

## **TOWARDS FULFILLMENT OF FUNDAMENTAL RULES OF HUMANITARIAN LAW IN THE CONTEXT OF THE NUCLEAR NON-PROLIFERATION TREATY**

SAEED BAGHERI,

Akdeniz University  
(Antalya, Turkey)

DOI:10.21684/2412-2343-2016-3-1-66-89

*The Non-Proliferation Treaty (NPT) is an international treaty that should be implemented during both peace and wartime. However, the obligations included in the treaty are dependent upon states' attitudes regarding other issues. Non-use of nuclear weapons is directly related to negotiations done for the purpose of non-proliferation of nuclear weapons, non-production or accumulation by other means and disarmament. In our day, prevention of the proliferation of nuclear weapons has been one of the issues of international law.*

*The present study is of crucial significance due to its endeavor to clarify the general principles of Humanitarian Law in a relationship to the threat of nuclear weapons' up to now, a special norm; significantly limiting or completely prohibiting the use of nuclear weapons, has not been accepted in international law. However, customary international humanitarian law regarding the use of nuclear weapons holds great value because of its purpose in eliminating nuclear weapons as a means of war through ascertaining their non-use and also appeasing the importance of nuclear ascendancy. In this respect, the NPT regime and its relationship with international humanitarian law will be discussed. Firstly, the NPT background, formation, main objectives and principles will be analyzed. In order to evaluate the relationship between the NPT and humanitarian law, the humanitarian obligations in general, humanitarian obligations in the context of the NPT and fulfillment of these obligations under the NPT should be studied. One of the main parts of the study is nuclear disarmament obligation included in the NPT. In this section, nuclear disarmament obligation in the context of the NPT and the legal framework of possible, general and comprehensive disarmament will be examined.*

**Keywords:** nuclear weapons; non-proliferation treaty; NPT; nuclear disarmament; international law; international humanitarian law.

**Recommended citation:** Saeed Bagheri, *Towards Fulfillment of Fundamental Rules of Humanitarian Law in the Context of the Nuclear Non-Proliferation Treaty*, 3(1) BRICS Law Journal 66–89 (2016).

## Table of Contents

- 1. Introduction**
- 2. NPT and Humanitarian Law**
  - 2.1. Formation of NPT, Its Main Objectives and Principles**
  - 2.2. A General Overview of Humanitarian Obligations**
  - 2.3. Humanitarian Obligations in the Context of the NPT**
  - 2.4. Fulfillment of Humanitarian Obligations under the NPT**
- 3. Nuclear Disarmament**
  - 3.1. Nuclear Disarmament Obligation in the Context of the NPT**
  - 3.2. The Legal Framework of Possible, General and Comprehensive Disarmament**
- 4. Conclusion**

## 1. Introduction

A specific norm that substantially restricts the use of nuclear weapons or eliminates completely these weapons has not been accepted in international law so far. However, the principles and fundamental rules of international humanitarian law applicable to nuclear weapons are also rules of customary international law. These rules are very significant in terms of reducing the importance of nuclear superiority by removing the function of these weapons as a 'means of warfare' resulting in the non-use of nuclear weapons. Actually, the concerns about humanitarian consequences of nuclear weapons have been highlighted in the Treaty on the Non-Proliferation of Nuclear Weapons (NPT).<sup>1</sup> In accordance with the NPT's preamble '*the parties to the Treaty [considers] the devastation that would be visited upon all mankind by a nuclear war and the consequent need to make every effort to avert the danger of such a war and to take measures to safeguard the security of peoples.*'

Taking into account, the destructive impacts of nuclear weapons on human beings after the devastation of Hiroshima and Nagasaki in 1945, the humanitarian impacts of nuclear weapons have been the subject of much discussion recently. Use of nuclear weapons at any time and under any circumstances, as well as a permanent drain on human and natural resources constituted by nuclear arsenals, will lead to humanitarian disaster.

---

<sup>1</sup> *Treaty on the Non-Proliferation of Nuclear Weapons (NPT)*, New York, June 12, 1968.

The obligations of disarmament and the elimination of nuclear weapons have been included in Article VI of the NPT. Unfortunately, the fulfillment of these obligations has not practically been realized. The obligation of nuclear disarmament is an accepted norm by all states that has been concluded in the United Nations General Assembly's first resolution adopted on 24 January 1946.<sup>2</sup> The resolution has elaborated on the goal of eliminating nuclear (atomic) weapons and all other major weapons 'adaptable to mass destruction'.<sup>3</sup> Accordingly, it can be said that the nuclear disarmament for international peace and security has long-since become an obligation under international law. Nuclear disarmament is one of the most important three pillars – disarmament, non-proliferation and peaceful use – of the NPT which was signed on July 1, 1968, and entered enforcement in 1970.

The main objective of the study is evaluating the implementation in good faith of the disarmament obligation by the states as a key element of the non-proliferation regime and the relationship between nuclear weapons and fundamental rules of humanitarian law applicable to weapons of mass destruction, especially nuclear weapons. For this purpose, Advisory Opinion of the International Court of Justice (ICJ) on the Legality of the Threat or Use of Nuclear Weapons (1996) will form the basis of the present study. In the light of what was mentioned above, the NPT, which is the basis of the existing global non-proliferation regime, has been given particular weight in this study.

## **2. NPT and Humanitarian Law**

### ***2.1. Formation of NPT, Its Main Objectives and Principles***

The United States, as the first country to produce nuclear weapons, first used them in Hiroshima and Nagasaki of Japan. However, when the United States came face to face with the effects of this technology, it asked for prevention of nuclear weapons' proliferation and in this accordance, it refused to share its nuclear information with other states and kept it secret. In 1949, after the Soviet Union (USSR) attained the capacity to develop nuclear weapons, the United States (the US) shared its technological developments regarding nuclear weapons, for the first time, with its ally; England. After the United States' decision to share its nuclear information, a nuclear proliferation race began. Thereafter, testing process of the nuclear weapons began. As a result, following the United States, SSCB, England and France realized their first nuclear tests. During the early 1960s, in a study done by order of the US president, John F. Kennedy, in the coming 20 years, which would be up to the 1980s,

<sup>2</sup> United Nations General Assembly, Establishment of a Commission to Deal with the Problems Raised by the Discovery of Atomic Energy, A/RES/1(I), 1st Session (Seventeenth Plenary Meeting), Jan. 24, 1946, available at <[http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/RES/1\(I\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/1(I))> (accessed Dec. 10, 2015).

<sup>3</sup> *Id.*, ¶. 5 (c).

almost 40 states were expected to be able to produce nuclear weapons.<sup>4</sup> This issue caused a lot of concern especially for the US and USSR. Moreover, a consensus had not been achieved between the two states concerning non-proliferation of nuclear weapons. This had been the case until 1964 when the People's Republic of China performed its first nuclear weapons' test. However, since this date the US and USSR have come to be on the same side. Having begun with Ireland's attempts under UN nuclear disarmament and because of ongoing negotiations, the *Nuclear Non-Proliferation Treaty (NPT)* was opened for signature on July 1, 1968. Proposed by Ireland, it has been signed by a majority of sovereign states. The NPT, whose main purpose is to prevent the proliferation of nuclear weapons, developed through the softening of the Cold War. Except for the United Nations Security Council's five permanent members, all the states who have signed the NPT are forbidden to accumulate nuclear weapons (Article II). By signing this Treaty, nuclear powers have accepted to give technical support to those states, which seek peaceful nuclear technology, to negotiate for nuclear disarmament, to decrease the number of nuclear weapons and finally complete disarmament.

The non-nuclear-weapon states who intend to accumulate nuclear energy are obliged to allow *The International Atomic Energy Agency (IAEA)*<sup>5</sup> to control nuclear plants in order to make sure of preventing the conversion of nuclear materials into weapons (Article III). States possessing nuclear weapons stipulate not to transfer nuclear weapons to non-nuclear-weapon states and non-nuclear-weapon states stipulate not to accept nuclear weapons if offered by armed states (Article II and III).

Preventing the proliferation of nuclear weapons, disarmament and the peaceful use of nuclear energy constitute the three main objectives of the NPT.

The NPT has accepted the advantages of nuclear technology used for peaceful purposes but has not clarified if the same technology can be used in making nuclear weapons. In this regard, the '*Nuclear-Weapon States*' and '*Non-Nuclear-Weapon States*' have been differentiated in the NPT. In the Treaty, nuclear-weapon states have been identified as states, which have tested one nuclear weapon before January 1st, 1967. At the time that the NPT was signed the five permanent United Nations Security Council members: the US, USSR, Britain, France and China, were the five official

<sup>4</sup> President Dwight D. Eisenhower's Atoms for Peace program helped some 40 countries develop nuclear power and research programs, while receiving pledges from all that such materials and technologies would not be diverted to weaponry uses. See Sarah J. Diehl & James C. Moltz, *Nuclear Weapons and Non-proliferation: A Reference Handbook* 14–16, 61 (2d ed., Santa Barbara 2008).

<sup>5</sup> On 8 December 1953, at the United Nations General Assembly, the President of the United States of America, Dwight D. Eisenhower, proposed the creation of an organization to promote the peaceful use of nuclear energy and to seek to ensure that nuclear energy would not serve any military purpose. Eisenhower's proposals led to the creation of the IAEA and helped to shape international cooperation in the civilian use of nuclear energy up to 1978, when a far reaching change in American nuclear law signalled the end of Eisenhower's programme of 'Atoms for Peace'. For detailed information, see David Fischer, *History of the International Atomic Energy Agency: The First Forty Years* 29–58 (Vienna 1997).

nuclear-weapon states. India and Pakistan were known to have nuclear weapons and Israel's nuclear weapons were deemed to hold a strong suspicion. However, none of these countries have signed the NPT. Before the emergence of the Treaty, the states, which have exploded a nuclear device, would not give up this capability by developing a controlled nuclear chain reaction. In Article VI of the NPT, despite the statement that '*Each of the Parties to the Treaty undertakes 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 ...*,' these states have not allowed a provision that would bind them. Some states, particularly India, have described this differentiation inherent in the NPT as discrimination and clearly announced that it would not be party to the Treaty and conducted its first nuclear weapons tests in 1974. Pakistan also announced that it would not be a party to the NPT and carried out its first nuclear test in 1998. These states are not party to the NPT thus do not have the status of '*nuclear-weapon states*' but rather are called '*de facto nuclear-weapon states*' or '*states which are going to get nuclear weapons*.'<sup>6</sup>

## **2.2. A General Overview of Humanitarian Obligations**

Humanitarian law obligations have been the subject of debate in the 2010 NPT Review Conference. Therefore, in order to understand and evaluate priorities in terms of issues, we will need to look briefly at the 2010 NPT Review Conference.

In actual facet, the NPT Review Conferences are operations that have been carried out for evaluation of the successes obtained in accordance with the objectives of the NPT and in cooperation with a process for achieving these goals. This process would succeed only if state parties act in accordance with the principle of 'good faith'<sup>7</sup> in order to achieve common goals.

The good faith principle would be realized only by implementation of activities that states have decided together. One of the key points of good faith principle was codified at the 1969 Vienna Convention on the Law of Treaties. According to Article 26 of the Vienna Convention, '*Every treaty in force is binding upon the parties to it and must be performed by them in good faith.*'

Discussing humanitarian obligations of states in the Final Document of the 2010 NPT Review Conference is very important in terms of nuclear weapons. The conference had serious concerns regarding the humanitarian consequences of possible uses of nuclear weapons. In this regard, the Conference has stated: '*The*

<sup>6</sup> See generally 'De Facto Nuclear Weapons States and the NPT Regime' (2013).

<sup>7</sup> The principle of 'good faith' is one of the fundamental principles of international law, which governs the formation, and the fulfillment of state obligations. According to Mohammed Bedjaoui, former president of the ICJ, '*It (the principle of good faith) is the guarantor of international stability, because it allows state A to foresee the behavior of its partner, state B, and thus makes it possible for the former to align its behavior with that of the latter.*' See Mohammed Bedjaoui, *Good Faith, International Law, and Elimination of Nuclear Weapons: Keynote Address*, available at <<http://lcn.org/disarmament/2008May01eventBedjaoui.pdf>> (accessed 15 Jan. 15, 2016).

*Conference expresses its deep concern at the continued risk for humanity represented by the possibility that these weapons could be used and the catastrophic humanitarian consequences that would result from the use of nuclear weapons.*<sup>8</sup> Firstly, France requested the removal of this provision and the United Kingdom has declared that it has suspicions on this issue. Furthermore, France has remained silent about the implementation of humanitarian law on nuclear weapons with regarding evidence which was presented to the ICJ in 1995. Even so, France has stated that there is not definitive ban on this issue and finally, the use of nuclear weapons is permitted during the implementation of the right to individual or collective self-defense.<sup>9</sup>

However, according to the 2010 NPT Review Conference, *'The Conference expresses its deep concern at the catastrophic humanitarian consequences of any use of nuclear weapons and reaffirms the need for all states at all times to comply with applicable international law, including international humanitarian law.'*<sup>10</sup> Actually, in accordance with this provision, the Conference has referred to 'the applicable international law'. But, the modification the term 'all times', has led to some concerns. In fact, referring to the 'applicable international law' is a sad situation. In this case, the emergence of the controversies on self-defense, reprisal and 'absence of applying humanitarian law in peacetime' would undermine the theory that 'the use of nuclear weapons is contrary to humanitarian law.' However, international humanitarian law is not the basis for the legality of nuclear deterrence policies. Even so, the ICJ has emphasized that international humanitarian law is applicable to the deterrence policy.<sup>11</sup> Undoubtedly, prohibition of the threat or use of force in Article 2(4) of United Nations Charter is applicable during wartime and peacetime. Referring to the humanitarian disasters in the wake of the use of nuclear weapons is directly connected to 'comply[ing] with the applicable international law at all times.' More importantly, the states' obligation to comply with the applicable international law at all times is as much important as their obligations to comply with international

<sup>8</sup> 2010 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons: Final Document, Vol. I Part I Review of the Operation of the Treaty, as provided for in its Article VIII (3), taking into account the decisions and the resolution adopted by the 1995 Review and Extension Conference and the Final Document of the 2000 Review Conference, NPT/CONF.2010/50 (Vol. I), May 28, 2010, 12, ¶ 80, available at <[http://www.un.org/ga/search/view\\_doc.asp?symbol=NPT/CONF.2010/50%20\(VOL.I\)](http://www.un.org/ga/search/view_doc.asp?symbol=NPT/CONF.2010/50%20(VOL.I))> (accessed Jan. 15, 2016).

<sup>9</sup> President Bedjaoui presiding in the case in Legality of the Use by a State of Nuclear Weapons in Armed Conflict (Request for Advisory Opinion Submitted by the World Health Organization) and in Legality of the Threat or Use of Nuclear Weapons (Request for Advisory Opinion Submitted by the General Assembly of the United Nations), Verbatim Record, Nov. 1, 1995, 66, available at <<http://www.icj-cij.org/docket/files/95/5943.pdf>> (accessed Jan. 15, 2016).

<sup>10</sup> 2010 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons: Final Document, Vol. I Part I Review of the Operation of the Treaty 19.

<sup>11</sup> Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons, ICJ Reports (1996), ¶ 67, available at <<http://www.icj-cij.org/docket/files/95/7495.pdf>> (accessed Jan. 16, 2016).

humanitarian law. Therefore, France's self-defense policy – the language used to describe French nuclear policy is similar in many ways to that of Britain, with the stated aim being to deter a potential aggressor who might threatens the country's 'vital interests'<sup>12</sup> – is contrary to Article 2(4) of the United Nations Charter.<sup>13</sup>

In light of the foregoing, the provision on humanitarian law that has been adopted within the framework of the 2010 NPT Review Conference enhances the prohibition of the use of nuclear weapons norm. Indeed, since the US used nuclear bombs on Hiroshima and Nagasaki, the aforementioned provision having merged with the obligation to non-use of nuclear weapons, strengthens the unconditional non-use customary international law rule. In this context, the US Nuclear Posture Review Report (2010) is remarkable. According to the Report, *'it is in the US interest and that of all other nations that the nearly 65-year record of nuclear non-use be extended forever.'*<sup>14</sup> After a while, President Obama and Indian Prime Minister Singh stated that they would support the strengthening of non-use of nuclear weapon rule for a period of 65 years. This statement has further strengthened the statement of the US Nuclear Posture Review Report.<sup>15</sup>

In this regard, the declaration that former judges of the ICJ and experts of international law and diplomacy signed in 2011 is also quite important. The Declaration referring to the 1996 ICJ Advisory Opinion has spoken of 'the nascent opinio juris' of 'a customary rule specifically prohibiting the use of nuclear weapons.'<sup>16</sup>

### **2.3. Humanitarian Obligations in the Context of the NPT**

In order to evaluate the humanitarian obligations in the context of the NPT, we should examine the Final Document of the 2010 NPT Review Conference.

In the Final Document of the 2010 NPT Review Conference, which was held in New York, the Conference reaffirmed *"the catastrophic humanitarian consequences of any use of nuclear weapons and need for all states to comply with international humanitarian law."* This provision has been considered under the 'Nuclear Disarmament/Principles and Objectives' section that has taken place in Part I of the Final Document with

---

<sup>12</sup> Chirac Reasserts French Nuclear Weapons Policy, 82 Disarmament Diplomacy (2006).

<sup>13</sup> *Id.*, ¶ 48.

<sup>14</sup> *Nuclear Posture Review Report*, United States Department of Defence ix (2010), available at <[http://www.defense.gov/Portals/1/features/defenseReviews/NPR/2010\\_Nuclear\\_Posture\\_Review\\_Report.pdf](http://www.defense.gov/Portals/1/features/defenseReviews/NPR/2010_Nuclear_Posture_Review_Report.pdf)> (accessed 16 January 2016).

<sup>15</sup> *Joint Statement by President Obama and Prime Minister Singh of India* (2010), available at <<https://www.whitehouse.gov/the-press-office/2010/11/08/joint-statement-president-obama-and-prime-minister-singh-india>> (accessed Jan. 16, 2016).

<sup>16</sup> *Vancouver Declaration: Law's Imperative for the Urgent Achievement of A Nuclear-Weapon-Free World*, Vancouver: The Simons Foundation and the International Association of Lawyers against Nuclear Arms (IALANA), 10–11 February (2011), available at <[http://www.cpdnp.jp/pdf/Vancouver\\_Declaration.pdf](http://www.cpdnp.jp/pdf/Vancouver_Declaration.pdf)> (accessed Jan. 16, 2016).



‘Conclusions and Recommendations for Follow-on Actions’ headline. According to the Final Document, the following statements have been put forward as conclusions and recommendations for follow-on actions:

*‘In pursuit of the full, effective and urgent implementation of Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons and paragraphs 3 and 4 (c) of the 1995 decision entitled ‘Principles and objectives for nuclear non-proliferation and disarmament,’<sup>17</sup> and building upon the practical steps agreed to in the Final Document of the 2000 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, the Conference agrees on the following action plan on nuclear disarmament which includes concrete steps for the total elimination of nuclear weapons.’<sup>18</sup>*

The obligation to abide by humanitarian law ensures the realization of the initial provisions of the NPT; because the obligation to follow the fundamental rules of international humanitarian law – for example, unnecessary suffering, principle of neutrality and rule of proportionality<sup>19</sup> – and implementation of these rules may prevent the use of nuclear weapons. *‘The states concluding this Treaty, hereinafter referred to as the Parties to the Treaty, considering the devastation that would be visited upon all mankind by a nuclear war and the consequent need to make every effort to avert the danger of such a war and to take measures to safeguard the security of peoples and believing that the proliferation of nuclear weapons would seriously enhance the danger of nuclear war’<sup>20</sup>* thus have agreed upon the provisions of the Treaty.

Acceptance of the legal requirements and obligations related to the non-use of nuclear weapons – thereby strengthening the illegitimacy of nuclear weapons – could provide for the creation of secure conditions for nuclear disarmament and disarmament negotiations. To this end, the provisions relating to nuclear disarmament have been provide in the preamble of the NPT and Article VI of the Treaty. Disarmament provision is understandable from the obligation undertaken by countries in the context of the 2000 NPT Review Conference. In accordance with this obligation, *‘A diminishing role for nuclear weapons in security policies to minimize the risk that these weapons will ever be used and to facilitate the process of their total elimination.’<sup>21</sup>*

<sup>17</sup> NPT/CONF.1995/32/DEC.2, New York, 17 April – 12 May (1995).

<sup>18</sup> 2010 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons: Final Document, Vol. I Part I Review of the Operation of the Treaty 19.

<sup>19</sup> For more information, see Saeed Bagheri, *Uluslararası İnsancıl Hukuk ve Nükleer Silahlar* 33–38 (Ankara 2015).

<sup>20</sup> Treaty on the Non-Proliferation of Nuclear Weapons (NPT), ‘preamble’, available at <<http://www.un.org/disarmament/WMD/Nuclear/NPTtext.shtml>> (accessed Jan. 22, January 2016).

<sup>21</sup> 2000 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons: Final Document, Vol. I Part I Review of the Operation of the Treaty, Taking into Account the Decisions and the Resolution adopted by the 1995 Review, NPT/CONF.2000/28, Vol. 1, Part I, 2000, 15. See also Jonathan Granoff, *The Nuclear Nonproliferation Treaty and its 2005 Review Conference: A Legal and Political Analysis*, 39(4) New York U. Int'l L. and Pol., 995–1006 (2007).



The humanitarian obligation that has been mentioned above and other obligations in the context of the NPT have been confirmed in the Final Document of the 2000 NPT Review Conference.<sup>22</sup> The Conference has agreed on the action plan for nuclear disarmament which includes concrete steps for the total elimination of nuclear weapons. According to Action point 5, *“The nuclear-weapon states commit to accelerate concrete progress on the steps leading to nuclear disarmament, contained in the Final Document of the 2000 Review Conference, in a way that promotes international stability, peace and undiminished and increased security”*.<sup>23</sup> Actually, the relationship between nuclear disarmament and non-use of nuclear weapons should be sought in the context of the NPT.

The NPT was opened for signature on 1 July 1968. Meanwhile, the US and USSR stated that *‘further effective measure relating to the cessation of the nuclear arms race at an early date and to nuclear disarmament’*<sup>24</sup> should be taken. *‘Under this heading members may wish to discuss measures dealing with the cessation of testing, the non-use of nuclear weapons, the cessation of production of fissionable materials for weapons use, the cessation of the manufacture of weapons and reduction and subsequent elimination of nuclear stockpiles, nuclear-free zones, etc.’*<sup>25</sup>

Nuclear disarmament and humanitarian obligations included in Action point 5 are not binding. Actually, this Action Plan is the result of a treaty which has been signed by states participating in an international conference. Nevertheless, according to the required procedure ‘signing’ and ‘ratification’ are not required. In accordance with Article 11 of the 1969 Vienna Convention on the Law of Treaties, *‘The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.’*<sup>26</sup> However, according to ‘Decision 2’ which 1995 the NPT Review Conference adopted on 11 May 1995 – *Principles and Objectives for Nuclear Non-Proliferation and Disarmament*<sup>27</sup> – the Action Plan is an agreement that has been signed in order to extend the legitimacy of the Non-Proliferation Treaty. This is the reflection of a common understanding of parties on the appropriate tools for the implementation of Article VI

<sup>22</sup> 2010 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons: Final Document, Vol. I Part I Review of the Operation of the Treaty 19.

<sup>23</sup> *Id.*, 21.

<sup>24</sup> *Final Verbatim Record of the Conference of the Eighteen-Nation Committee on Disarmament, Meeting 390, ENDC/PV. 390*, UN Eighteen-Nation Committee on Disarmament, Geneva, Aug. 15, 15.08.1968, ¶ 93, available at <<http://quod.lib.umich.edu/e/endc/4918260.0390.001/30>> (accessed Jan. 22, January 2016).

<sup>25</sup> *Id.*

<sup>26</sup> *Vienna Convention on the Law of Treaties*, 23 May 1969, available at <<https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XXIII/XXIII-1.en.pdf>> (accessed Jan. 22, 2016).

<sup>27</sup> *Principles and Objectives for Nuclear Non-Proliferation and Disarmament*, NPT/CONF.1995/32/DEC.2, New York, 17 April – 12 May (1995).

of the NPT. As a result, the implementation of these obligations is evidence of the compliance of states parties to the NPT and Article VI.<sup>28</sup> This is directly connected with international humanitarian law. Nuclear disarmament, prevention of nuclear war and the realization of the basic purposes of the NPT are within the scope of international humanitarian law obligations. Actually, nuclear disarmament included in Article VI is an obligation that has been brought in line with humanitarian justifications. Therefore, the absence of humanitarian law in the NPT text does not mean that the Treaty is disconnected with customary rules of international humanitarian law. In accordance with Article VI, *'Each of the parties to the Treaty undertakes 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.'* This provision is extremely significant and directly connected with customary rules of humanitarian law, because potentially disastrous humanitarian and environmental consequences of the use of nuclear weapons could last a long time and be irreversible in terms of the negative impact on the conditions of human life and health of present and future generations.

#### **2.4. Fulfillment of Humanitarian Obligations under the NPT**

Implementation of the obligations of international law and humanitarian law related to nuclear weapons in good faith will only take place by eliminating the incompatibility of existing doctrines on this issue and changing the states' policies in accordance with international humanitarian law requirements. Fulfillment of humanitarian law obligations also requires conducting negotiations in good faith in order to completely eliminate of nuclear weapons. Nuclear disarmament, in accordance with the rules of international humanitarian law, is also the effective dimension of humanitarian disarmament and the logic of possession and non-use of biological and chemical weapons according to an international convention.<sup>29</sup>

In his statement on 20 April 2010, Jakob Kellenberger, President of the International Committee of the Red Cross (ICRC) clarified: *'... any use of nuclear weapons could be compatible with the rules of international humanitarian law.'* He believes that *'The position of the ICRC, as a humanitarian organization, goes – and must go – beyond a purely legal analysis. Nuclear weapons are unique in their destructive power, in the unspeakable human suffering they cause, in the impossibility of controlling their effects in space and time, in the risks of escalation they create, and in the threat they pose to the environment, to future generations, and indeed to the survival of*

<sup>28</sup> For more information see Christopher A. Ford, *Debating Disarmament: Interpreting Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons*, 14(3) Non-proliferation Rev. 401–428 (2007). DOI: 10.1080/10736700701611720.

<sup>29</sup> For more information see Ken Berry et al. (eds.), *Delegitimizing Nuclear Weapons Examining: The Validity of Nuclear Deterrence* 37–39 (Monterey, United States 2010), available at <[https://www.eda.admin.ch/content/dam/eda/de/documents/aussenpolitik/sicherheitspolitik/Delegitimizing\\_Nuclear\\_Weapons\\_May\\_2010.pdf](https://www.eda.admin.ch/content/dam/eda/de/documents/aussenpolitik/sicherheitspolitik/Delegitimizing_Nuclear_Weapons_May_2010.pdf)> (accessed Jan. 23, 2016).

humanity. The ICRC, therefore, appeals today to all states to ensure that such weapons are never used again, regardless of their views on the legality of such use.<sup>30</sup> According to the ICRC, 'preventing the use of nuclear weapons requires fulfillment of existing obligations to pursue negotiations aimed at prohibiting and completely eliminating such weapons through a legally binding international treaty. It also means preventing their proliferation and controlling access to materials and technology that can be used to produce them.'<sup>31</sup>

The ICJ advisory opinion on the Legality of the Threat or Use of Nuclear Weapons holds significant value in the course of this study. Actually, the ICJ Advisory Opinion is a response to the United Nations General Assembly's question concerning the Legality of the Threat or Use of Nuclear Weapons. In order to answer this question, the Court stated that 'nuclear disarmament' included in Article VI of NPT should be interpreted. In this regard, the ICJ has emphasized that '*There exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.*'<sup>32</sup> The Court also, referring to the *Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (1972)* and the *Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (1993)*, compared nuclear weapons with chemical and biological weapons.<sup>33</sup>

Fulfilling the disarmament obligation in good faith requires an extensive study. However, fulfillment of the NPT obligations adopted at the 2000 and 2010 NPT Review Conferences – early entry into enforcement of the '*1996 Comprehensive Nuclear-Test-Ban Treaty (CTBT)*', continuation of negotiations in order to make the '*Treaty Banning the Production of Fissile Material for Use in Nuclear Weapons or Other Nuclear Explosive Devices*' and elimination of nuclear weapons through performance of irreversible reactions – will demonstrate the good faith of states in this accordance. Good faith also requires avoiding activities which would undermine the goal of nuclear disarmament.<sup>34</sup>

---

<sup>30</sup> Jacob Kellenberger, *President of the International Committee of the Red Cross, Statement: Bringing the Era of Nuclear Weapons to an End* (2010), available at <<http://www.icrc.org/eng/resources/documents/statement/nuclear-weapons-statement-200410.htm>> (accessed Jan. 23, 2016).

<sup>31</sup> *Id.*

<sup>32</sup> *Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons*, ¶ 105/2/F.

<sup>33</sup> *Id.*, ¶ 57.

<sup>34</sup> The good faith principle prohibits every act, behavior, declaration and/or initiative tending to deprive the NPT of its object and purpose, especially nuclear disarmament included in Article VI. See Bedjaoui, *Id.*, p. 21. It could be said that this prohibition also covers the modernization of the nuclear arsenals and nuclear defense systems of the nuclear-weapon states and their failures of nuclear-weapon states to making multilateral negotiations for nuclear disarmament.

Additionally, initiation of negotiations in order to ensure the elimination of nuclear weapons in the context of a multilateral treaty is evidence of good faith of the states in this accordance.<sup>35</sup> Many of the states have called for the realization of this process in The United Nations General Assembly and NPT Review Conferences. However, this request has been rejected by all nuclear-weapon states party to the NPT except China.<sup>36</sup>

2010 NPT Review Conference has called '*on all nuclear-weapon states to undertake concrete disarmament efforts and affirms that all states need to make special efforts to establish the necessary framework to achieve and maintain the world without nuclear weapons.*'<sup>37</sup> In order to achieve these aims and objectives, the Conference has also noted '*the five-point proposal for nuclear disarmament of the Secretary-General of the United Nations, which proposes, inter alia, consideration of negotiations on a nuclear weapons convention or agreement on a framework of separate mutually reinforcing instruments, backed by a strong system of verification.*'<sup>38</sup> In continuation of these negotiations, the 2010 NPT Review Conference also recognized '*the legitimate interests of non-nuclear-weapon states in the constraining by the nuclear-weapon states of the development and qualitative improvement of nuclear weapons and ending the development of advanced new types of nuclear weapons.*'<sup>39</sup>

The states' meeting in good faith for nuclear disarmament, their wish for reconciliation, avoidance of delays and their intention to achieve positive results will make the realized negotiations significant.<sup>40</sup> According to the ICJ, nuclear disarmament obligation includes both the act and the result. In other words, 'nuclear disarmament obligation is an obligation to achieve a precise result – nuclear disarmament in all its aspects – by adopting a particular course of conduct, namely, the pursuit of negotiations on the matter in good faith.'<sup>41</sup> It can be said that the United

<sup>35</sup> For more information see Christopher G. Weeramantry, *Good Faith Negotiations Leading to the Total Elimination of Nuclear Weapons: Request for an Advisory Opinion from the International Court of Justice* 31–32 (Harvard 2009), available at <<http://lcnp.org/disarmament/2009.07.ICJbooklet.pdf>> (accessed Jan. 23, 2016).

<sup>36</sup> United Nations General Assembly, *Follow-up to the Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons*, A/RES/64/55, Sixty-fourth Session, 2 December, 2010, available at <[http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/RES/64/55](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/64/55)> (accessed Jan. 23, 2016).

<sup>37</sup> *2010 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons: Final Document* 20.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> See Weeramantry, *Id.*, 30–31.

<sup>41</sup> *Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports 1996, ¶ 99.

Nations Secretary-General Ban Ki-moon's five-point proposal on 24 October 2008 is sufficiently definitive in this issue.<sup>42</sup>

### 3. Nuclear Disarmament

#### 3.1. Nuclear Disarmament Obligation in the Context of the NPT

In recent years, the nuclear disarmament which developed out of concern for humanitarian suffering has failed. In other words, a genuine nuclear disarmament process has not been realized, none of the nuclear-weapon states have abandoned their nuclear weapons and after many disarmament conferences and treaties (such as START I<sup>43</sup> and START II<sup>44</sup>) coordinated so far, nuclear weapons have not been

<sup>42</sup> Ban Ki-moon's five-point proposal can be summarized as follows: a) Fulfilment of the obligations under the NPT to undertake negotiations on effective measures leading to nuclear disarmament by all NPT parties; pursuing this goal by agreement on a framework of separate, mutually reinforcing instruments; negotiating a nuclear-weapons convention, backed by a strong system of verification, as has long been proposed at the United Nations; engage the nuclear-weapon states with other states on this issue at the Conference on Disarmament in Geneva; resumption of bilateral negotiations between the US and Russian Federation aimed at deep and verifiable reductions of their respective arsenals; b) Commencement of the discussions of the Security Council's permanent members, perhaps within its Military Staff Committee, on security issues in the nuclear disarmament process; assuring non-nuclear-weapon states will not be the subject of the use or threat of use of nuclear weapons and convening a summit on nuclear disarmament by Security Council; freeze own nuclear-weapon capabilities and make their own disarmament commitments of Non-NPT states; c) Regarding the 'Rule of law', entering into force of the CTBT and endeavoring to make the Conference on Disarmament to begin negotiations on a fissile material treaty immediately, without preconditions; entering into force of the Central Asian and African nuclear-weapon-free zone treaties; ratifying all the protocols to the nuclear-weapon-zone treaties by nuclear-weapon states; establishing such a zone in the Middle East; concluding their safeguards agreements with the IAEA, and voluntarily adopting the strengthened safeguards under the Additional Protocol by all NPT parties; d) Accountability and transparency: The nuclear-weapon states often circulate descriptions of what they are doing to pursue these goals, yet these accounts seldom reach the public. The nuclear-weapon states' sending such material to the United Nations Secretariat, and encouraging its wider dissemination. The nuclear powers could also expand the amount of information they publish about the size of their arsenals, stocks of fissile material and specific disarmament achievements. The lack of an authoritative estimate of the total number of nuclear weapons testifies to the need for greater transparency; e) Realizing a number of complementary measures include the elimination of other types of Weapons of Mass Destruction (WMD); new efforts against WMD terrorism; limits on the production and trade in conventional arms; new weapons bans, including of missiles and space weapons; arranging the Blix Commission for a 'World Summit on disarmament, non-proliferation and terrorist use of weapons of mass destruction' by General Assembly. For more information see *Address to the East-West Institute: The United Nations and Security in a Nuclear-Weapon-Free World*, Secretary General Ban Ki-Moon, 24 October (2008), available at <[http://www.un.org/apps/news/infocus/speeches/search\\_full.asp?statID=351](http://www.un.org/apps/news/infocus/speeches/search_full.asp?statID=351)> (accessed Jan. 23, 2016).

<sup>43</sup> *Treaty between the United States of America and the Union of Soviet Socialist Republics on Strategic Offensive Reductions (START I)*, signed in 31 July 1991 and entered into force in 5 December 1994 (Parties: United States, Russian Federation, Belarus, Kazakhstan and Ukraine). The Treaty has been expired in 5 December 2009, available at <[http://www.nti.org/media/pdfs/START\\_I\\_1.pdf?\\_id=1316646898](http://www.nti.org/media/pdfs/START_I_1.pdf?_id=1316646898)> (accessed Jan. 23, 2016).

<sup>44</sup> *Treaty Between the United States of America and the Russian Federation on Further Reduction and Limitation of Strategic Offensive Arms (START II)*, signed in Signed 3 January 1993 and entered into force in December 1994, available at <<http://www.state.gov/t/avc/trty/102887.htm#treatytext>> (accessed Jan. 23, 2016).

completely eliminated. Although the aforementioned treaties can be considered an important step towards the reduction of nuclear weapons, the path to nuclear disarmament is long. This means that the nuclear disarmament, targeted by Article VI of the NPT, has not been realized. Article VI of the Treaty explicitly commits all states 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.*' In this respect, the most important problem is that the nuclear-weapon states have assimilated the nuclear deterrence politics. In this situation, the legitimacy of the treaties relating to nuclear non-proliferation could be criticized. Nuclear weapons have ascended the nuclear-weapon states to the highest level of international hierarchy. Therefore, the efforts to acquire nuclear weapons have been marked as a nobstacle, laying the ground work for intervention with seeker states and the beginnings of a war of prevention against them. In this respect, the possession of these weapons by the nuclear-weapon states and their reluctance to participate in the disarmament process could be perceived as a violation of the general rules of international law. This tension between the law and practice has been raised in the ICJ's Advisory Opinion in a striking manner. Namely, the Court has internalized the minimum interpretation – use of nuclear weapons in an extreme circumstance of self-defense in which the very survival of a state is at stake – of international law.

Distinguishing between the nuclear-weapon states and other states on the basis of international law and striving to maintain this distinction will require the use of the principle of sovereign equality of states by the non-nuclear weapon states – in line with their aims and interests – on the basis of the same standards of international law. Accordingly, the nuclear disarmament process would be completely undermined as long as the states continue to adopt a policy of deterrence.

One question is if international humanitarian law and NPT are directly bound. One of the most important goals of the NPT regime is achieving nuclear disarmament. Article VI of the NPT commits all of the states' parties to pursue negotiations in good faith on nuclear disarmament. Therefore, it seems far from inappropriate to ask if nuclear disarmament is one of the humanitarian goals of the NPT regime.

According to the Final Document agreed by the 2010 NPT Review Conference, '*The Conference expresses its deep concern at the catastrophic humanitarian consequences of any use of nuclear weapons and reaffirms the need for all states at all times to comply with applicable international law, including international humanitarian law.*'<sup>45</sup> As a consequence, all of the NPT parties have obligated themselves to comply with the humanitarian law regarding the NPT obligations for nuclear weapons due to their accountability within the NPT review process. The combination of commitments in the NPT includes the fundamental NPT Article VI obligation of good faith negotiation

<sup>45</sup> 2010 Rev. Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, Final Document, Volume I Part I, Review of the Operation of the Treaty 19.

of nuclear disarmament. This provision is important as it enables a critic to better read between the lines of the provision and make better sense of it; it comes in a section of the Final Document entitled 'Conclusions and recommendations for follow-on actions' and is inserted in Part I of that section, 'Nuclear Disarmament' under 'Principles and Objectives'. In accordance with the provisions of Part I, *'Effective and urgent implementation of Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons and paragraphs 3 and 4(c) of the 1995 decision entitled 'Principles and objectives for nuclear non-proliferation and disarmament'; and building upon the practical steps agreed to in the Final Document of the 2000 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, the Conference agrees on the following action plan on nuclear disarmament which includes concrete steps for the total elimination of nuclear weapons.'*<sup>46</sup>

According to the annex of 1995 Review and Extension Conference of the Parties to the NPT, *'The Conference further agreed that Review Conferences should look forward as well as back. They should evaluate the results of the period they are reviewing, including the implementation of undertakings of the states parties under the Treaty, and identify the areas in which, and the means through which, further progress should be sought in the future.'*<sup>47</sup> Substantively, the humanitarian law supports non-use of nuclear weapons. This fact has been realized in the Preamble of the NPT. The First Preamble of NPT reads as follows: *'Considering the devastation that would be visited upon all mankind by a nuclear war and the consequent need to make every effort to avert the danger of such a war and to take measures to safeguard the security of peoples ...'*<sup>48</sup>

Consequently, we can see the connection between non-use of nuclear weapons and nuclear disarmament in the origins of the NPT. In this context, both USSR and the US, after opening of the NPT for signature, proposed an agenda including *'the cessation of testing, the non-use of nuclear weapons, the cessation of production of fissionable materials for weapons use, the cessation of manufacture of weapons and reduction and subsequent elimination of nuclear stockpiles ...'*<sup>49</sup>

The action plan was adopted by a review proceeding provided by the Treaty, as part of the strengthened review process agreed on in connection with the 1995 legally binding decision to extend the treaty indefinitely. It represents state parties' collective understanding of the appropriate means for implementation of Article VI. Implementation of action plan obligations consequently would be strong evidence that state parties are in general complying with Article VI and the NPT. This point

<sup>46</sup> *Id.*, 19.

<sup>47</sup> 1995 Review and Extension Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, Final Document, Part I, Organization and work of the Conference, UN Doc. NPT/CONF.1995/32, Part I, annex, 1995, 8.

<sup>48</sup> Treaty on the Non-Proliferation of Nuclear Weapons, 'Preamble'.

<sup>49</sup> Final Verbatim Record of the Conference of the Eighteen-Nation Committee on Disarmament, ¶ 93.



certainly applies to the humanitarian law obligation, due to the close interconnection between the application of humanitarian law and the realization of the core purposes of the NPT; prevention of nuclear war, and disarmament.<sup>50</sup> Meanwhile, the ICJ, in its 1996 Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, predicated the application of humanitarian law to nuclear weapons.<sup>51</sup> In this context, it would not be wrong if we said that ICJ has a humanitarian approach to nuclear disarmament as an NPT obligation.

Although there is no direct discussion or naming of humanitarian law in the NPT, the Treaty owes its validity to humanitarian law. If the humanitarian law aspect is excluded from the NPT, the Treaty and its binding value would be eradicated. Therefore, skipping humanitarian law in the NPT and its additional obligations would somehow be denying those obligations. As justification, in Article VI, the obligation of disarmament actually verifies a humanitarian law obligation. Consequently, it is far from an overestimation that humanitarian law and the NPT are directly connected. As a result, it is necessary that a clear explanation of the exact requirements bring the current policies of nuclear-weapon states into compliance with fundamental rules of humanitarian law and the NPT regime be made. Reasonably enough, had the disarmament obligation in Article VI of the NPT been applied by nuclear-weapon states, the present day international community would not have had to deal with cases such as Iran or North Korea.

Generally, the NPT regime has focused on preventing of the acquisition of nuclear weapons by developing countries, especially some of the countries that have the potential to disrupt international stability, and are supported by the U.S. In fact, it should be said that the mainstay of the NPT regime is based on this cognizance that the greatest threat to mankind and to the survival of civilization does not come from the states that have hundreds of nuclear warheads and technical capabilities that can be sent to large distances; but the threat comes from the states that don't have any of the facilities mentioned above or have a small nuclear arsenal. Therefore, the approach of nuclear-weapon states towards nuclear weapons weakens the 'legitimacy' that is closely associated with world order. It is obvious that the nuclear-weapon states follow different policies in order to prevent proliferation of nuclear weapons and weapons of mass destruction. Consequently, some of the states – such as Israel – have reached for nuclear weapons capability without any dissidence from the nuclear-weapon states. While, as a result of existing doubts about developing nuclear weapons by some of the states – such as Iran and North Korea – threatening their sovereign rights is violating the principle of sovereign equality of states as

<sup>50</sup> Charles J. Moxley JR., John Burroughs and Jonathan Granoff, *Nuclear Weapons and Compliance with International Humanitarian Law and the Nuclear Non-Proliferation Treaty*, 34(595) Fordham Int. L. J. 686 (2011).

<sup>51</sup> *Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports (1996), ¶ 42, 86.

a fundamental rule of international law. However, this discriminatory and coercive practice model could be rendered plausible by referring to the threat of use of nuclear weapons or militancy that has been perceived in theory.

Consequently, in order to have a consistent disarmament regime some of the states have proposed that establishing a standing body or holding annual meetings may be favorable. Without a doubt, in order to realize the objectives of Article VI of the NPT, the framework for governance should be reviewed. Besides this, in order for the disarmament process to succeed, Article VI of the NPT should be strengthened. More important than anything else, the creation of a global disarmament treaty may be a considerable emprise to develop the regime and realize nuclear disarmament. For this reason, it is necessary that all of the states – nuclear-weapon states and non-nuclear-weapon states – participate in negotiations on this continuum.

### **3.2. The Legal Framework of Possible, General and Comprehensive Disarmament**

Nuclear disarmament obligation included in Article VI of the NPT is stated as follows:

*'Each of the Parties to the Treaty undertakes 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, and on a treaty on general and complete disarmament under strict and effective international control.'*

There is no provision regarding the illegitimacy of the use of nuclear weapons in international jurisprudence. Any other treaties related to nuclear weapons outside the NPT generally contain similar provisions included in Article VI of the NPT. According to one view, Article VI of the NPT is an express agreement by state parties to be bound by a future treaty, the object and purpose of which is nuclear disarmament and nonproliferation (*pactum de contrahendo*).<sup>52</sup> The purpose of treaty-making is reaching a successful conclusion of the nuclear disarmament negotiations. Therefore, the provision included in Article VI is very important in terms of conducting disarmament negotiations in good faith and reaching a significant conclusion (making a nuclear disarmament treaty). *'Complete nuclear disarmament under strict and efficient international control has always been seen as the ultimate goal of disarmament treaties and of many United Nations General Assembly resolutions.'*<sup>53</sup> Additionally, the ICJ has characterized the obligation included in Article VI as *'an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.'*<sup>54</sup>

<sup>52</sup> See David Simon, *Article VI of the Non-Proliferation Treaty Is a Pactum De Contrahendo and Has Serious Legal Obligation by Implication* 7–16, available at <[https://www.law.upenn.edu/journals/jil/jilp/articles/2-1\\_Simon\\_David.pdf](https://www.law.upenn.edu/journals/jil/jilp/articles/2-1_Simon_David.pdf)> (accessed Jan. 30, 2016).

<sup>53</sup> See Hisakazu Fujita, *The Advisory Opinion of the International Court of Justice on Legality of Nuclear Weapons*, 316 *Int'l Rev. of the Red Cross* 63–64 (1997).

<sup>54</sup> *Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports (1996), ¶ 105/2/F.

The United Nations General Assembly has internally expressed the same view in its 51/45 (O) Resolution, which has been adopted on 10 January 1997.<sup>55</sup> In addition, the European Parliament in its Resolution on the 1995 Review and Extension Conference of the Parties to the NPT<sup>56</sup> and Resolution on the 2005 NPT Review Conference<sup>57</sup> has emphasized the making of nuclear disarmament treaty and necessity of states' commitment to the disarmament obligation as a final aim of Article VI. However, nuclear-weapon states party to the NPT despite talking about nuclear disarmament, have in practice acted completely differently. The five permanent members of the United Nations Security Council that became the five licit nuclear-weapon states under the NPT have used the Security Council to prevent the development of nuclear weapons by other states.<sup>58</sup>

In its 1996 Advisory Opinion, the ICJ asserted that it cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very 'survival of a state' would be at stake.<sup>59</sup> It should be said that, if it is assumed that the use of nuclear weapons is defensive, what follows is a discussions about which states could take advantage of this right. Undoubtedly, all of the states are equally entitled to the right to use of nuclear weapons for defensive purposes that has been foreseen in the ICJ's Advisory Opinion. However, taking advantage of this right by a majority of the states is impossible, because only a few states have nuclear capability. Therefore, if the non-nuclear weapon states acquire nuclear weapons by violating their commitments arising from the NPT or withdrawing from the Treaty, it could not be guaranteed whether or not they would use them for defensive purposes. Additionally, when it comes to the use of force by nuclear-weapon states in order to self-defend in extreme circumstances where the very survival of a state is at stake, these states undoubtedly have the capability to defend their survival without any use of nuclear weapons!

Even though the ICJ's Advisory Opinion has dealt with a completely distinct principle of international law – a threat or use of force by means of nuclear weapons is contrary to Article 2, paragraph 4 of the UN Charter – concerning nuclear weapons; however, it could be said that the uncertainty in the ICJ's Advisory Opinion – inconclusive opinion

<sup>55</sup> United Nations General Assembly, *General and Complete Disarmament*, A/RES/51/45, Fifty-first Session, 10.01.1997, available at <[http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/RES/51/45](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/51/45)> (accessed Jan. 25, 2016).

<sup>56</sup> *Resolution on the Conference on the Extension of the Nuclear Non-Proliferation Treaty (NPT) in New York from 17 April to 12 May A4-0054/1995* (1995), ¶ 6.

<sup>57</sup> *European Parliament Resolution on Nuclear Disarmament: Non-proliferation Treaty Review Conference in 2005 – EU Preparation of Third NPT PrepCom* (New York, 26 April – 7 May 2004), ¶ G.

<sup>58</sup> See Ramesh Thakur, *Nuclear Nonproliferation and Disarmament: Can the Power of Ideas Tame the Power of the State?*, 13(1) Int'l Stud. Rev. 37 (2011). DOI: 10.1111/j.1468-2486.2010.00996.x.

<sup>59</sup> *Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports (1996), ¶ 105/E.

on the use of nuclear weapons in some exceptional circumstances such as the survival of a state being at stake – cannot be interpreted as a reaction in compliance with international humanitarian law. Therefore, considering the devastating and destructive effects of nuclear weapons, the ICJ's Advisory Opinion could be criticized, because it does not cover any "general and complete ban" on use of nuclear weapons.

Nevertheless, the lawfulness of the use of these weapons in the event of extraordinary self-defense with the realization of nuclear disarmament will also disappear completely. The obligation of non-production, non-development and non-stockpiling of nuclear weapons is the basis of nuclear disarmament. In this respect, the elimination of existing nuclear stocks would lead to general and complete nuclear disarmament.<sup>60</sup>

Achieving the goal of a world free of nuclear weapons requires taking serious and practical steps. In this context, the United Nations General Assembly has emphasized that in order to completely eliminate nuclear weapons, states should decrease these weapons and launch platforms in a balanced way as soon as possible. The General Assembly has also mentioned the threat of terrorist use of weapons of mass destruction, particularly nuclear weapons and the necessity of taking international steps in order to control these weapons. According to the General Assembly, nuclear-weapon states should take effective measures in order to completely eliminate nuclear weapons. In short, the United Nations General Assembly '*urges the nuclear-weapon states to stop immediately the qualitative improvement, development, production and stockpiling of nuclear warheads and their delivery systems.*'<sup>61</sup>

The ICJ has evaluated the General Assembly's question concerning the Legality of the Threat or Use of Nuclear Weapons, not only from the use of force and humanitarian law perspective, but also from the 'disarmament law' perspective taking into account 'applicable law' to nuclear weapons. In addition, the Court has predicted a path for the realization of sustainable disarmament. Accordingly, treating nuclear disarmament as a legal obligation is a fairly accurate decision.

The disarmament process will terminate all activities for the acquisition of nuclear weapons. Therefore, the realization of nuclear disarmament depends on the prohibition of production, development, stockpiling and also the destruction of existing stocks completely. However, if nuclear-weapon states will not give an undertaking that they will not use these weapons under any condition, then nuclear disarmament will not be possible. Consequently, only reducing the ballistic missile does not imply the reduction of nuclear weapons. In this regard, the United Nations General Assembly has called '*...upon the nuclear-weapon states, pending the*

---

<sup>60</sup> See Fujita, *Id.*, 63.

<sup>61</sup> United Nations General Assembly, Sixty-eighth Session, A/RES/68/47, 10 December, 2013, ¶ 6, available at <[http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/RES/68/47](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/68/47)> (accessed Jan. 25, 2016).

*achievement of the total elimination of nuclear weapons, to agree on an internationally and legally binding instrument on a joint undertaking not to be the first to use nuclear weapons, and calls upon all States to conclude an internationally and legally binding instrument on security assurances of non-use and non-threat of use of nuclear weapons against non-nuclear-weapon states.*<sup>62</sup>

International law moves towards the goal of completely prohibiting nuclear weapons in terms of the right to self-defense and international humanitarian law. Despite all the developments that have taken place in the international community, there are many reasons that the nuclear-weapon states have not once again used nuclear weapons since the devastation of Hiroshima and Nagasaki. From a legal perspective, the tradition of non-use of these weapons since 1945 could be based on the belief in the illegitimacy of any use of nuclear weapons. Accordingly, nuclear-weapon states acting in accordance with the fundamental rules of international humanitarian law applicable in armed conflicts have not used these weapons once again. Therefore, it can be said that a customary rule has been formed concerning the banning of nuclear weapons completely in terms of humanitarian law. One of the most important developments that strengthened the hope for banning nuclear weapons completely was the *'International Conference on Humanitarian Impact of Nuclear Weapons in Oslo'*.<sup>63</sup>

During and after the Cold War, nuclear weapons have witnessed many vicissitudes in terms of quantity and quality. Although the Eastern Bloc Countries have reduced their nuclear arsenals through bilateral agreements, they have tested and produced new weapons. However, in both cases, these weapons were not used in wartime or peacetime. Rather than political factors, the belief in destruction of the target state and violation of the right to life of the citizens of the aggressor state a result of the use of nuclear weapons, is one of the most important reasons that states have not used these weapons. Actually, non-use of nuclear weapons by nuclear-weapon states after the disasters of Hiroshima and Nagasaki in 1945 is based upon the belief that using these weapons will constitute a violation of humanity, humanitarian law and human interests.<sup>64</sup> Indeed, it can be said that the international community's belief is related to non-use of nuclear weapons. This perception is in the interest of the international community and a legitimate way to eliminate the possibility of the use of nuclear

<sup>62</sup> *Id.*, ¶ 9.

<sup>63</sup> For more information on the clarifications of International Campaign to Abolish Nuclear Weapons (ICAN) concerning Oslo Conference, see *ICAN Final Statement to Oslo Conference on Humanitarian Impact of Nuclear Weapons* (2013), available at <[http://www.regjeringen.no/globalassets/upload/ud/vedlegg/hum/hum\\_ican\\_final.pdf](http://www.regjeringen.no/globalassets/upload/ud/vedlegg/hum/hum_ican_final.pdf)> (accessed Jan. 25, 2016).

<sup>64</sup> *Further these fundamental rules – rules of humanitarian law – are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law.* See *Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports (1996), ¶ 79.

weapons; but this is an ideal and has not taken place in the international legal order, because nuclear disarmament has not been realized in the strictest sense up to now.

Despite everything mentioned above, non-use of nuclear weapons in the last seventy years does not mean the complete banning of nuclear weapons; because nuclear-weapon states have repeatedly informed other states of their right to use nuclear weapons.<sup>65</sup> The nuclear-weapon states in their reports relating to negative security assurances, have abandoned – absolutely or conditionally – their right to the use of nuclear weapons against non-nuclear weapon state which are party to the NPT. Moreover, non-use of nuclear weapons is a legal obligation based on predefined conditions. However, due to the absence of any legal obligation, the capability of the USSR and the US to use these weapons during the ‘Cuban Missile Crisis’<sup>66</sup> (1962) and ‘Operation Desert Storm’<sup>67</sup> (1990–1991) has created serious concerns.<sup>68</sup>

The ICJ, in some exceptional cases, has not opposed the use of nuclear weapons in terms of humanitarian law. However, control and limitation of the content of nuclear weapons are practically impossible. From this point of view, banning the use of nuclear weapons completely is a very important and sensitive issue in terms of preventing the violation of humanitarian law applicable to armed conflict.<sup>69</sup>

The claim that ‘modern nuclear weapon delivery systems are, indeed, capable of precisely engaging discrete military objectives’<sup>70</sup> does not seem acceptable, because the existence of these types of weapons has not been proven.

[The United Nations] *General Assembly resolutions are not legally binding*, [but there is] *a consensus [among the states] which considers the threat of use or use of nuclear weapons as a contradiction to the fundamental humanitarian principles upon*

---

<sup>65</sup> For more information see Dan Caldwell & Robert E. Williams JR., *Seeking Security in an Insecure World* 60 (Lanham, Maryland 2012).

<sup>66</sup> In October 1962, a US spy plane caught the USSR attempting to sneak nuclear-tipped missiles into Cuba, 90 miles off the United States’ coast. This event draws the parties – USSR and US – to the brink of nuclear war for the first time and became one of the first major crisis of the Cold War. See Graham Allison, *The Cuban Missile Crisis at 50 Lessons for U.S. Foreign Policy Today*, 91(4) Foreign Affairs 4, 11 (2012).

<sup>67</sup> In response to Iraq’s invasion and annexation of Kuwait, the US coalesced troops from 34 nations to defend Saudi Arabia in the Persian Gulf; which was called the Gulf War. This was a war, whose troop-buildup phase was codenamed as Operation Desert Shield, and whose war phased was codenamed as Operation Desert Storm. For more information, see Robert E. Lee, *Technology’s Child: Schwarzkopf and Operation Desert Storm*, in *Command Concepts: A Theory Derived from the Practice of Command and Control* 55–71 (Carl H. Builder, Steven C. Bankes & Richard Nordin, eds.) (California 1999).

<sup>68</sup> See Jasjit Singh, *Re-examining the 1996 ICJ Advisory Opinion: Concerning the Legality of Nuclear Weapons*, 1(5) Cadmus J. 162 (2012).

<sup>69</sup> Richard Bilder, *Nuclear Weapons and International Law*, in *Nuclear Weapons and Law* Arthur 4 (Selvyn and Martin Feinriders, eds., Westport 1984).

<sup>70</sup> *ICJ Hearing for the Nuclear Weapons Advisory Opinion* 71 (Nov. 15, 1995), available at <<http://www.icj-cij.org/docket/files/95/5947.pdf>> (accessed Jan. 25, 2016).

*which the international laws of war are founded.*<sup>71</sup> In addition, according to the General Assembly, the use of nuclear and thermonuclear weapons is contrary to the United Nations Charter and its aims and objectives in general.<sup>72</sup>

Considering the status of nuclear-weapon states, it can be said that ‘*the total elimination of nuclear weapons is the only absolute guarantee against the use or threat of use of nuclear weapons.*’<sup>73</sup> Accordingly, ‘the full and effective implementation of the 13 practical steps for nuclear disarmament contained in the Final Document of the 2000 Review Conference,’<sup>74</sup> ‘the early entry into enforcement and strict adherence of the CTBT’<sup>75</sup> and ‘conclusion of an international legal instrument or instruments on adequate and unconditional security assurances to non-nuclear-weapon states’ are required.<sup>76</sup>

#### 4. Conclusion

Delegitimization of nuclear weapons will greatly aid eliminating them, which requires a new discourse about security, as well as nuclear weapons themselves. A significant outcome of the 2010 NPT Review Conference was that the final document expressed deep concern at the catastrophic humanitarian consequences of any use of nuclear weapons and was a reminder of the need for all states, at all times, to comply with applicable international law, including international humanitarian law.

Advancing the 1996 advisory opinion of the ICJ, the Review Conference statement strongly suggests that use of nuclear weapons in any circumstance is illegal. It undoubtedly develops the norm of non-use of nuclear weapons. In fact, when combined with the practice of non-use since the US atomic bombings of Nagasaki and Hiroshima, the provision strengthens the case for a customary legal obligation categorically prescribing non-use.

Actually, the 2010 NPT Review Conference considers the ICJ opinion further than the Court did itself. While the ICJ opinion stated that the threat or use of nuclear weapons is generally contrary to international law, the Review Conference links the catastrophic humanitarian consequences of any use of nuclear weapons with the

<sup>71</sup> Elliot L. Meyrowitz, *The Laws of War and Nuclear Weapons*, 9(2) Brooklyn J. of Int'l L. 255 (1993).

<sup>72</sup> United Nations General Assembly, *Declaration on the Prohibition of the Use of Nuclear and Thermo-Nuclear Weapons*, A/RES/1653 (XVI), 1067th Plenary Meeting, 28 November, 1961. For more information on the other resolutions that the General Assembly has condemned the use of nuclear weapons, see also Martin Feinrider, *International Law as Law of the Land: Another Constitutional Constraint on Use of Nuclear Weapons*, 7 Nova L. J. 103–126 (1982).

<sup>73</sup> See United Nations General Assembly, Sixty-eighth Session, A/RES/68/47, 10.12.2013, ¶ 12, available at <[http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/RES/68/47](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/68/47)> (accessed Jan. 25, 2016).

<sup>74</sup> *Id.*, ¶ 13.

<sup>75</sup> *Id.*, ¶ 19.

<sup>76</sup> *Id.*, ¶ 18.



call for compliance with law 'at all times', which means the use of nuclear weapons is unlawful in all circumstances. The Review Conference's statement reinforces the moral unacceptability and presumptive unlawfulness of any use of nuclear weapons.

Moving to the question of the applicability of the rules of humanitarian law to the possible threat or use of nuclear weapons, it was not possible to conclude that these principles and rules do not apply to nuclear weapons. Such a conclusion would in effect misconstrue the intrinsically humanitarian nature of the judicial principles at hand, which permeate the entire law of armed conflict and apply to all forms of war and to all weapons; those of the past and those of the present and future. The ICJ in its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons (1996) did remark that the consequences that should be drawn from the applicability of humanitarian law to nuclear weapons are controversial. In other words, the ICJ was fully aware that "nuclear weapons" have a double nature: on the one hand, they are weapons thus justifiable under the general legal system applying to all weapons; and on the other, they are nuclear, and thus necessarily subject to a special regime because of this characteristic. According to the Court, with regard to the unique characteristics of nuclear weapons, the use of these weapons seemed scarcely reconcilable with respect to the demands of law applicable in armed conflict.<sup>77</sup> Actually, nuclear weapons are nonetheless weapons whose effects are clearly contrary to certain prescriptions of that corpus juris of customary rules of humanitarian law. Consequently, international law, and with it the stability of international order, which it is tasked to govern, can only suffer from that uncertainty over the legal status of such a fearsome weapon.

Emphasis on the catastrophic the humanitarian consequences of any use of nuclear weapons may be the most effective way to generate political momentum towards nuclear disarmament. In this direction, all states need to comply with applicable international law, including international humanitarian law at all times. In this regard, states can increase their security by supporting the important agreements found in current arms control treaties such as the NPT. Therefore, they should lead an international diplomatic effort to strengthen the NPT.

As a result, currently demands of the non-nuclear weapon states relating to nuclear disarmament and peaceful nuclear energy – unlimited access – cannot be ignored. From this perspective, it could be said that satisfying developing states' demands for and seeking for a common ground on, nuclear energy control systems, will be an accurate method. Consequently, reaching a new consensus regarding the rights and wrongs of nuclear energy could be one of the most important steps on global nuclear order in the 21st century. Additionally, it is necessary to initiate a process that clarifies the general illegality of nuclear weapons, just as biological and chemical weapons that have been prohibited as weapons of mass destruction. Therefore, breaking the vicious circle that has taken shape in the event of disarmament undertaken by states

---

<sup>77</sup> Bedjaoui, *Id.* at 4.

on one hand and producing a new generation of nuclear weapons on the other, is not impossible. To this end, in order to realize nuclear disarmament, ratifying an international treaty and an effective implementation mechanism could prove to be a great advantage to the disarmament process.

### References

- Allison, Graham, *The Cuban Missile Crisis at 50 Lessons for U.S. Foreign Policy Today*, 91(4) Foreign Aff. (2012).
- Berry, Ken et al., (eds.), *Delegitimizing Nuclear Weapons Examining: The Validity of Nuclear Deterrence* (Monterey, United States 2010).
- Bilder, Richard, *Nuclear Weapons and International Law*, in *Nuclear Weapons and Law* Arthur 4 (Selvyn and Martin Feinriders, eds., Westport 1984).
- Caldwell, Dan & Williams, Robert E. JR., *Seeking Security in an Insecure World* (Lanham, Maryland 2012).
- Fischer, David, *History of the International Atomic Energy Agency: The First Forty Years* (Vienna 1997).
- Ford, Christopher A., *Debating Disarmament: Interpreting Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons*, 14(3) Non-proliferation Rev. (2007). DOI: 10.1080/10736700701611720.
- Feinrider, Martin, *International Law as Law of the Land: Another Constitutional Constraint on Use of Nuclear Weapons*, 7 Nova L. J. (1982).
- Lee, Robert E., *Technology's Child: Schwarzkopf and Operation Desert Storm*, in *Command Concepts: A Theory Derived from the Practice of Command and Control* (Carl H. Builder, Steven C. Bankes & Richard Nordin eds., California 1999).
- Meyrowitz, Elliot L., *The Laws of War and Nuclear Weapons*, 9(2) Brooklyn J. of Int'l L. (1993).
- Moxley JR., Charles J., Burroughs, John and Granoff, Jonathan, *Nuclear Weapons and Compliance with International Humanitarian Law and the Nuclear Non-Proliferation Treaty*, 34(595) Fordham Int'l L. J. (2011).
- Thakur, Ramesh, *Nuclear Nonproliferation and Disarmament: Can the Power of Ideas Tame the Power of the State?*, 13(1) Int'l Stud. Rev. (2011). DOI: 10.1111/j.1468-2486.2010.00996.x.
- Weeramantry, Christopher G., *Good Faith Negotiations Leading to the Total Elimination of Nuclear Weapons: Request for an Advisory Opinion from the International Court of Justice* (Harvard 2009).

### Information about the author

**Saeed Bagheri (Antalya, Turkey)** – Assistant Professor at Department of International Law, Akdeniz University (Dumlupinar blvd., Campus, 07058, Antalya, Turkey; email: sbagheri@akdeniz.edu.tr).