

Banning the Use of Nuclear Weapons

by Jozef Goldblat

Although there is no evidence that the existence of nuclear weapons and the declared readiness to use them have prevented the outbreak of another world conflict, there is a fairly widespread belief that nuclear deterrence helped to maintain peace over several decades. At present, however, in the radically different post-Cold War international political climate, deliberate employment of nuclear weapons against any adversary is difficult to imagine. It is, therefore, surprising that the strategic doctrines, those concerning the use of nuclear weapons, remain basically unchanged. Moreover, the employment of nuclear weapons is envisaged - at least by some nuclear powers - not only as a last resort, but also as a way to react to attacks committed with any weapons at any point of the globe. And yet, as stated by General Lee Butler, the former Commander-in-Chief of the U.S. Strategic Command, the likely consequences of nuclear war have no politically, militarily or morally acceptable justification.ⁱ

This paper argues that the efforts to create a nuclear-weapon-free world are bound to remain fruitless as long as the use of nuclear weapons has not been universally and unreservedly banned.

Restrictions on the use of weapons

It is generally recognized that, in their application, weapons and war tactics must be confined to military targets; that they must be proportional to their military objectives as well as reasonably necessary to the attainment of these objectives; and that they must not cause unnecessary suffering to the victims or harm human beings and property in neutral countries. These rules form part of the international humanitarian law applicable in armed conflicts, often referred to simply as international humanitarian law, and are embodied in several multilateral treaties.

The 1868 Declaration of St. Petersburg prohibits the use of projectiles below a certain specified weight, if they are explosive or charged with « fulminating or inflammable substances ». The 1899 and 1907 Hague Declarations and Conventions prohibit the use of bullets which expand or flatten in the human body, of poison or poisoned weapons, of unanchored automatic submarine contact mines as well as of anchored submarine mines which do not become harmless as soon as they have broken loose from their moorings, and of torpedoes which do not become harmless when they have missed their target. The 1925 Geneva Protocol prohibits the use of asphyxiating, poisonous or other gases and of all analogous liquids, materials and devices, as well as of bacteriological methods of warfare. The 1977 Environmental Modification Convention prohibits the employment of techniques which modify the environment to cause destruction, damage or injury to another state. The several Protocols to the 1981 Inhumane Weapons Convention prohibit the use of weapons, the primary effect of which is to injure by fragments which in the human body escape detection by X-rays, as well as laser weapons causing permanent blindness; they also restrict the use of landmines, booby-traps and incendiary weapons. The above prohibitions apply to relations among parties to the relevant agreements. Some of them, however,

including the prohibitions under the 1925 Geneva Protocol, are widely considered to be binding on parties and non-parties alike.

In three cases, the prohibitions or restrictions on the use of weapons, as specified above, have led to bans on the possession of weapons. Thus, the 1972 Biological Weapons Convention, in force since March 1975, bans the development, production, stockpiling or retention of microbial or other biological agents or toxins for hostile purposes, and provides for their destruction. The 1993 Chemical Weapons Convention, in force since April 1997, bans the development, production, stockpiling or retention of chemical weapons, and also provides for their destruction. The 1997 Anti-Personnel Mines Convention (not in force at the time of writing) bans the development, production, acquisition by other means, stockpiling and retention or transfer of anti-personnel mines, and provides for the destruction of such mines in storage or already emplaced. However, there exists in international law no specific norm prohibiting or significantly restricting the use of nuclear weapons. This may be one of the main reasons why there have been no negotiations on the elimination of these weapons, as recommended by the very first resolution of the UN General Assemblyⁱⁱ.

Efforts to outlaw the use of nuclear weapons

Attempts to establish a rule of law expressly banning the use of nuclear weapons have been going on for several decades. In 1961, by a vote of 55 to 20, with 26 abstentions, the UN General Assembly adopted a declaration stating that the use of nuclear weapons was contrary to the « spirit, letter and aims » of the United Nations and, as such, a direct violation of the UN Charter. The resolution went on to proclaim the use of nuclear weapons to be a « crime against mankind and civilization ». The United States and other NATO countries opposed this resolution, contending that in the event of aggression the attacked nation must be free to take whatever action with whatever weapons not specifically banned by international law. In addition to the pronouncement of the illegality of nuclear weapons, the Assembly asked the Secretary General to ascertain the views of the governments of UN member states on the possibility of convening a special conference for signing a convention on the prohibition of the use of these weaponsⁱⁱⁱ. The Secretary-General's consultations proved inconclusive and the requested conference was never convened.

Resolutions advocating an unconditional ban on the use of nuclear weapons were also considered at subsequent sessions of the UN General Assembly. In particular, the Final Document of the Tenth Special Session of the UN General Assembly, held in 1978, recommended that efforts be made to bring about conditions in international relations that would preclude the use or threat of use of nuclear weapons^{iv}. This and other similar recommendations have remained without a follow-up^v.

Applicability of existing law to nuclear weapons

There is a body of opinion that there is no need to create a legal norm to ban the use of nuclear weapons, because such a ban is already covered by the humanitarian law of armed conflict. The arguments are as follows.

The use of nuclear weapons can be deliberately initiated either in a surprise pre-emptive attack aimed at disarming an adversary who may or may not be nuclear-armed, or in the course of escalating hostilities started with non-nuclear means of warfare. The first situation, usually referred to as « first strike », is covered by the fundamental rule of international law enshrined in the UN Charter, namely, that the threat or use of force against the territorial integrity or political independence of any state is prohibited unconditionally, irrespective of the type of weapon employed - nuclear or non-nuclear. The second situation, usually referred to as « first use », involves the right of self-defence, which is also enshrined in the UN Charter: all states may defend themselves, individually or collectively, until the UN Security Council has taken measures necessary to restore and maintain international peace and security. The Charter does not specify which weapons may or may not be used by states in such a situation, but the right of self-defence is not unlimited.

In discussing the limitations on the right of self-defence, one should start from the rule, which is embodied in the 1907 Hague Convention IV on laws and customs of land warfare, and which prohibits the employment of arms causing « unnecessary » suffering or the destruction of the enemy's property, unless such destruction is « imperatively demanded » by the necessities of war. This rule seems to have little practical value, because no suffering caused by weapons of war can be objectively described as necessary, and because military necessity is a subjective notion as well. Nevertheless, the above-mentioned 1868 St. Petersburg Declaration was quite specific as to what was allowed and what was forbidden. It proclaimed that the only legitimate objective which states may endeavour to accomplish during war is to weaken the military forces of the enemy, and that, consequently, the employment of arms which uselessly aggravate the suffering of disabled men, or render their death inevitable, is contrary to the laws of humanity. Since nuclear explosions could cause massive injury to people and massive damage to property, and since mass destruction can hardly be a necessity, it would be nearly impossible to observe the relevant rule in a nuclear war.

Modern weapons are capable of precise targeting. It is conceivable, therefore, that a low-yield tactical nuclear weapon might be used against an isolated military objective without causing indiscriminate harm to other objectives. However, once the nuclear threshold has been crossed, there can be no guarantee that a high-yield nuclear weapon will not be used. There will always be a risk of nuclear escalation on the part of the attacker, as well as on the part of the attacked nation, if the latter, too, possesses nuclear weapons. Thus, irrespective of motivation, a single use could provoke a nuclear war impossible to contain in either space or time. Indeed, it is not the targeting that should be decisive in determining the legality of nuclear weapons, but rather the enormous destructive potential of these weapons and the uncontrollable effects of their use. With today's technology, it is possible to release from one nuclear weapon in one microsecond more energy than that released from all conventional weapons in all wars throughout history^{vi}. Even the 1925 Geneva Protocol, which deals with weapons less devastating than nuclear weapons, does not differentiate between targets or between more or less severe effects caused by the use of the banned weapons.

Under customary international law, reiterated in the 1949 Geneva Conventions for the protection of war victims, the belligerents are under strict obligation to protect the civilians, not taking part in hostilities, against the consequences of war. The indiscriminate nature of nuclear weapons

renders this norm very difficult to comply with. Even if exclusively military targets were aimed at, civilian casualties could be an important by-product; in many cases they might outnumber the military ones. Yet another iniquitous aspect of nuclear warfare is the inability of the belligerents to comply with the requirement to respect the inviolability of the territory of neutral states. It is impossible to confine the effects of nuclear explosions, particularly radioactive contamination, to the territories of states at war.

Although the primary effects of nuclear explosions are blast and heat, nuclear radiation and radioactive fall-out, which they produce, inflict damage on the biological tissue of humans, animals and plants. Nuclear weapons can, therefore, for the purpose of the international humanitarian law, be compared to poison, the use of which as a method of warfare is prohibited by the Hague Declarations and the Geneva Protocol mentioned above^{vii}. And, since nuclear explosions may also be expected to cause widespread, long-term and severe damage to the natural environment, their use would contravene Protocol I Additional to the 1949 Geneva Conventions and relating to the protection of victims of international armed conflicts.

It should finally be noted that, in placing limitations on the conduct of hostilities, the 1907 Hague Convention IV included the so-called Martens Clause, which was subsequently re-affirmed in several treaties. This Clause makes usages established among civilized peoples, the laws of humanity and the dictates of the public conscience obligatory by themselves, even in the absence of a specific treaty prohibiting a particular type of weapon. It was this legal yardstick that the International Military Tribunal, convened in Nuremberg to prosecute Nazi leaders after World War II, applied in concluding that the law of war is to be found not only in treaties but also in customs and practices of states, and that, by its continual adaptation, this law follows the needs of a changing world. Thus, also weapons and tactics, which may be resorted to in the exercise of legitimate self-defence, must not be violative of the existing norms, whether or not these norms are spelled out in formal international agreements.

The cumulative effect of the generally accepted restraints on the use of all weapons is such that nuclear war can hardly be initiated with obedience to the rules of customary international law. It should be noted that in its judgement of 1986 in the case concerning military and paramilitary activities in and against Nicaragua, the International Court of Justice confirmed that customary law has the same standing as treaty law. Nonetheless, in view of the special character of nuclear weapons, a ban on their use cannot be simply deduced from restrictions regarding other types of weapon. This reasoning must have guided those who in 1925 decided to sign the Geneva Protocol banning the use of chemical and bacteriological means of warfare, even though the use of these means had already been condemned by the « general opinion of the civilized world », as stated in the Protocol itself. In other words, prohibitions concerning specific weapons ought to be incorporated in positive law, as they are in the case of chemical and biological weapons, as well as in the case of anti-personnel mines.

In its advisory opinion of 8 July 1996, the International Court of Justice (ICJ), the judicial organ of the United Nations, declared its inability to rule that the use or threat of use of nuclear weapons is prohibited unconditionally. At the same time, the ICJ declared the existence of an international obligation to achieve nuclear disarmament « in all its aspects »^{viii}. However, nuclear

disarmament is not achievable without prior undertaking by states not to use nuclear weapons under any circumstance. Mere cuts in nuclear arsenals will not necessarily lead to their abolition.

Nuclear security assurances and their limitations

Under the 1995 UN Security Council Resolution 984, the non-nuclear weapon states parties to the 1968 Nuclear Non-Proliferation Treaty (NPT) obtained assurances (the so-called negative security assurances) that nuclear weapons would not be used against them. These assurances, considered by many as politically (not legally) binding, are conditional: the United States, the United Kingdom, France and Russia stated that their assurances would cease to be valid in the case of an invasion or any other attack on these powers, their territories, their armed forces or other troops, their allies, or on a state towards which they have a security commitment, « carried out or sustained by such a non-nuclear-weapon state in association or alliance with a nuclear-weapon state ». On another occasion, the United States said that any use of chemical or biological weapons against it would be met with a devastating and overwhelming response; the nature of that response was not specified, but it was generally taken to mean nuclear. China's assurances not to use nuclear weapons against non-nuclear weapon states or nuclear weapon-free zones are unconditional. China also expressed readiness to conclude an agreement on no first use of nuclear weapons among the nuclear weapon states.

Following its May 1998 nuclear test explosions, India made a unilateral declaration that it would not be the first to use nuclear weapons. Pakistan, which has also tested nuclear explosive devices, refuses to adopt a no-first-use posture as long as India enjoys superiority in conventional armaments.

Legally binding assurances of non-use of nuclear weapons are contained in protocols to the nuclear weapon-free-zone treaties. They have been given to parties to these treaties, but are understood by the nuclear powers (again with the exception of China) to be subject to the same or similar conditions as the assurances given to parties to the NPT. The use of nuclear weapons against non-parties to the above-mentioned treaties, or between nuclear powers, is not formally prohibited.

Consequences of no-use commitments

Only a formal unconditional undertaking not to use nuclear weapons against any country, whatever its status - nuclear or non-nuclear, aligned or non-aligned, party or not party to the NPT or a nuclear weapon-free-zone treaty - appears to have real significance. As a corollary to such an undertaking, tactical nuclear weapons would have to be totally eliminated because of their first-strike characteristics: once deployed close to the front lines - as they must be to have military value - they are likely to be employed very early in armed conflict to avoid capture or destruction by the adversary's conventional forces. (So far, only the United States and Russia are committed, under an informal regime consisting of unilateral unverified declarations, to reduce the numbers of their tactical nuclear weapons, remove them from surface ships and attack submarines, and partially destroy them.)

To become even more credible, the non-use commitments would have to be backed up by taking nuclear strategic forces off alert. This would require an observable separation of nuclear warheads from launchers in such a way as to render their use physically impossible without a substantial delay facilitating detection of clandestine preparations for use. Continuously monitored de-alerting would reduce the risk of a surprise attack, and of an unauthorized or accidental launch of nuclear weapons. Once the use of nuclear weapons is prohibited, the very threat of such use will become unlawful.

According to the doctrine of belligerent reprisals, a retaliatory use of nuclear weapons to make a violator of the ban on use desist from further illegitimate actions would not be considered a breach of the ban, if it were proportionate to the violation committed and to the injury suffered. Thus, countries possessing nuclear weapons would be committed only to *no first use*, it being understood that attacks on the civilian population and objects protected by international law could not be tolerated under any circumstance. Some people argue that the doctrine of belligerent reprisals is inapplicable in the context of nuclear warfare, because the particularly inhumane nature of nuclear weapons makes their second use as illegal as their first use. Several countries adopted such attitude with regard to biological and/or chemical weapons, even before the possession of these weapons had been banned; they have thereby recognized that the prohibition on use is absolute, not subject to exceptions. It is doubtful, however, whether those possessing nuclear weapons would be willing, in case of a nuclear aggression, to give up the right to respond in kind.

Responses to CBW attacks

Once the right of legitimate self-defence, individual or collective, is restricted to the use of non-nuclear means of warfare, a nuclear response to an aggression committed with chemical or biological weapons will be prohibited as well. Breakouts from the 1925 Geneva Protocol and the 1993 Convention, which ban the employment of CBW weapons, could be countered with modern conventional weapons if the situation could not be remedied with non-military means. Moreover, parties may withdraw from arms control treaties when some extraordinary events have jeopardized their interests. A proven violation would justify withdrawal, even without the required several months' notice. The withdrawing treaty-abiding country would not have chemical or biological weapons readily available for immediate response to a violation of the relevant bans, but reconstitution of CBW stocks would not be a very complicated or overly lengthy process. Besides, the use of these weapons is unlikely to be decisive for the outcome of an armed conflict.

Though classified as weapons of mass destruction along with nuclear weapons, biological and chemical weapons have several important distinctive features. Under certain exceptional circumstances, the use of biological weapons may produce fatalities comparable to those caused by nuclear weapons.^{ix} However, since it would be difficult to recognize each unusual outbreak of a disease as an aggression, and since there would be no « signature » of the user, BW attacks could hardly be deterred by a threat of nuclear retaliation. Attacks with chemical weapons, even on a large scale, could not reach the level of destructiveness caused by a nuclear attack. Moreover, there exist means of defence against biological and chemical weapons (vaccination, antidotes, masks, protective clothes, decontaminants), as well as warning systems with highly

sensitive sensors capable of detecting the agents in question. There are no such means or systems against nuclear weapons.

Making a no-use treaty

The proposed non-use obligations should be included in a multilateral treaty open to all states. A forum to negotiate the treaty could be the Geneva-based Conference on Disarmament (CD). However, in view of the weaknesses of the CD, it would seem advisable to set up a special international body for this purpose, preferably a diplomatic conference. The participants in such a conference - to be convened by a representative group of like-minded nations - would not need to include *all* states which have declared to possess nuclear weapons or the capability to manufacture them. However, the treaty worked out by the conference should become effective only upon its ratification by *all* such states, that is, by China, France, India, Israel, Pakistan, Russia, the United Kingdom and the United States.

Violation of the treaty banning the use of nuclear weapons must be qualified as a crime under international law and treated as such. (The Statute of the International Criminal Court, adopted in July 1998, would have to be complemented accordingly.) In case of doubt as to whether a nuclear device has been used, and by whom, the UN Security Council should - at the request of any party - engage in investigations which might include on-site inspection. A permanent member of the Security Council, accused of violating the treaty, would have to waive its right of veto with regard to resolutions concerning investigation of breaches. Such waiver should also be applicable to decisions which the Security Council might adopt if the situation created by a violation required action, such as the provision of assistance to the affected party or compensation for the caused damage. To avoid amending the U.N. Charter, the described circumscription of the great powers' privileges could be achieved through unilateral or joint statements made by these powers.

The treaty should be of unlimited duration. Withdrawal from it could be justified only in case of an internationally established material breach of its provisions.

Conclusion

A global ban on the use of nuclear weapons would reinforce the fire-break separating conventional and nuclear warfare. It would, thereby, diminish the risk of nuclear war and weaken the political force of explicit or implicit threats to initiate such a war. Indeed, the doctrine of nuclear deterrence, in so far as it consists in threatening a nuclear attack in response to a non-nuclear attack, would have to be declared invalid.

Furthermore, in discarding the war-fighting functions of nuclear weapons, the non-use posture would minimize the importance of nuclear superiority, whether quantitative or qualitative. It would, therefore, clear the way towards the abolition of tactical nuclear weapons and towards new substantial reductions of strategic nuclear forces.

Given the attitudes of the majority of the *de jure* or *de facto* nuclear weapon powers, the prospect of reaching a no-use treaty is not bright. However, only when such a treaty is signed,

will the pledges made by these powers to eventually bring about complete nuclear disarmament become credible.

ⁱ *Disarmament Times*, Vol. XXI, No1, April 1998.

ⁱⁱ UN General Assembly Resolution 1(I), of 24 January 1946, recommended that atomic weapons and all other major weapons adaptable to mass destruction be eliminated from national armaments. Weapons of mass destruction were defined in 1948 by the UN Commission for Conventional Armaments as those which include atomic explosive weapons, radioactive material weapons, lethal chemical and biological weapons, and any weapons developed in the future which have characteristics comparable in destructive effect to those of the atomic bomb or other weapons mentioned above. (UN document S/C.3/32/Rev.1, August 1948.)

ⁱⁱⁱ UN General Assembly Resolution 1664 (XVI), 24 November 1961.

^{iv} UN document A/RES/S-10/2, 13 July 1978.

^v The 1997 resolution calling for a convention on the prohibition of the use of nuclear weapons, introduced by India, was adopted by 109 votes in favour, 30 against and 27 abstentions (UN document A/RES/52/39C).

^{vi} UN document A/35/392, 12 September 1980, p.10.

^{vii} The 1954 Protocol III (Annex II) to the 1948 Brussels Treaty (Paris Agreements on the Western European Union) defined nuclear weapons as «any weapon which contains, or is designed to contain or utilize, nuclear fuel or radioactive isotopes and which, by explosion or other uncontrolled nuclear transformation of the nuclear fuel, or by radioactivity of the nuclear fuel or radioactive isotopes, is capable of mass destruction, mass injury or mass *poisoning*» (emphasis added). See J. Goldblat, *Arms Control: A Guide to Negotiations and Agreements*, PRIO and SAGE Publications, Oslo, London, 1994, p.302.

^{viii} The International Court of Justice Communique 96/23, The Hague, 8 July 1996.

^{ix} Report of the Secretary-General, *Chemical and Bacteriological (Biological) Weapons and the Effects of their Possible Use*, U.N. document S/9292/Rev.1, 1969. U.S. Congress, Office of Technology Assessment, *Proliferation of Weapons of Mass Destruction: Assessing the Risks*, August 1993.

Jozef Goldblat is Vice-President of the Geneva International Peace Research Institute (GIPRI) and Resident Senior Fellow at the United Nations Institute for Disarmament Research (UNIDIR) in Geneva. He lectures at universities and is the author of books, essays and newspaper and journal articles on truce supervision, arms race and disarmament problems. From 1969 to 1989 he directed the arms control and disarmament research programme at the Stockholm International Peace Research Institute (SIPRI). In 2006 he received the GCSP (Geneva Centre for Security Policy) Award for his achievements in the field of international and human security and was granted, by the President of Poland, the Knight's Cross of the Order of Merit for his contribution to the cause of international peace. In 2007 the President of the Republic of Italy bestowed upon Jozef Goldblat the title of the Knight of the Order to the Merit of the Italian Republic for the promotion of international peace and security through disarmament, arms reduction and non-proliferation.
