

The Legality of Nuclear Weapons

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By Francesco Adriani, Rossella Muzzeddu

Introduction

On 21 September, Russian Federation's President Vladimir Putin announced the partial mobilisation of Russian citizens to reinforce Moscow's military deployment in the Russian war in Ukraine (Ellyatt, 2022).

In his speech, Putin remarked that Russia will protect its territorial integrity with 'all the means at [our] disposal' (The Washington Post, 2022). The statement struck fear in the West, as the nuclear threat lurks over Europe. With the usage of nuclear weapons being now a tangible risk, questions have been again raised about the legal status of such armaments under current international law.

Legislation

The legality issue of nuclear weapons is a complicated one and it goes a long way back.

In 1961, The United Nations General Assembly (UNGA) approved a resolution declaring the illegality of the use of nuclear weapons (GA Res. 1653 (XVI), 1961). Fifty-five States voted in favour of the Resolution, twenty States voted against it, whereas twenty-six abstained. The voting figures of this Resolution suggest a lack of the *opinio juris* element required for the establishment of a norm of customary international law, a view upheld by the International Court of Justice (ICJ) in a famous (as much as it was controversial) advisory opinion (International Court of Justice, 1996).

The UNGA requested such an opinion on 15 December 1994 (GA Res. 49/75K, 1994), which was finally delivered by the ICJ (HRTA, the Court) on 8 July 1996. The advisory opinion stated that "no specific authorization of the threat or use of nuclear weapons" can be found neither in customary nor in treaty law, but also no "comprehensive and universal prohibition" (GA Res. 49/75K, 1994). Therefore, the ICJ did not clarify doubts on the matter. Moreover, the ICJ claimed that it could not "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". This normative gap leaves room for manipulation of international law, as history shows that States might invoke such extreme circumstances even when perpetrating deliberate aggression.

Nevertheless, in the same opinion, the ICJ stated that "Any threat or use of force by means of nuclear weapons that is contrary to Article 2, paragraph 4, of the United Nations Charter and that fails to meet all the requirements of Article 51, is unlawful". The ICJ also specified that the use of these weapons should be compatible with the requirements of binding States under international law on armed conflict and international humanitarian law. Therefore, the Court seemed to limit itself to establishing that the use or threat of nuclear weapons should be subject to the same obligations applicable to the general use of force. This view, however, fails to consider the reality of the situation as it does not address the specific nature of nuclear weapons, instead giving them the same consideration given to any other kind of weapon.

How it works

The most recognisable characteristic of a nuclear weapon is its mass-destruction capacity. Once employed, it unleashes destructive power, regardless of where and against whom it is used. The consequences of their use persist for decades after a conflict. These inherent features make nuclear armaments difficult to reconcile with the obligations mentioned by the ICJ, particularly the principles of proportionality and necessity, as well as the principle of distinction between civilian and military objectives. Nevertheless, the UN report states that the outcome of a nuclear explosion depends significantly on the weapon's size and the area affected (United Nations, 2022). Therefore, a clear assessment would require case-by-case investigations. The principles and standards in question are all based on the idea of a balance between the humanitarian and military interests at stake: in such an equation, the former cannot be said to always prevail. Collateral damage and civilian casualties must therefore be assessed according to the principle of proportionality. However, the principle of humanity is embedded in the concepts of proportionality and distinction. Therefore, defending a nuclear attack on the mere basis of the principle of military necessity seems rather weak (Brugnera, 2020).

Another rule of humanitarian law is the so-called Martens Clause, which was first announced at the Hague Convention II of 1899 and proved to be an effective tool to deal with the rapid evolution of military technology (Hague Convention II, 1899). The clause is also found in other treaties and is customary. It has three possible interpretations: the first provides for customary rules to continue to apply even after the enforcement of a specific treaty. The second suggests that what is not expressly prohibited by a treaty is ipso facto not authorised. The third and broadest interpretation, on the other hand, states that armed conflicts must obey not only international customary and treaty law but also the very principles invoked by the Clause. This interpretation could make a very strong case for banning nuclear weapons according to Shahabuddeen, judge of the ICJ (Shahabuddeen, 1996). In contrast, another judge, Christopher Greenwood offers a contrary view, arguing that the concept is too vague to be used as a basis for a rule of law (Greenwood, 1997).

The threat of the use of nuclear force

Article 2(4) of the United Nations Charter, in compelling States not to use force in their international relations, refers not only to the use of force *stricto sensu*, but also to the threat of use of force. Regarding nuclear weapons, this generates a few doubts as far as deterrence is concerned (Unsal, 2022). Indeed, the threat of the use of nuclear arms, even when not advanced explicitly, is the underlying core of the nuclear deterrence strategy, and from a realistic perspective is what has prevented such armaments from being employed in conflicts.

The ICJ was asked to clarify this aspect as well in its advisory opinion (para. 37-50), ruling as follows: "Whether (The threat of use of nuclear weapons) is a "threat" contrary to Article 2, paragraph 4, depends upon whether the particular use of force envisaged would be directed against the territorial integrity or political independence of a State, or against the Purposes of the United Nations or whether, if it was intended as a means of defence, it would necessarily violate the principles of necessity and proportionality".

Moreover, the Deterrence and Defence Posture Review (DDPR) stressed that the fundamental purpose of North Atlantic Alliance nuclear forces is deterrence, highlighting the political function of nuclear weapons (NATO, 2012).

The DDPR was endorsed by Allied Heads of State and Government at the NATO Chicago Summit in May 2012. While the Alliance focuses on the maintenance of effective deterrence, political control of nuclear weapons will be maintained in all circumstances and nuclear planning and consultation within the Alliance, in accordance with political guidance (NATO, 2022).

The United States and its allies also must seek greater clarity on Russia's nuclear doctrine to better understand how Russian political and military officials think operationally about first use, under what circumstances, and against what targets. This awareness can help determine how NATO deters or dissuades Russia from undertaking any potential escalation. The political cohesion and therefore resolve of NATO is vital to all of this (Perkovich & Vaddi, 2021).

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