

# The Entry into Force of the 2017 Treaty on the Prohibition of Nuclear Weapons and International Legal Restrictions on Their Use<sup>1</sup>

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**Abstract.** The present article analyzes the consequences of the coming into force of the 2017 Treaty on the Prohibition of Nuclear Weapons, which forbids use of nuclear weapons and their deployment on the territories of states that ratified it.

The article is based on the main international treaties that regulate the status of nuclear weapons – the 1968 Treaty on the Non-Proliferation of Nuclear Weapons, the 2017 Treaty on the Prohibition of Nuclear Weapons, and the 1996 Advisory Opinion of the International Court of Justice.

The entry into force of the Treaty on the Prohibition of Nuclear Weapons divided states into two groups – States Participants to the Treaty and states that are not party to it. According to the Treaty, the use of nuclear weapons is prohibited in the territory of States Participants and must be considered a war crime. The use of nuclear weapons prohibited in the territory of states that are not party to the Treaty is subject to the same regime as before. The International Court of Justice considered this regime in its Advisory Opinion on the Legality of the Threat and Use of Nuclear Weapons of 1996. The present article analyses this Advisory Opinion.

The author comes to the conclusion that the legal foundations upon which the Advisory Opinion is based remain in force, including its central provision that there it is not forbidden for a state to use nuclear weapons when its survival is at stake. This situation may occur when a state enters into an armed conflict with another state or group of states (allied by their membership in a military-political organization) with superior military and economic potential. The use of nuclear weapons is not forbidden against all members of this military-political organization.

**Keywords:** law of international security; international humanitarian law; Non-Proliferation Treaty; Treaty on the Prohibition of Nuclear Weapons; weapons of mass destruction; war crimes; International Court of Justice.

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<sup>1</sup> English translation from the Russian text: Marusin I. S. 2022. Vstuplenie v silu Dogovora o zapreshchenii yadernogo oruzhiya 2017 g. i mezhdunarodno-pravovye ogranicheniya na ego primenenie. *Moskovskiy Zhurnal Mezhdunarodnogo Prava* [Moscow Journal of International Law]. No. 3. P. 19–32. DOI: <https://doi.org/10.24833/0869-0049-2022-3-19-32>

On January 22, 2021, after ratification by 50 states, the Treaty on the Prohibition of Nuclear Weapons entered into force.<sup>2</sup> It is the first international treaty that obliges the parties to not use nuclear weapons and to destroy any stockpiles they may have. The treaty was developed by the United Nations and opened for signing in 2017 after its text was approved by the UN General Assembly: 122 countries voted in favour of the final draft; one country (the Netherlands) opposed it; and one (Singapore) abstained. The remaining UN member states, including all those that possess nuclear weapons, did not participate in the vote, thus expressing their attitude towards it.

The entry into force of the Treaty on the Prohibition of Nuclear Weapons alters the legal regime for the creation, deployment and use of nuclear weapons that had developed over previous decades. Until 2021, the main international legal instrument defining the status of nuclear weapons was the Treaty on the Non-Proliferation of Nuclear Weapons signed in 1968, which divided participating states into two groups – those that possess nuclear weapons and those that do not. The first group, according to Art. IX, para. 3, includes states that have manufactured and exploded a nuclear weapon or other nuclear explosive device prior to January 1, 1967. Specifically, this refers to the United States, the United Kingdom, China and the Russian Federation (participating in the Treaty as the successor state to the Soviet Union). Under Art. I of the Treaty, these countries undertake not to transfer to any recipient whatsoever nuclear weapons or control over such weapons, nor in any way to assist, encourage, or induce any non-nuclear weapon State to manufacture or otherwise acquire nuclear weapons or control over such weapons.<sup>3</sup>

The second group includes all other participating states that do not possess nuclear weapons. These countries pledged not to receive the transfer from any transferor whatsoever of nuclear weapons or of control over such weapons, nor to manufacture or otherwise acquire nuclear weapons, nor to seek or receive any assistance in the manufacture of nuclear weapons.<sup>4</sup>

Every country in the world currently participates in the Treaty on the Prohibition of Nuclear Weapons, with the exception of India, Pakistan, North Korea, South Sudan and Israel.<sup>5</sup> The first three of these countries have published official statements to the effect that they have detonated nuclear explosive devices, while the Israeli government neither confirms nor denies reports that it possesses nuclear weapons.

<sup>2</sup> The Treaty on the Prevention of Nuclear Weapons Enters into Force Today. UN News. 22.01.2022. URL: <https://news.un.org/ru/story/2021/01/1394852> (accessed: 10.07.2022).

<sup>3</sup> Treaty on the Non-Proliferation of Nuclear Weapons of June 12, 1968. URL: [https://www.un.org/ru/documents/decl\\_conv/conventions/npt.shtml](https://www.un.org/ru/documents/decl_conv/conventions/npt.shtml) (accessed: 10.07.2022).

<sup>4</sup> Ibid.

<sup>5</sup> Treaty on the Non-Proliferation of Nuclear Weapons. URL: <https://treaties.unoda.org/tZnpt> (accessed: 10.07.2022).

Thus, the 1968 Treaty on the Prohibition of Nuclear Weapons regulates the production and possession of nuclear weapons, but says nothing about their use, meaning that no restrictions are imposed on using nuclear weapons.

Much has been written about the Treaty on the Prohibition of Nuclear Weapons, by both Russian<sup>6</sup> and by foreign scholars.<sup>7</sup> For the most part, researchers note the importance of the document in limiting the nuclear arms race. For example, Jack Garvey points out that there are no technical secrets when it comes to how to create nuclear weapons. The main barrier to building nuclear weapons for any state is the counter-proliferation regime and the difficulties it creates in obtaining nuclear fissile material (Garvey 2009: 378–379). At the same time, many countries, Germany among them, have started to raise the issue of potentially renouncing their nuclear-free status, albeit mostly in the press.<sup>8</sup>

### **The Treaty on the Prohibition of Nuclear Weapons and Its Significance for Regulating the Use of Nuclear Weapons**

The Treaty on the Prohibition of Nuclear Weapons was developed in 2017.<sup>9</sup> The most important provisions are contained in Art. 1, in accordance with which each State Party undertakes never under any circumstances to: develop, manufacture, acquire, possess or stockpile nuclear weapons or other nuclear explosive devices; transfer nuclear weapons to any recipient whatsoever; receive the transfer of or control over nuclear weapons from anyone; use or threaten to use nuclear weapons or other nuclear explosive devices; assist, encourage or induce anyone to engage in any activity prohibited to a State Party under the Treaty; seek or receive any assistance from anyone to engage in any activity prohibited to a State Party under the Treaty; or allow any stationing of any nuclear weapons or other nuclear explosive devices in its territory or at any place under its jurisdiction or control. As such, the Treaty prohibits the use, under any circumstances, of any type of nuclear weapon, regardless of its yield and means of delivery, both strategic (such as intercontinental missiles with nuclear warheads) and tactical (such as artillery shells or torpedoes).

The Treaty also establishes a special mechanism to implement these obligations. Each State Party to the Treaty shall inform the Secretary-General of the United Nations, not later than 30 days after the Treaty enters into force for that State Party, whether it

<sup>6</sup> See: (Osipov 1987; Ulyanov, Lysenko 2018: 1–13; Lysenko 2018: 15–19; Sidorova 2009: 222–234).

<sup>7</sup> See: (Cottrell 2016: 133–178; Thranert 2008: 327–340; Nystuen, Torbjørn 2014: 374–396).

<sup>8</sup> Reitz U. Keine Angst vor Kernwaffen: Warum Deutschland jetzt über atomare Aufrüstung sprechen muss. FocusOnline. 10.03.2022. URL: [https://www.focus.de/politik/ausland/ukraine-krise/keine-angst-vor-kernwaffen-warum-deutschland-jetztueber-atomare-aufruestung-sprechen-muss\\_id\\_65436312.html](https://www.focus.de/politik/ausland/ukraine-krise/keine-angst-vor-kernwaffen-warum-deutschland-jetztueber-atomare-aufruestung-sprechen-muss_id_65436312.html) (accessed: 10.07.2022).

<sup>9</sup> The text is available on the UN's official website. URL: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N17/209/75/PDF/N1720975.pdf?OpenElement> (accessed: 10.07.2022).

owned or currently owns nuclear weapons, and whether there are any nuclear weapons in its territory. The Secretary-General of the United Nations shall transmit all such declarations received to the States Parties.

Further obligations of States Parties are set out depending on the content of these declarations. These can be divided into four groups: 1) the obligations of non-nuclear-weapon states; 2) the obligations of non-nuclear-weapon states that host the nuclear weapons of other states in their territory; 3) the obligations of states that previously possessed nuclear weapons but eliminated such weapons, as well as their nuclear-weapon programmes, prior to the entry into force of the Treaty; and 4) the obligations of states that possessed nuclear weapons at the moment the 2017 Treaty entered into force.

States belonging to the first group (those that do not possess nuclear weapons and do not host the nuclear weapons of other states on their territory) must conclude a special safeguards agreement with the International Atomic Energy Agency, if such an agreement has not already been concluded. Negotiation of such an agreement shall commence within 180 days and conclude no later than 18 months from the entry into force of the Treaty for that State Party.

Non-nuclear-weapon states that host the nuclear weapons of other states in their territory must remove such weapons from their territory within a timeframe to be determined by the first meeting of States Parties. Upon the removal of such weapons, the State Party shall submit to the Secretary-General of the United Nations a declaration that it has fulfilled its obligations under the Treaty.

Each State Party to the Treaty that after July 7, 2017 possessed nuclear weapons and eliminated its nuclear-weapon programmes prior to the entry into force of the Treaty must cooperate with a competent international authority designated by the States Parties for the purpose of verifying the irreversible elimination of its nuclear-weapon programme.

Additionally, such a State Party must conclude a special safeguards agreement with the International Atomic Energy Agency sufficient to provide credible assurance of the non-diversion of declared nuclear material from peaceful nuclear activities and of the absence of undeclared nuclear activities in that State Party. Negotiation of such agreement shall commence within 180 days and conclude no later than 18 months from the entry into force of the Treaty for that State Party.

The most significant obligations are imposed by the 2017 Treaty on states that possess nuclear weapons. Such states are required, no later than 60 days after the entry into force of the Treaty for the given State Party, to submit to the States Parties or to a competent international authority designated by the States Parties a plan for the verified and irreversible elimination of its nuclear-weapon programme and all nuclear-weapons-related facilities. The plan should be legally binding on the State Party, which will have to eliminate its nuclear weapons and nuclear-weapons-related facilities no later than a date to be determined by a decision of the meeting of the States Parties to the treaty.

In addition, these States, just like those in the previous group, must conclude, within the same timeframe, a special safeguards agreement with the International Atomic Energy Agency sufficient to provide credible assurance of the non-diversion of declared nuclear material from peaceful nuclear activities and of the absence of undeclared nuclear activities in that State Party.

The reaction among the scientific community to the 2017 Treaty on the Prohibition of Nuclear Weapons has been mixed. For example, Stuart Casey-Maslen (Casey-Maslen 2019) and Jonathan L. Black-Branch lauded the very fact that the Agreement was concluded, and were also mostly positive about its contents. Bakhtiyar Tuzmukhamedov, on the other hand, called the Treaty “a legal shell for a nuclear-free illusion” (Tuzmukhamedov 2021: 120). The provisions of the Treaty have also been analysed by Russian legal scholars, specifically, in an article by M. N. Lysenko and A. D. Ostapova (Lysenko, Ostapova 2022), a monograph edited by E. B. Mikhailenko and published in Yekaterinburg (Adami et al. 2020), and an article by E. B. Mikhailenko and V. I. Mikhailenko (Mikhailenko, Mikhailenko 2017). Additionally, K. G. Murtashina prepared a series of articles on how this Treaty has been assessed in various countries, including Japan, China and the states of Southeast Asia (Murtashina 2019: 6–23; Murtashina, Pashkova, 2019: 160–168; Murtashina 2019: 84–93). And Sébastien Philippe, Zia Mian (Philippe, Zia 2022), Nick Ritchie (Ritchie 2022), and Alex Wellerstein (Wellerstein 2022) all contributed to a special UN edition on the issue of verifying the implementation of the Treaty’s provisions.

However, for all its potential shortcomings, the Treaty on the Prohibition of Nuclear Weapons has now acquired legal force and henceforth divides the countries of the world into two groups on the issue of the use of nuclear weapons – the States Parties to the Treaty, which have undertaken to not possess or use nuclear weapons, and states that are not party to the Treaty. The latter will continue to retain the right to own and use nuclear weapons (subject to the provisions of the 1968 Treaty on the Non-Proliferation of Nuclear Weapons). However, they will now need to take into account the fact that the States Parties to the 2017 Treaty must, in accordance with its provisions, prevent any use of nuclear weapons on their territory, as well as the use of nuclear weapons by nuclear-weapon states in the territories of such states against their armed forces or the armed forces of third countries, which would constitute the use of prohibited weapons. The use of such weapons in modern international law entails the international responsibility of states whose armed forces possess such weapons, as well as the criminal liability of individuals and military personnel who use such weapons directly, and those who give them the relevant orders.

Such individuals are punishable both under national legislation, if such liability has been established for the use of prohibited means and methods of warfare, and in international criminal judicial institutions, whose statutes qualify the use of such means and methods a type of war crime.

The government of any State Party to the 2017 Treaty that allows the armed forces of another state to use its territory for the purposes of unleashing a nuclear strike on a third state, regardless of whether that state is a party to the 2017 Treaty, is equally liable under the law. In this case, we can talk about the responsibility of both these states, and the military personnel of their officials. If a state uses the territory of a State Party to the 2017 Treaty to launch a nuclear attack on the territory of a third state without the consent of that State Party, then the liability of the said State Party will be limited, but it will be held liable nonetheless, since the Treaty on the Prohibition of Nuclear Weapons obliges States Parties to prevent under all circumstances the use of nuclear weapons on their territory.

### **International Legal Restrictions on the Use of Nuclear Weapons Applicable to States that are Not Party to the Treaty on the Prohibition of Nuclear Weapons**

States that are not party to the Treaty are not bound by the above restrictions. However, the restrictions on the use of nuclear weapons set forth in the norms of other instruments of international law, both treaty and customary, remain in force. A summary of these norms was given by the International Court of Justice in its Advisory Opinion of July 8, 1996 on the Legality of the Threat or Use of Nuclear Weapons.<sup>10</sup>

However, more than 25 years have passed since this Advisory Opinion was issued. To what extent have the legal grounds on which the Opinion was based changed? To what extent are the conclusions it draws contestable today? Let us take a closer look at the Advisory Opinion of July 8, 1996 on the Legality of the Threat or Use of Nuclear Weapons with these questions in mind.

The Advisory Opinion was drawn up at the request of the UN General Assembly as formulated in Resolution 49/75 K of December 15, 1994. In the resolution, the General Assembly posed the following question to the International Court of Justice: Is the threat or use of nuclear weapons in any circumstance permitted under international law?

In its response to these questions, the International Court of Justice first turned to international legal acts that do not directly regulate the use of certain types of weapons, but rather include a number of provisions that can be interpreted as containing a ban on the use of nuclear weapons. These acts include, first and foremost, International

<sup>10</sup> The text of the Advisory Opinion can be found on the official website of the International Court of Justice. See: International Court of Justice: Legality of the Threat or Use of Nuclear Weapons. Advisory opinion of 8 July 1996. URL: <https://www.icj-cij.org/public/files/case-related/95/095-19960708-ADV-01-00-EN.pdf> (accessed: 10.07.2022). The very same day, the International Court of Justice issued another advisory opinion at the request of the World Health Organization (WHO) on the issue of the legality of the use of nuclear weapons. However, in its second Advisory Opinion, the International Court of Justice did not consider the issue on its merits, citing the fact that it does not fall within the remit of the WHO. For more on that Advisory Opinion, see: (Blishchenko, Doria 1999: 122–126).

Covenant on Civil and Political Rights, Art. 6 of which enshrines the right to life. In accordance with the provisions of this article, this right is inherent to every human being. It is protected by law, and no one can be arbitrarily deprived of his or her life.<sup>11</sup> Having analysed this provision, the International Court of Justice concluded that the right to not be arbitrarily deprived of one's life applies also in hostilities. However, what exactly is meant by arbitrary deprivation of life must be determined by *lex specialis*, namely, the law applicable in armed conflict. Thus whether a particular loss of life in warfare is to be considered an arbitrary deprivation of life can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the International Covenant on Civil and Political Rights itself.

Similarly, the International Court of Justice did not agree with the contention that the provisions of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide provided sufficient basis for prohibiting the use of nuclear weapons. The Court pointed out that the prohibition of genocide would be pertinent in this case if the recourse to nuclear weapons were accompanied by the intent to destroy a national, ethnical, racial or religious group, as such. However, it would only be possible to arrive at such a conclusion after having taken due account of the circumstances specific to each case of the use of nuclear weapons. The International Court of Justice failed to find a prohibition on the use of nuclear weapons in the current norms of international environmental law, although it did note that environmental factors need to be taken into account in armed conflict.

Thus, having analysed the universal international treaties on the protection of fundamental human rights and freedoms, the protection of the environment, and the prohibition genocide, the International Court of Justice did not find any provisions that would prohibit the use of nuclear weapons. This conclusion remains true today. Not a single universal international legal act involving nuclear-weapon states has been adopted in the years since the Advisory Opinion was published – neither in human rights protection, nor in international environmental law, nor in international criminal law – whose provisions could be interpreted as prohibiting the use of nuclear weapons. Like before, to determine the legality of the use of nuclear weapons, we must turn to the provisions of treaties or customary international law governing armed conflicts.

On this issue, the International Court of Justice notes that international customary and treaty law does not contain any specific prescription authorizing the threat or use of nuclear weapons or any other weapon in general or in certain circumstances, in particular those of the exercise of legitimate self-defence. The use of nuclear or any other weapons does not require a specific authorization in international law. The practice of international relations shows that the illegality of the use of certain weapons as such does not result from an absence of authorization but, on the contrary, is formulated in terms of prohibition. Such a prohibition can be enshrined both in a treaty and

<sup>11</sup> International Covenant on Civil and Political Rights of 16 December 1966. URL: <https://www.un.org/ru/documents/declconv/conventions/pactpol.shtml> (accessed: 10.07.2022).

in customary law. The International Court of Justice started by analysing international treaties on the law on the conduct of hostilities and the weapons used in such cases, specifically the Second Hague Declaration of July 29, 1899, the Hague Convention IV of October 18, 1907, and the Geneva Protocol of June 17, 1925, and concluded that none of them can be construed as imposing a prohibition on the use of nuclear weapons. Further, in para. 62 of its Advisory Opinion, the International Court of Justice examined the 1968 Treaty on the Non-Proliferation of Nuclear Weapons and noted that the treaties dealing with the acquisition, manufacture, possession, deployment and testing of nuclear weapons point to an increasing concern in the international community with these weapons and the desire for a general prohibition of their use, but they do not constitute such a prohibition by themselves.

The International Court of Justice came to the same conclusion following its consideration of treaties establishing nuclear-free zones in Latin America (the 1969 Treaty of Tlatelolco) and the South Pacific (the 1985 Treaty of Rarotonga). Paragraph 63 of the Advisory Opinion notes that these two treaties, the security assurances given to their signatories by the nuclear-weapon States, and the fact that the UN Security Council took note of them with satisfaction, testify to a growing awareness of the need to liberate the community of States and the international public from the dangers resulting from the existence of nuclear weapons. The signing of treaties on the creation of nuclear-weapons-free zones in Southeast Asia (in Bangkok on December 15, 1995) and Africa (in Cairo on April 11, 1996) is further evidence of this. However, the Court quite rightly does not view these treaties as amounting to a comprehensive and universal conventional prohibition on the use of nuclear weapons.

Having failed to find such a prohibition in existing international treaties, the International Court of Justice turned to an examination of customary international law. Paragraph 68 of the Advisory Opinion notes that a number of states point to a series of General Assembly resolutions, beginning with Resolution 1653 (XVI) of November 24, 1961, that condemn the use of nuclear weapons, as evidence of the existence of a rule of international customary law which prohibits the use of such weapons. However, according to other states, the resolutions in question are not binding and are not declaratory of any customary rule of prohibition of nuclear weapons, since both nuclear- and non-nuclear-weapon states voted in favour of them.

In its assessment of these positions, the International Court of Justice noted that General Assembly resolutions, while not binding, may have normative value. They can provide evidence important for establishing the existence of a rule or the emergence of a customary rule of international law. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption. A comparison of the content of a series of resolutions on a particular issue may lead to the conclusion that a customary rule of international law has emerged. Analysing the content of Resolution No. 1653, the first of the resolutions of the General Assembly proclaiming the illegality of the use of nuclear weapons, the International Court of Justice noted that it qualifies this stance through reference to a number

of treaties on the prohibition of other types of weapons, from the Declaration of St. Petersburg of 1868 to the Geneva Protocol of 1925, following which the general rules of customary international law apply to nuclear weapons. According to the Court, the application of general rules of customary law to nuclear weapons indicates that there was no specific rule of customary law which prohibited the use of nuclear weapons, otherwise the General Assembly would have referred to it directly. The adoption at subsequent sessions of the General Assembly recalling the content of Resolution 1653 (XVI) may indicate the desire of a large section of the international community to achieve complete nuclear disarmament.

It would seem that this conclusion is still relevant today. In the years since the publication of the Advisory Opinion, the states that possessed nuclear weapons back then have expressed no desire whatsoever to agree to the destruction of their nuclear stockpiles. Moreover, three more states – India, Pakistan and North Korea – announced that they were developing their own nuclear weapons, which only further confirms the thesis that there is no generally accepted conventional or customary norm prohibiting nuclear weapons as such.

Thus, we cannot talk about the illegality of nuclear weapons *per se*, but rather about the illegality of their use in certain circumstances. This is precisely what the final part of the Advisory Opinion deals with. First and foremost, the International Court of Justice unanimously concluded that the threat or use of nuclear weapons should also be compatible with the requirements of the international law applicable in armed conflict, particularly those of the principles and rules of international humanitarian law, as well as with specific obligations under treaties and other undertakings which expressly deal with nuclear weapons. However, states interpret this provision differently. Some believe that the use of nuclear weapons cannot in any way be compatible with the requirements of international humanitarian law and should be banned. Nuclear weapons do not distinguish between combatants and civilians, between civilian and military targets, and the consequences of their use cannot be limited to legitimate military targets. Nuclear weapons are, by their very nature, indiscriminate, and the death toll if used would be enormous. In addition, the use of nuclear weapons would constitute a violation of the neutrality of states not participating in the conflict, as their effects cannot be limited to the territories of the states participating in the conflict.

These are the arguments given by researchers who believe that the existing norms of international humanitarian law prohibit nuclear weapons. For example, in a 1987 article on the legality of the use of nuclear weapons, David M. Corwin noted that any military benefit conferred by the use of nuclear weapons is disproportionate to the harms caused, and that any use of nuclear weapons is thus illegal under international law (Corwin 1987:272). Corwin refers to Art. 51, para. 5 of the Protocol Additional to the Geneva Conventions of 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), of 1977, which provides a definition of indiscriminate attacks. According to this article, an indiscriminate attack is an attack which

may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.<sup>12</sup>

This argument was repeated almost verbatim in 2015 by Louis Maresca and Eleanor Mitchell, who point out that studies have shown that the use of nuclear weapons in or near a populated area would amount to an indiscriminate attack and that there should also be a presumption of illegality with regard to the use of nuclear weapons outside such areas (Maresca, Mitchell 2015: 621).

While the International Court of Justice generally shares this position, it does not agree with the conclusion that the use of nuclear weapons is prohibited in all cases, even though there are no norms that articulate this unambiguously. The Court did not formulate a position on three separate sub-items of the Advisory Opinion's central issue – the permissibility of the use of nuclear weapons in certain circumstances.

The first is the issue of the legality of the use of low-yield tactical nuclear weapons. The International Court of Justice noted that none of the States advocating the legality of the use of nuclear weapons under certain circumstances indicated what the precise circumstances justifying such use would be, nor whether such limited use would not escalate into the all-out use of high yield nuclear weapons. Given the lack of such data, the International Court of Justice concluded that it did not have sufficient grounds to determine the legality of the use of low-yield nuclear weapons.

Another sub-item of the overarching question of the Advisory Opinion that the International Court of Justice failed to adequately address is the issue of whether the use of nuclear weapons, by virtue of their inherent qualities, contradicts existing international humanitarian law. The Court noted that the principles and norms of international law governing armed conflicts impose strict requirements on the conduct of such conflicts, prohibiting the use of weapons that do not distinguish between military and civilian targets, or which would result in unnecessary suffering to combatants. Given the unique characteristics of nuclear weapons, the use of such weapons is irreconcilable with respect for such requirements, the Court concluded that it did not have sufficient elements to enable it to conclude with certainty that the use of nuclear weapons would necessarily be at variance with the principles and rules of law applicable in armed conflict.

The third sub-item on which the International Court of Justice could not provide a definitive conclusion was the question of the legality of the use of nuclear weapons by a state in an extreme circumstance of self-defence, in which its very survival would be at stake. Here, the Court cites the fundamental right of every state to survival, and thus its right to resort to self-defence, in accordance with Article 51 of the UN Charter, as

<sup>12</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), of 8 June 1977. URL: [https://www.icrc.org/ru/doc/assets/files/2013/ap\\_i\\_rus.pdf](https://www.icrc.org/ru/doc/assets/files/2013/ap_i_rus.pdf) (accessed: 10.07.2022).

well as the policy of deterrence, to which a number of states adhered for many years, and the reservations that certain nuclear-weapon states have with regard to the protocols on the nuclear-free status of Latin America and the South Pacific.

Summing up its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, the International Court of Justice states that, having examined the state of international law viewed as a whole and considered the elements of fact at its disposal, it could not reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a state in an extreme circumstance of self-defence, in which its very survival would be at stake (Art. 97 of the Advisory Opinion).

This was an understandably disheartening conclusion, given the magnitude of the issue for the entire international community and the thoroughness of the study carried out by the International Court of Justice. After all, if the International Court of Justice, which has the final word when it comes to interpreting international law, could answer this question, then who could? And we are not talking some abstract, theoretical issue here. The leaders of a state at war with another state or group of states that are significantly superior to it in terms of military and economic power may well be faced with this very problem tomorrow.

However, despite the absence of a clearly formulated position, the Advisory Opinion of the International Court of Justice of July 8, 1996 retains its fundamental significance in determining the legality or illegality of the use of nuclear weapons by states that are not parties to the 2017 Treaty on the Prohibition of Nuclear Weapons thanks to its analysis of international treaty and customary law. In Paragraph 52 of the Advisory Opinion, the International Court of Justice indicated that the use of any type of weapon does not require a specific authorization in international law. Such use may be prohibited by international law, in which case it will be illegal, but the fact that such a prohibition does not exist means that such use cannot be considered as such. Paragraph 94 of the Advisory Opinion states that the Court was unable to reach a conclusion on the prohibition of the use of low yield nuclear weapons if such use does not violate the general provisions of international humanitarian law prohibiting the use of weapons of an indiscriminate nature. Accordingly, if it is possible to comply with such requirements, then the use of low yield nuclear weapons will not be deemed unlawful (an example here could be the use of a torpedo with a nuclear warhead against an aircraft carrier sufficient to destroy it with a single hit).

In para. 97, the International Court of Justice concluded that it is not unlawful to use nuclear weapons in an extreme circumstance of self-defence, in which the very survival of the state would be at stake, and we are compelled to agree with this conclusion. If in the abovementioned Art. 51, para. 5 of the Protocol Additional to the Geneva Conventions of 1949, civilian casualties are not considered unlawful unless they are excessive in relation to the concrete and direct military advantage anticipated, then they obviously should not be considered unlawful either when we are talking about more than a mere military advantage during a conventional military operation, but rather about the very existence of the state. It would appear unlawful to demand that

a state choose between its own existence (and, therefore, the lives of its own citizens) and the lives of the civilian population of an enemy state, as it would put the interests of that state above one's own interests.<sup>13</sup>

How should we understand this key provision? It seems that the very survival of a state would be at stake if defeat in an armed conflict would lead to the complete destruction of that state – that is, the destruction of the entire structure of the authorities of the state, the removal from office and often the physical extermination of its civil servants, and the establishment of foreign domination over the territory of that state either through direct military occupation or the creation of a puppet government (this is precisely what happened in Iraq following the U.S.-led incursion in 2003).

While it is true that an armed conflict may end in defeat for any of the parties involved, not every such defeat entails a threat to the survival of the state. Let us give an example. As we know, the U.S. Armed Forces were embroiled in combat operations in Vietnam from 1965 to 1973 and in Afghanistan from 2001 to 2021. Both of these conflicts ended in failure for Washington – the regimes they supported collapsed, and the United States had to hastily withdraw its troops from these countries. However, the survival of the state was never at stake during these conflicts, nor was it at stake during other conflicts in which the United States took part, such as the Korean War or the Gulf War. At no time did the United States face the threat of invasion by Vietnamese or Iraqi troops, and the use of nuclear weapons by Washington during these conflicts would therefore have been unlawful.

Who determines whether or not a given state is under threat of destruction? Obviously, the right to order the use of nuclear weapons is reserved for the highest-ranking officials of a state. At the same time, their assessment of the situation will be guided by their personal ideas about the emerging threat and ways to counter it. Of course, regulatory benchmarks for assessing a particular threat exist, but one obvious criterion has to be pointed out here – the balance of power, military and economic, between the states involved in the conflict. It was obvious during the Vietnam War that no development of events would have posed a threat to the existence of the United States (the same cannot be said of the Democratic Republic of Vietnam). However, if a state that possesses nuclear weapons enters into an armed conflict with another state that has a larger population and superior military and economic potential, then such a threat may well arise, and recourse to the use of nuclear weapons is a distinct possibility if the conflict plays out unfavourably for that country.

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<sup>13</sup> David M. Corwin draws a similar conclusion in his article, writing that the use of nuclear weapons in most cases leads to a violation of one or more of the principles of humanity, although the country may exempt itself from a determination that its conduct was unlawful by successfully invoking the defences of military necessity, reprisal, or self-defense. The success of these defenses rests on a determination that the degree of the violations is proportionate to the military objective sought to be achieved.

It is also necessary to take the presence of allies among the warring sides and their participation in military-political organizations into account. If the charter documents of a given organization oblige certain member states to provide military assistance to other member states, and if the total military and economic potential of the members of this organization exceeds the military and economic potential of the state that has entered into an armed conflict with any member of this organization, then all the member states, regardless of the size of their military power, may be a target for the use of nuclear weapons, since a conflict with such a military-political organization inevitably calls into question the very existence of that state.

The issue of fulfilling the allied obligations of states possessing nuclear weapons is murkier. Is the use of nuclear weapons prohibited if the survival of the state possessing such weapons is not at stake, but that of an allied country to which it has pledged unconditional military assistance is? Judging by the wording used by the International Court of Justice, the answer would be no. As stated in para. 97 of the Advisory Opinion, the International Court of Justice was unable to reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a state in an extreme circumstance of self-defence, in which its very survival – and not that of allied states – would be at stake.

Does the entry into force of the 2017 Treaty on the Prohibition of Nuclear Weapons change the legal validity of the conclusion of the International Court of Justice in its 1996 Advisory Opinion? Does it give sufficient grounds to talk about the emergence of a customary legal norm that would prohibit the use of nuclear weapons entirely? It would seem not.

As we all know, on the same day that the Treaty on the Prohibition of Nuclear Weapons was adopted, the United States, United Kingdom and France – all permanent members of the UN Security Council and nuclear-weapon states – issued a joint statement indicating that they had no intention of signing and ratifying the Treaty. The nuclear obligations of these states will thus not change. For example, they do not accept the claims that the Treaty reflects changes in customary international law or in any way contributes to its development (Nystuen, Egeland, Hugo 2018: 32).

On January 3, 2022, the leaders of the five permanent members of the UN Security Council issued a joint statement in which they affirmed that “nuclear weapons – for as long as they continue to exist – should serve defensive purposes, deter aggression, and prevent war,” and the desire to “further strengthen [their] national measures to prevent unauthorized or unintended use of nuclear weapons.” However, they said nothing about any intention to give up their nuclear weapons or commit to never using them. They also stated that they remained committed to their “Nuclear Non-Proliferation Treaty (NPT) obligations, including [their] Article VI obligation ‘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.”<sup>14</sup> Not a single word was said about the 2017 Treaty on the Prohibition of Nuclear Weapons, which had already been adopted and was about to enter into force.

The norms of customary international law and treaty law become binding when, and only when, states agree to abide by them. If states possessing nuclear weapons, as well as a sizable number of other states, do not agree with the binding nature of the rules established in the Treaty on the Prohibition of Nuclear Weapons, then these rules will not become binding on them as a result of its conclusion and as ordinary rules of international law. As the Norwegian legal scholars Gro Nystuen, Kjølsv Egeland and Torbjørn Graff Hugo have noted, a customary norm prohibiting nuclear weapons may emerge in international law in the foreseeable future, but it is unlikely to be binding for states that do not accept it (Nystuen, Egeland, Hugo 2018: 33). And they emphasize the fact that the Treaty on the Prohibition of Nuclear Weapons was not designed to impose legal obligations on states that do not accede to it.

## Conclusion

The entry into force of the Treaty on the Prohibition of Nuclear Weapons did not introduce any fundamental changes to the resolution of the issue of the use of nuclear weapons. While the Treaty imposes a complete ban on the use of such weapons and requires the destruction of all stockpiles by States Parties, not a single nuclear-weapon state has acceded to it, and they are thus not subject to its provisions. The use of nuclear weapons by these states remains subject to the restrictions set forth by the general rules of international humanitarian law, which the International Court of Justice analysed in its Advisory Opinion of July 8, 1996. It seems that the main provisions of the Advisory Opinion remain in force today, since no universal international legal norms have emerged in the intervening period that would call these provisions into question. In accordance with these provisions, the International Court of Justice did not find a prohibition of the use of nuclear weapons by a state in cases where its very survival would be at stake. I would like to hope that this situation remains in the realm of the hypothetical.

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### **Conflict of interest:**

The author declares the absence of any conflicts of interest.

<sup>14</sup> Joint Statement of the Leaders of the Five Nuclear-Weapon States on Preventing Nuclear War and Avoiding Arms Races. 03.01.2022. URL: <http://kremlin.ru/events/president/news/67551> (accessed: 10.07.2022).

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