.

¹² See NPT/CONF. 2015/PC. III/WP.1 8 of 2 April 2014, para. 29.

¹³ Resolution adopted by the General Assembly on 2 December 2014; 69/37: Towards a nuclear-weapon-free world: accelerating the implementation of nuclear disarmament commitments, para. 15.

¹⁴ Hernando Zamanillo, E. *Op. cit.*, p. 285.

anced outcome at the NPT Review Conference that will contribute to real progress towards the objectives enshrined in the NPT¹⁵.

Reasons for the adoption of the TPNW. The opinion of the International Court of Justice

This chapter will set out the essential reasons for the adoption of the TPNW, both those that have traditionally been argued (without going as far as possible into the different positions of the states, which will be dealt with later) and those drawn from the research carried out, and particularly from the ICJ's Advisory Opinion of 8 July 1996.

At the Nayarit and Vienna Conferences it was already made clear that, although it was understood that there was little likelihood of an actual detonation of nuclear weapons, the mere risk of such a detonation must be qualified as unacceptable, such that this risk is evident whether by accident, miscalculation or deliberate action, and that the only way to eradicate it is the complete elimination of these weapons¹⁶. This being the objective envisaged in the new TPNW, there is no doubt that if the Treaty were to be fully effective, it would contribute extremely effectively to the minimisation of nuclear risks.

Given that, as noted above, the effects of nuclear weapons detonations do not transcend national borders, and are therefore a global problem in terms of risk prevention, there is no doubt that any progress in disarmament towards the ultimate goal of eliminating nuclear weapons must be properly assessed and attributed an importance that is beyond doubt (assessments of its real effectiveness aside). So much so that the ICJ itself has stated that the prohibition of the use of weapons that cause indiscriminate effects, as in this case, constitutes a norm of *ius cogens*, such that «states must never attack civilians and, consequently, must never use weapons that cannot distinguish between civilian and military objectives¹⁷».

On the other hand, when analysing the possible reasons for the adoption of the TPNW, it is essential in the opinion of the undersigned to refer to the ICJ and, more specifically, to its Advisory Opinion of 8 July 1996 cited above, in which the Court essentially refers to the compatibility of the threat or use of nuclear weapons with the principles and rules of international law, on the basis of the fact that international law «does not specifically authorise the threat or use of nuclear weapons», but neither does

¹⁵ De Salazar, G. *Op. cit.*, p. 166.

¹⁶ See NPT/CONF. 2015/WP. 30 of 22 April 2015 (*Op. cit.*).

¹⁷ Doswald Beck, L. (1997). International humanitarian law and the Advisory Opinion of the International Court of Justice on the legality of the threat or use of nuclear weapons. *International Review of the Red Cross*, No. 22 (139), p. 40.

it «contain a total and universal prohibition of the threat or use of nuclear weapons as such»¹⁸.

First of all, analysing the legality or illegality of nuclear weapons as such (paragraphs 49-73), it considers that the use of these weapons cannot be considered as expressly prohibited on the basis of the provisions of the Second Hague Declaration (1907), the Regulations annexed to the Fourth Hague Convention (1907) or the Geneva Protocol (1925). In this way, and at the time of its issuance, it refers that the line of action to date has been the declaration of the illegality of certain weapons, considered weapons of mass destruction, by means of specific instruments, there being at that time no specific prohibition of the use of nuclear weapons in existing international treaties, nor in international custom (as there was in the case of bacteriological and chemical weapons)¹⁹. In the light of this opinion, I believe that an essential motivation for the adoption of the TPNW should be sought precisely in eliminating this problem raised by the ICJ, so that in the future the ICJ can rule on the «general» illegality of the threat or use of nuclear weapons.

Following this first conclusion, it then examines (paragraphs 74-87) the question of whether the use of nuclear weapons should be considered illegal under the principles and rules of IHL. The Court holds that, although nuclear weapons came into being after most of the principles and rules of IHL were already in force, it cannot be concluded from this fact that such rules and principles do not apply to these weapons, as this would be contrary to the universal vocation of IHL itself.

Particularly in relation to the principle of neutrality (paragraphs 88-97), there are various positions, ranging from those that maintain that the application of IHL does not imply a total prohibition of the use of nuclear weapons, to others that understand that the necessarily indiscriminate consequences of the use of such weapons can in no case be compatible with the principles and norms of IHL. According to this second theory, therefore, the TPNW would be not only a tool to serve the goal of achieving nuclear disarmament, but also a way of complying with the provisions of IHL in any case, in such a way that a general prohibition on the use of nuclear weapons would prevent possible future non-compliance with such provisions.

Moreover, suffice it to say that the Court recognises that the very characteristics of nuclear weapons seem hardly compatible with respect for the requirements of IHL, although it is forced to conclude that it cannot reach a definitive conclusion on the

18 Greenwood, C. (1997). *The Advisory Opinion on nuclear weapons and the contribution of the International Court to international humanitarian law*. *International Review of the Red Cross*, vol. 22, no. 139, p. 71.

19 On the failure to adopt an express resolution on the merits of this case and the concept of *non liquet* in international law: Aznar-Gómez, M.J. (1999). *The 1996 Nuclear Weapons Advisory Opinion and Non liquet International Law*. *International & Comparative Law Quarterly*. Pp. 13 to 17.

20 Matheson, M.J. (1997). *The Opinions of the International Court of Justice on the Threat or Use of Nuclear Weapons*. *American Journal of International Law*. P. 424.

legality of the use of nuclear weapons in «extreme» circumstances of self-defence, in which the very survival of the State invoking it is threatened²¹.

Is there an obligation for NPT member states to negotiate disarmament? And for non-members? The case of the Marshall Islands

In relation to the first of the questions posed and in the light of Article VI of the NPT, the answer seems clear to be yes, as the ICJ has already made clear in its Advisory Opinion analysed above, in which (paragraphs 98-103) it refers to this issue, recognising the long-term problem in international law in relation to the different opinions regarding the legal status of this type of weapons and recognising that the most appropriate means in this respect is complete nuclear disarmament. In such circumstances, the Court recognises the importance of this obligation to negotiate in good faith for nuclear disarmament, an obligation which is not one of mere conduct but precisely one of achieving a concrete result: nuclear disarmament. It can therefore be concluded in any case that the dual obligation to negotiate and conclude these negotiations applies to all NPT states parties.

But should these negotiations be channelled through the Treaty which is the main subject of this paper? In order to answer this second question, we will turn to the specific case of the Marshall Islands; to do so, we will first set out the background to the dispute in question, without which it would be difficult to understand it.

Between 1945 and 1992, the US conducted more than a thousand nuclear tests, most of which, after the first one in the New Mexico desert, moved to the Pacific, more specifically to the Marshall Islands. To this end, the population of these islands was forcibly displaced from 1946 onwards. Between June 1946 and August 1958, 67 nuclear tests were conducted in the Marshall Islands, both in the atmosphere and underwater, causing severe and long-lasting damage, including the physical disappearance of some islands²².

Following decolonisation through the *Compact of Free Association*, signed in 1982, the United States prevented the Marshall Islands from signing the South Pacific Nuclear Free Zone Treaty. Section 177 of the Agreement provided that the United States Government agreed to compensate Marshall Islands citizens for loss or damage to property and persons caused by the nuclear testing programme, with the Nuclear Claims Tribunal Act being established in 1987, and the Marshall Islands Government filing a petition for review of the Agreement on 11 September 2000. This request was based on a finding of injury and damage resulting from the US nuclear testing

²¹ Cervell Hortal, M.^aJ. (1999). El derecho internacional humanitario y las armas nucleares. *Anales de derecho: revista de la Facultad de Derecho*, p. 81.

²² Pigrau Solé, A. (2018). El caso de las islas Marshall: colonialismo, armas nucleares y justicia ambiental. *Anuario Español de Derecho Internacional* no. 44, pp. 444 to 455.

programme that could not reasonably have been detected, or could not have been determined, prior to the entry into force of the programme. An amended version of the FTA was adopted in 2003, which did not include any provisions on the subject, giving rise to a complaint in this regard. This was rejected by the US Congress, and a wide range of other lawsuits were brought against the US government.

In parallel to these claims supported by the Marshall Islands government, it is worth noting that the Marshall Islands changed its strategy in 2014, adopting two lines of action focused on the alleged violation of the NPT: one before the federal courts and the other before the ICJ, shifting the debate from an issue related to personal and environmental damage to another concerning the very existence of nuclear weapons, as well as the necessary respect for the NPT as a fundamental instrument of the nuclear weapons regime. Thus, on 24 April 2014, the Government of the Republic of the Marshall Islands simultaneously filed nine separate complaints with the ICJ registry against the nine nuclear-weapon States (China, North Korea, France, Israel, Russia, the United States, the United Kingdom, India and Pakistan) for non-compliance with their nuclear disarmament obligations under the NPT²³.

Considering the claims as a whole, it can be identified that the Marshall Islands generally considers that the States Parties to the NPT have breached their obligations under Article VI by actively refusing to negotiate in good faith for effective measures leading to cessation of these activities and nuclear disarmament and by ignoring UN General Assembly resolutions in this regard. The applicant state thus sought a ruling requiring these states to enter into multilateral negotiations within a specified period (one year from the date of delivery of the judgement), with a view to concluding an international treaty on general and complete disarmament under strict and effective international control. In the applicant's view, the obligations under Article VI are not only treaty-based but also customary in nature, so that they do not only apply to States Parties to the NPT but to any State that has pursued nuclear rearmament policies.

In the end, the lawsuit could only be brought against three of the nine states (the United Kingdom, India and Pakistan), precisely those that had previously accepted the ICJ's compulsory jurisdiction in accordance with Article 36.2 of the ICJ Statute. Even within these three respondent states, only the UK is a party to the NPT, so India and Pakistan's non-compliance could be based solely on an international norm of a customary nature, which gave the Court grounds to resolve the question posed at the beginning of this chapter: is there a general obligation to negotiate nuclear disarmament?²⁴

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23 Fernández Egea, R. (2016). Jurisprudencia ambiental internacional (segundo semestre 2016). *Revista Catalana de Dret Ambiental*, vol.VII, n.º 2, pp. 4 to 9.

24 It is up to the ICJ to determine whether or not we are dealing with a norm of *jus cogens*. In this sense, Abello-Galvis (2011). Introducción al estudio de las normas de *jus cogens* en el seno de la Comisión de Derecho Internacional. CDI, *Vniversitas*, no. 123, pp. 95-99.

However, in its judgement of 5 October 2016, the aforementioned ICJ considers that it cannot deal with the merits of the matter, due to the plea raised by the defendants based on the «*non-existence of a dispute between the parties*». It does not accept the Marshall Islands' allegation concerning its statements in various international fora calling on these states to intensify their efforts towards safe and effective disarmament. It thus considered that they could not be understood as an assertion that those States were in breach of international law, so that the defendants could not have been aware of the existence of a dispute between them and the Marshall Islands in respect of the issue at hand. Likewise, it did not consider as valid the allegation regarding the fact that the parties had conflicting opinions in their pleadings and defence, as it required that the dispute had previously existed. In any case, the decision was far from unanimous among the members of the Court, with a multitude of judges giving separate and dissenting opinions. Most of the judges who voted against the ruling (Bennouna, Cançado Trindade, Crawford, Robinson, Sebutinde, Yusuf and Judge *ad hoc* Bedjaoui) considered that the 'awareness' requirement (the need for the defendant to be aware of the existence of a clear opposition of views with the plaintiff for a dispute to exist) is too formalistic and subjective, excessively limiting the ICJ's knowledge of cases.

According to Judges Sebutinde and Yusuf, and Judge *ad hoc* Bedjaoui, the existence of a dispute between the parties could be affirmed in the case in dispute, with Judge Yusuf adding that such a dispute may be incipient and crystallise with the filing of the lawsuit. Despite the inadmissibility of the claim, nothing would prevent the Marshall Islands from bringing it again without it being inadmissible again due to the lack of a prior dispute, an issue that was appreciated by other judges such as Xue, Bhandari or Gaja, according to whom the ICJ should have inadmissible the claim on the basis of other objections raised by the defendants (such as the so-called Monetary Gold rule²⁵).

Turning to the opinions in favour of having admitted the claim and gone into the merits of the case, Judge Crawford considered that the Monetary Gold rule objection is intrinsically linked to the merits of the case, and therefore should not have been previously ruled on as an exception.

The dissenting opinion of Judge Cançado Trindade is particularly relevant for the purposes of this article. He states that the existence of an obligation to carry out negotiations in good faith in order to achieve nuclear disarmament can be affirmed, an obligation that would have a customary character as it exists both in practice and *opinio iuris* in the international community. He justifies this view by reviewing the International Conferences that have dealt with the humanitarian impact of nuclear weapons, the establishment of nuclear-weapon-free and protected zones and the numerous UN Assembly and Security Council resolutions, as well as the statements of the UN Secretary General that have referred to the obligation to pursue negotiations in good faith

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25 According to it, the ICJ could not rule on the merits given the absence of other nuclear states as defendants, while condemning only the UK, Pakistan or India would not solve the problem of nuclear disarmament.

to achieve nuclear disarmament. In the opinion, not only of Judge Cançado Trindade but also of Robinson, as the ICJ is the main judicial organ of the United Nations, it should have shown some sensitivity to this issue, contributing to its resolution, as it is one of the most important concerns of the international community²⁶.

Therefore, and trying to answer the questions posed in the title of this chapter, it can be concluded that the ICJ ruling in the Marshall Islands case has been a missed opportunity to resolve this issue in a more or less definitive way, as it is clear that NPT member states do have an international obligation to negotiate disarmament under the terms of Article VI, but that there is no clear opinion on this matter from non-member states.

Legal analysis of the provisions of the TPNW

This chapter will analyse the provisions which, in the author's view, are most interesting and innovative in relation to the previous Treaty.

Beginning with the Preamble to the TPNW, it starts with the recognition of the NPT as «*a cornerstone of the nuclear disarmament and non-proliferation regime, with a vital role in promoting international peace and security through the implementation of Article VI of the NPT itself*»²⁷. Therefore, and in accordance with the wording of this Preamble, great importance is attached to the NPT itself, referring also to the development of Article VI, which constitutes the primary objective of the new Treaty.

For its part, Article 1 of the TPNW adopts an absolute prohibition of conduct «*involving the derivative use of any nuclear device, including permitting the stationing, installation or deployment on the territory of a State Party*»²⁸.» The following conduct is prohibited under this article:

- To develop, test, produce, manufacture, otherwise acquire, possess or stockpile nuclear weapons or other nuclear explosive devices;
- To transfer or receive the transfer of nuclear weapons or other devices or direct or indirect control over them.
- To use or threaten to use nuclear weapons or other nuclear explosive devices.

²⁶ According to Article 1.1 of the San Francisco Charter, it is a purpose of the Organisation «To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace; and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to breaches of the peace».

²⁷ Hernando Zamanillo, E. *Op. cit.*, p. 285.

²⁸ Art. 1. g of the TPNW.

Article 2 adds the obligation to declare the existence of this type of weapon by the State that has them under its control or jurisdiction, imposing on the UN Secretary-General the obligation to transmit to the States Parties the declarations received in this regard.

In the field of disarmament, Article 4 of the TPNW provides for the establishment of an international authority whose main task would be to verify the elimination of nuclear weapons, with the parties undertaking to make them «*immediately inoperable*». This results in the creation of an authority in charge of verifying the process which, although it does not pose particular problems in relation to the ultimate aim of establishing an authority independent of the States through which to channel the verification process, it can and does pose problems on the practical side, especially in relation to the economic costs that could arise from the establishment of the verification systems.

As for domestic implementation by States Parties, Article 5 provides for the obligation of transposition into domestic law through the adoption of «appropriate legal, administrative and other measures, including the imposition of criminal penalties» for the purpose of preventing and suppressing activities prohibited by the CTBT carried out by persons or on territory under the jurisdiction or control of the State concerned. In the opinion of the undersigned, this last part could give rise to problems regarding the application of the different jurisdictions, as it expressly refers to both the personal and spatial criteria in the delimitation of jurisdiction, a problem that could have been solved by referring to the general criteria on jurisdiction.

Article 6 sets out a number of provisions in relation to victim assistance and environmental restoration, provisions that I believe are necessary, especially in light of cases such as the Marshall Islands case described above, and establishes the obligation of States Parties to provide appropriate assistance to persons under their jurisdiction affected by the use or testing of nuclear weapons, «in accordance with applicable IHL and human rights law», and goes on to state that such assistance shall take into account age and gender *without discrimination*. It is this last statement that is difficult to understand, in the sense that if such aid is to take gender and age into account, it will, in the opinion of the undersigned, necessarily discriminate on the basis of these criteria, so that without going into an assessment of the necessity or advisability of such discrimination, it is difficult to make compatible the first reference to these criteria in order to end up referring to non-discrimination.

Referring in arts. 10 and 11 to the system of amendments and dispute settlement between the parties respectively, Art. 12 reflects the intention to «universalise» the prohibition of nuclear weapons that is the primary objective of the TPNW, stating that «[e]ach State Party shall encourage States not parties to this Treaty to sign, ratify, accept, approve or accede to it, with the objective of achieving universal adherence to the Treaty by all States».

In the same vein, and given the universal and univocal vocation of the ultimate purpose of the Treaty, Article 16 expressly prohibits the making of reservations to its

articles, a prohibition which, although it seems intended to guarantee the application of its provisions in full, may be excessively ambitious in such a way that nuclear states may find this point difficult to reconcile with their national interests. However, Article 17 of the Treaty includes the possibility for the parties to withdraw from the Treaty due to extraordinary events, imposing the obligation to give twelve months' notice prior to its effectiveness and establishing that if after this period it is involved in an armed conflict, the provisions of the TPNW will apply to it until such time as it ceases to apply.

Therefore, in the light of the latter article, the threat or use of force in armed conflict by means of nuclear weapons would in practice be totally incompatible with the provisions of the TPNW, regardless of the exceptional circumstances in which the States Parties are involved.

Balance between utopia and reality

It will analyse the fundamental problems posed by the TPNW with regard to its ultimate goal of eliminating nuclear weapons, problems arising from a series of issues such as the current lack of adherence by the nuclear powers, the alleged verification of disarmament, the costs involved, etc.

Firstly, and due to its special practical impact, it is worth mentioning that Article 9 of the TPNW refers to the costs derived from the effective implementation of the Treaty, determining the obligation to cover these costs not only by the States Parties but also by those States that are not parties but participate in the meetings as observers, «*in accordance with the United Nations scale of assessment adjusted appropriately*». In particular, and with regard to costs related to verification through the measures required by Article 4 of the TPNW itself, as well as «*the destruction of nuclear weapons or other nuclear explosive devices and the elimination of nuclear weapons programmes, including the elimination or conversion of all nuclear weapons-related facilities, should be borne by the States Parties to which they are attributable*».

Having made the reference to the costs and continuing with the practical effectiveness of the Treaty, it is striking that the TPNW does not limit itself to establishing a general prohibition on the use of nuclear weapons for destructive purposes, but that Article 2 of the Treaty itself prohibits the possession or possession of this type of weapon, regardless of its subsequent use. This objective, no doubt well-intentioned, is currently difficult to reconcile with the defence pretensions of the nuclear powers, as well as with certain defence strategies of certain International Organisations, such as NATO. In principle and according to the organisation's official objectives, its member states are committed to supporting transparency and mutual trust in order to improve international stability. However, NATO's doctrine on nuclear weapons is a faithful reflection of the security and defence policy of the Western nuclear powers, and especially of the US nuclear deterrence strategy. It is based on the strategic privilege that these states benefit from in the NPT, which is based on nuclear weapons as one of the pillars of their security and defence policies, as well as using them to consolidate their

supremacy; that is why in the current and medium-term context it does not seem easy for the members of this organisation to sign up to the TPNW, as it would be incompatible with their strategy on peace and security²⁹.

In this regard, it is worth mentioning that NATO's strategic concept (Lisbon, 19 November 2010), ratified by the organisation at the Warsaw Summit of 8-9 July 2016, makes it clear that as long as nuclear weapons exist, NATO will be a nuclear-capable organisation.

In view of the foregoing, and although an analysis of the TPNW shows that it is an instrument for achieving the objective set out in the NPT itself, which already called for the adoption of a general and complete disarmament treaty in Article VI, it seems clear that before it enters into force it is already limited by the fact that the nuclear states have not taken part in it (nor does it appear that they will do so in the medium term), with the possible consequence of diverting attention from the non-proliferation and disarmament regime, called into question by the drafting of this new international treaty.

For the time being, it seems that the idea of achieving total disarmament in the medium term is illusory, which leaves a window open to explore new measures to prevent possible future humanitarian catastrophes, with the TPNW itself appealing even in this sense to the responsibility of States in the prohibition and definitive elimination of nuclear weapons, especially in relation to the humanitarian aspects and the prevention of the effective use of such nuclear weapons³⁰. Thus, as long as the TPNW does not enter into force, the most viable option would be to insist on the full implementation of the NPT, particularly Article VI, which would also be compatible with the subsequent entry into force of the TPNW.

Going further and beyond the idea of an absolute ban on nuclear weapons as the ultimate goal, it seems difficult even to achieve an effective reduction of nuclear weapons, given the lack of political consensus on this issue. This inevitably leads to the impossibility of reaching agreements in this regard. This opens the door to export control rather than disarmament agreements, and the prospects are dim despite the fact that at least «controlled proliferation» has been achieved, with «only» eight or nine nuclear powers.

Continuing with the analysis of the problems related to the effective implementation of the TPNW, it should be noted that there are measures in the NPT that could be useful in achieving the same objective, but which have not been developed due to the lack of commitment by states. Article VI of the NPT itself, by referring to the

29 Gouyez Ben Allal, A. (2014). La política nuclear de la OTAN: la amenaza de las armas nucleares tácticas para la seguridad internacional y el régimen de no proliferación nuclear. *Paix et sécurité internationales: Revue maroco-espagnole de Droit International et Relations Internationales* no. 2, pp. 65 to 80.

30 Hernando Zamanillo, E. *Op. cit.*, pp. 291 et seq.

obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament under international control, leaves the door open (as discussed in previous chapters) to different negotiating tracks. The ambiguity of this precept has given rise to interpretative problems that remain in force today, with the ICJ advocating the interpretation of non-nuclear countries, which argue that this obligation is imposed on nuclear states, which contravenes their interests in relation to the possession of this type of weapons for deterrence purposes.

It is true that the signing of the TPNW itself pursues the essential objective of giving effect to the oft-mentioned article VI of the NPT, although, as has already been pointed out, the fundamental problem is determined by the current ineffectiveness of the new Treaty in terms of achieving complete and definitive disarmament, caused by the reluctance of the nuclear powers.

In any case, there is no doubt that the new Treaty contributes, with all the necessary limitations, to the idea of delegitimising nuclear weapons as such, a delegitimation that must take into account the humanitarian dimension in the nuclear field, considering that the humanitarian impact of the possible use of nuclear weapons would entail *catastrophic humanitarian consequences*³¹ and *incalculable human suffering*, trying to achieve the definitive stigmatisation of this type of weapons.

Analysis of state arguments

This chapter will analyse the arguments put forward by states in relation to the possession and use of nuclear weapons, particularly with regard to the TPNW. This analysis is particularly relevant in view of the fact that, with regard to the possible determination of a customary rule, both the existence of a uniform practice at the international level and the fact that this practice is «*extensive and representative*»³² are essential.

First, and referring to the two great nuclear powers (the United States and the Russian Federation), to which approximately 90 percent of the existing powers belong, we find that the possession of nuclear weapons has served to compensate for the superiority in conventional weapons that the opposing side may have had at a given moment, especially in the context of the Cold War³³. While at that time it was the US that tried to compensate for its inferiority in the field of conventional weapons with respect to the USSR, today the situation is the reverse, with Russia relying on this type

³¹ In this sense, the Advisory Opinion of the International Court of Justice of 8 July 1996.

³² Henckaerts, J-M. (2007). Estudio sobre el derecho internacional humanitario consuetudinario. Una contribución a la comprensión y al respeto del derecho de los conflictos armados. *Anuario Mexicano de Derecho Internacional*, vol. 7, pp. 520 and 521.

³³ Ortíz-Cañavate Levenfeld, J. (2014). *El futuro de las armas nucleares tácticas de la OTAN*. Opinion paper: Spanish Institute for Strategic Studies, pp. 7 and 8.

of weapons to try to balance the situation through so-called tactical nuclear weapons (i.e. those deployed and capable of being used in an eventual conflict scenario).

It is precisely this attempt to maintain balance that is the reason why Russia today continues to give nuclear weapons a pre-eminent role in its military strategy, including considerations of their use in response to large-scale conventional attacks, as reflected in its 2010 military doctrine³⁴. Although it is true that it is limited to serious cases involving the use of nuclear weapons by the enemy or conventional weapons when there is a threat to the very existence of the state, the express reference to the use of this type of weapon is striking. The latest reforms of the Russian army show that the Russian government does not consider nuclear deterrence alone to be sufficient, maintaining the aforementioned exceptions that would allow the use of nuclear weapons in certain circumstances and in accordance with the military doctrine in force in that country³⁵.

As far as the United States is concerned, the US has constantly reaffirmed the importance of «*the fundamental role of nuclear weapons (...) in deterring a nuclear attack on the United States, its allies and partners*», while the United Kingdom has also confirmed the role of nuclear weapons as «*the ultimate guarantee of the nation's survival*³⁶».

Nevertheless, the US understands that it does not need to rely on such weapons today as much as it did in the past, without prejudice to continuing to convey the message of «assured destruction» through technological superiority in the conventional arena, which can replace, at least in part, the nuclear deterrent of the past. Thus, the US has initiated a major reduction of nuclear weapons, declaring in its 2010 Nuclear Posture Review that it «*will not use or threaten to use nuclear weapons against those non-nuclear weapon states that are parties to the Nuclear Non-Proliferation Treaty (NPT) and that comply with their non-proliferation obligations*». However, it cannot be overlooked that this statement of commitment is limited, referring only to non-nuclear states that are party to the NPT and in compliance with their non-proliferation obligations.

Having set out the positions of the two main nuclear powers, we will now analyse some positions of other States, essentially on the basis of the various International Conferences that have been held on this issue and which have already been described in previous chapters, as they can be useful in establishing the positions of the different States from a historical point of view.

At the Vienna Conference in 2014, which was based on the unacceptability of the harm that the use of nuclear weapons would cause to the victims, essentially referring

³⁴ According to it, the Russian Federation reserves the right to use nuclear weapons in response to the use of nuclear weapons and other weapons of mass destruction against it and (or) its allies, and also in the case of aggression against its nation involving the use of conventional weapons when the very existence of the state is under threat.

³⁵ Barcelona Centre for International Affairs. La política de defensa de la Federación Rusa. P. 509.

³⁶ Gouyez Ben Allal, A. *Op. cit.*, p. 67.

to moral and ethical aspects and concluding that the only possible solution would be the total elimination of this type of weaponry, it is worth highlighting the intervention of New Zealand, which strongly called for this prohibition, referring especially to the possible humanitarian consequences in connection with the Advisory Opinion of the International Court of Justice in 1996.

Similarly, Australia, through its representative, made special reference to the humanitarian aspect, expressing the desire for concrete efforts to achieve the effective implementation of Article VI of the NPT, fundamentally through effective arms control and transparency in management. Thus, the TPNW is the culmination (even if only for theoretical purposes) of this process concerning the humanitarian impact of nuclear weapons.

Having devoted part of this analysis to the positions of the major nuclear powers, as well as the most relevant positions in the humanitarian sphere on the part of the, shall we say, states in favour of the prohibition of nuclear weapons, mention must be made of another series of states that pose serious difficulties for the effective implementation of the new Treaty. Such would be the case of Israel, India and Pakistan, countries that have never in fact been members of the NPT, so their access to such weapons could not even be considered non-compliance³⁷.

More controversial is the case of North Korea, which conducted its first nuclear test only three years after announcing its exit from the NPT in 2003, with states parties maintaining different positions on the country's current status in relation to the NPT. In any case, we should not forget that, apart from this controversial case, the new nuclear powers (India, Pakistan, North Korea and Israel) are not even party to the NPT.

Conclusions

There is no doubt of the importance of the subject of this paper, since not only the absolute prohibition of nuclear weapons but also the reduction of the existing arsenal itself, as well as the imposition of restrictions on their possession, manufacture, stockpiling, use, etc., has given rise to intense debate within the international community, a debate which, moreover, is not likely to reach a positive conclusion from a practical point of view and with a view to the aforementioned prohibition. This is despite the fact that, in order to encourage this debate and the adoption of common points of view, a multitude of initiatives have been taken (for example, the three major conferences mentioned above) which, although they have produced positive results, have not achieved their primary objective of prohibition, and the problem has been carried over to the present day.

37 Martín Corrales, C. (2017). *Tratado sobre la prohibición de las armas nucleares: Progress towards nuclear disarmament?* Opinion Paper: Spanish Institute for Strategic Studies. Pp. 6 and 7.

This inability to resolve the problem is not surprising if we take into account the historical background to the issue, which, together with the different security and defence strategies and particularly with regard to the role of nuclear weapons in these areas, offer multiple visions and interests that make it difficult to reach concrete agreements.

In any case, there is no doubt that the issue of the possible use of nuclear weapons in relation to international humanitarian law is of particular importance in this case. This is evidenced by the International Court of Justice itself stating, for example, that *«humanitarian law in particular is imperative that it take into account the unique characteristics of nuclear weapons, and in particular their destructive capacity, their capacity to cause untold human suffering and their capacity to harm future generations³⁸»*.

With regards to the problems of the new Treaty and in comparison with the NPT, which is one of the most successful treaties concerning nuclear weapons (rarely have such a large number of states been willing to voluntarily renounce their use for military purposes through an international instrument), we find that the main problem with regard to the effectiveness of the TPNW and the achievement of the ultimate goal of prohibition of nuclear weapons lies precisely in the lack of ratification, especially by the nuclear powers³⁹. Thus, while the NPT (thanks, in my opinion, to its ambiguity on certain points) achieved a broad consensus in the international community that facilitated the accession of the vast majority of its member states, the TPNW, which is more ambitious in its objectives, has not yet shown any signs of becoming the great instrument for facilitating the prohibition that it should have been.

In this connection, the question arises: Are the TPNW and the NPT compatible? The answer to this question is not easy, since the TPNW has a clearly different normative basis than the NPT, with a rationale that could be described as humanitarian⁴⁰. The new Treaty thus has a different objective, namely to achieve a definitive ban on this type of weapon. This different normative basis of the new Treaty, however, is based on that of the NPT, within the framework of the nuclear non-proliferation regime, which has revealed certain contradictions, such as the following:

First, it turns out that the very preamble of the TPNW reaffirms the applicability of the NPT as a cornerstone of guaranteeing the maintenance of international peace and security. In this regard, Art. 18 determines that the TPNW itself shall apply without prejudice to obligations previously entered into by States Parties, provided that such obligations are compatible with the text of the new Treaty. Therefore, as a first approximation, it could be concluded that the TPNW Treaty should not prevent compliance with the obligations set out in the NPT. However, by establishing the necessary compatibility for

38 Advisory Opinion of 8 July 1996.

39 Garrido Rebolledo, V. (2005). La conferencia de revisión del TNP: entre el desarme y la no proliferación. Real Instituto Elcano de Estudios Internacionales y Estratégicos. P. 3.

40 Herrera Almela, M.F. (2018). *El tratado sobre la prohibición de las armas nucleares: ¿es realmente necesario?* Opinion Paper: Spanish Institute for Strategic Studies. Pp. 8 and 9.

their application, a fundamental requirement of compatibility of the international obligation to be applied with those assumed under the new Treaty is introduced.

In the same vein, and in relation to the compatibility or incompatibility of the obligations established in both treaties, it should be noted that the TPNW does not recognise one of the fundamental pillars on which the NPT is based, namely the existence of two categories of states: nuclear-weapon states and non-nuclear-weapon states. Similarly, the TPNW prohibits states from allowing «*any stationing, installation or deployment*» of nuclear weapons on their territory, a prohibition that is not explicitly included in the NPT, as well as prohibiting nuclear testing despite the fact that the Comprehensive Nuclear-Test-Ban Treaty (CTBT) has not yet entered into force. It can therefore be concluded that the compatibility of the Treaties in question is, at the very least, open to question.

In spite of all this, I believe that it would not be fair to assess the TPNW in an absolutely negative way; although some authors have considered that «it is nothing more than a high-risk gamble that jeopardises the delicate balance of non-proliferation⁴¹», restricting this analysis only to the effective contribution to disarmament and prohibition in a purely practical and short-term sense, it should be stressed that the very approval of a Treaty whose ultimate aim is to achieve this prohibition, emphasising the very serious problems that could arise from a possible nuclear incident, particularly in humanitarian terms, could favour the delegitimisation of nuclear weapons in itself, giving rise to a broadening of the terms of international discussion in this regard that could in the future contribute to the effective prohibition of this type of weapons.

In any case, there is no doubt that non-proliferation, as well as disarmament and nuclear arms control, will continue to be at the top of the political and diplomatic agenda, particularly in the doctrinal discussion on International Humanitarian Law, given the problems posed by the existence of a vast amount of nuclear material, spread throughout the world, with a destructive power 150,000 times greater than the bomb dropped on Hiroshima. Nuclear disarmament thus continues to be a priority for humanity⁴², especially if we take into account the indiscriminate consequences that would necessarily result from its use (which could hardly be compatible with the principles of IHL), as the ICJ made clear in its Advisory Opinion of 8 July 1996.

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