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International Humanitarian Law and the UN Nuclear Ban Treaty

by Adriano Iaria

In early July 2017, 122 nations approved the Treaty on the Prohibition of Nuclear Weapons (TPNW) negotiated during a United Nations conference held in New York from 15 June to 7 July 2017.¹ The conference was organized pursuant to a United Nations General Assembly resolution (A/RES/71/258) approved in December 2016 that reaffirmed the urgency of securing substantive progress in multilateral nuclear disarmament.

The treaty prohibits states parties from engaging in a full range of nuclear weapon related activities. These include efforts to develop, test, produce, manufacture, acquire, possess or stockpile nuclear weapons or other nuclear explosive devices, as well as the use or threat of use of these weapons.

¹ United Nations, *Treaty on the Prohibition of Nuclear Weapons* (A/CONF.229/2017/8), 7 July 2017, <http://undocs.org/A/CONF.229/2017/8>.

Yet, while over a hundred nations were involved in negotiating the treaty, all nuclear armed states, as well as Japan and NATO countries, boycotted the conference, not taking part in the negotiations. Only a handful of European countries participated, with the Netherlands being the only state to have voted against the treaty.²

The TPNW will be open for signature by all UN member states from 20 September 2017, with fifty ratifications needed for the treaty's entry into force. While doubts persist and cynics abound, the TPNW does provide a robust framework of international humanitarian law. It tries to clarify some pending legal issues related to nuclear weapons and recognizes the important role of international civil society and non-

² United Nations General Assembly, *Voting results on L.3/Rev.1*, New York, 7 July 2017, https://s3.amazonaws.com/unoda-web/wp-content/uploads/2017/07/A.Conf_.229.2017.L.3.Rev_.1.pdf.

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governmental organizations (NGOs) in advancing the cause of multilateral nuclear disarmament.

The treaty's preamble clearly places the TPNW's objectives in a humanitarian framework. This is important given the traditionally opaque relationship between international humanitarian law and the use of nuclear weapons. In addition to a general reference to international law, paragraph 9 of the preamble emphasizes that parties to an armed conflict do not have complete autonomy to choose their "methods or means of warfare".

This principle was already contained in Article 22 of the Regulations concerning the Laws and Customs of War on Land, signed in The Hague on 18 October 1907, and in Article 35 of the 1977 Additional Protocol I to the Geneva Conventions. It is a principle that became, albeit with a slightly different wording, a rule of customary law.³ Paragraph 9 of the preamble is significant as it tries to resolve reservations formulated during the ratification and signing of the Additional Protocol I.

In fact, when Belgium, Canada, France, Germany, Italy, the Netherlands, Spain and the United Kingdom deposited their instruments of ratification, they formulated a reservation that effectively excluded nuclear weapons from the

scope of the Additional Protocol I.⁴ Similar reservations were reiterated by the United States and United Kingdom at the moment of signing.

A different opinion was delivered by the International Court of Justice (ICJ). In an advisory opinion issued on 8 July 1996, the ICJ ruled that the threat or use of nuclear weapons should be "compatible with the requirements of international law applicable in armed conflict", with a particular emphasis on "international humanitarian law, as well as with specific obligations under treaties and other undertakings which expressly deal with nuclear weapons". While the court was unable to "conclude definitively" whether the threat or use of nuclear weapons would be lawful in an "extreme circumstance of self-defence", and agreed that there exists no "comprehensive and universal prohibition" of nuclear weapons in customary or conventional international law, judges did agree unanimously that states have an "obligation" to pursue negotiations towards nuclear disarmament.⁵

Paragraph 9 of the preamble of the TPNW is significant as it builds on this latter opinion, linking the use of nuclear weapons to the rules of customary law related to international

³ See "Rule 17. Choice of Means and Methods of Warfare", in Jean-Marie Henckaerts and Louise Doswald-Beck (eds.), *Customary International Humanitarian Law*, Vol. 1: Rules, Cambridge, ICRC and Cambridge University Press, 2005, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul.

⁴ Julie Gaudreau, "The Reservations to the Protocols Additional to the Geneva Conventions for the Protection of War Victims", in *International Review of the Red Cross*, No. 849 (March 2003), p. 143-184, <https://www.icrc.org/eng/resources/documents/article/review/review-849-p143.htm>.

⁵ International Court of Justice (ICJ), *Advisory Opinion of 8 July 1996 on the Legality of the Threat or Use of Nuclear Weapons*, <http://www.icj-cij.org/en/decisions/advisory-opinion/1996/1996/desc>.

humanitarian law. These include “the rule of distinction, the prohibition against indiscriminate attacks, the rules on proportionality and precautions in attack, the prohibition on the use of weapons of a nature to cause superfluous injury or unnecessary suffering, and the rules for the protection of the natural environment”.

By framing the preamble in such language, the TPNW places a limit on the use and threat of use of nuclear weapons. Indeed, paragraph 10 of the preamble considers that “any use of nuclear weapons would be contrary to the rules of international law applicable in armed conflict, in particular the principles and rules of international humanitarian law”, while paragraph 11 makes reference to the Martens Clause, reaffirming that the use of nuclear weapons would be “abhorrent to the principles of humanity and the dictates of public conscience”.

In its last paragraph, the preamble stresses “the role of public conscience in the furthering of the principles of humanity as evidenced by the call for the total elimination of nuclear weapons” while recognizing the important role played by civil society, NGOs, religious leaders, parliamentarians and the International Red Cross and Red Crescent Movement in advancing the cause of nuclear disarmament.

The paragraph, *mutatis mutandis*, is also contained in the preamble of the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, adopted in 1997 and entered into force in 1999. This is

no coincidence, given that many hope that the relatively successful experience of the Mine Ban Treaty can be replicated for nuclear disarmament. While many states, including the US, Russia and China, are non-signatories to the Mine Ban Treaty, the international stigma associated with these weapons have made it increasingly hard for countries to justify their use.

It is in this respect that the TPNW’s reference to the assisting role of the International Red Cross and Red Crescent Movement, as well as other NGOs which are invited to attend periodical meetings and the review conference of the TPNW as observers, is of significance. As argued by Matthew Bolton from the International Disarmament Institute, “the power of humanitarian disarmament treaties derive[s] from their ability to generate a stigma around a weapon and address the human suffering it causes”.⁶

At present, the TPNW cannot be described as opening a new era of international politics. Nuclear weapons are likely to remain a reality well into the future. What the treaty has established however is important for three reasons.

Firstly, the TPNW represents the first instrument dealing with multilateral nuclear disarmament to be approved in over twenty years. Second, the treaty will help international civil society, NGOs and possibly wider segments of

⁶ Matthew Bolton, “Ensuring the Nuclear Weapon Ban Treaty is a Humanitarian Treaty”, in *Nuclear Ban Daily*, Vol. 1, No. 1 (27 March 2017), p. 3, <http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/nuclear-weapon-ban/reports/NBD1.1.pdf>.

the global public opinion to lobby their respective governments to advance the cause of nuclear disarmament. Finally, the TPNW reflects the efforts of a large majority of non-nuclear armed states to progress towards the goal of global nuclear disarmament, explicitly linking this objective to the spirit of the UN Charter and the UN's objective to maintain international peace and security.⁷

By reviving international debates on nuclear weapons and framing the use of such weapons on the basis of international humanitarian law and the rules of public conscience, a large majority of UN member states have expressed their frustration with the sluggish progress towards nuclear disarmament. Today, international actors and signatory states can derive inspiration and cover from the language contained in the TPNW, helping to create a large multilateral front in opposition to nuclear weapons. In this respect, and while much remains to be done and quick progress appears unlikely, the TPNW does put forward a core set of principles that may help advance the cause of multilateral nuclear disarmament for present and future generations.

19 September 2017

⁷ Zia Mian, "After the Nuclear Weapons Ban Treaty: A New Disarmament Politics", in *Bulletin of the Atomic Scientists*, 7 July 2017, <http://thebulletin.org/node/10932>.

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