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**INTERNATIONAL LEGAL REGIME ON NUCLEAR
DISARMAMENT: CONTEMPORARY DEVELOPMENTS**

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“A nuclear war cannot be won and must never be fought”

- Ronald Reagan and Mikhail Gorbachev¹

ABSTRACT

The Hiroshima-Nagasaki bombings shook the conscience of the entire international community as it not only brought untold sorrow to the people of Japan, but also trans-generational effects on the succeeding generations. It was wished that similar incidents should never happen again and this brought the issue of nuclear disarmament to the attention of the international community. The General Assembly of the United Nations adopted a resolution as early as 1946 which focused on the elimination of atomic bombs. Subsequently, many more resolutions were adopted by the General Assembly and the Security Council. The first binding instrument to ban nuclear weapon testing, i.e., Partial Test Ban Treaty was adopted in 1963. This Treaty did not provide for a comprehensive ban on the testing of nuclear weapons. In 1968, the Treaty on the Non-Proliferation of

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¹ The agreed statement made by both the leaders of nuclear super-powers towards the end of the cold war. See *Securing Our Common Future: An Agenda for Disarmament*, OFFICE FOR DISARMAMENT AFFAIRS, UNITED NATIONS (New York, 2018).

Nuclear Weapons was adopted to prohibit the rapid increase in the number of nuclear weapons. In 1996, Comprehensive Test Ban Treaty was adopted to ban nuclear testing comprehensively. In addition, five Nuclear-Weapon-Free Zones ["NWFZs"] were created by various treaties at regional levels.

The regulatory framework so established, coupled with the NWFZs, the Advisory Opinion of International Court of Justice of 1996, and various resolutions of the General Assembly and the Security Council created a positive environment to achieve the goal of nuclear disarmament. Finally, the Treaty on the Prohibition of Nuclear Weapons, 2017 ["TPNW"] was adopted aiming to achieve the aforesaid goal. The TPNW seems to be a promising treaty. This article discusses the international legal regime with respect to nuclear disarmament, particularly the obligations of State Parties under TPNW.

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I. INTRODUCTION

The dropping of atomic bombs by the United States on Hiroshima and Nagasaki in Japan in 1945 brought untold sorrow to humanity as a whole and the Japanese in particular. Hundreds and thousands of people were killed, wounded, and maimed. There is no clear-cut figure of the dead and wounded. As per one estimate, the atom bomb killed around 2,37,000 people in Hiroshima alone, either directly or indirectly through its effects, which included radiation sickness, burn injuries and cancer.² The death toll by the atom bomb effect at Nagasaki was around 80,000.³ The United Nations has also estimated the deaths to be around 3,00,000 in the two places.⁴ Such nuclear weapons could not make a distinction between combatants and non-combatants. They imposed sufferings of the most horrible kind on the people. The impact of the atomic bomb, like any other nuclear weapon, did not remain confined only to that generation but also moved on to the succeeding generations through trans-generational effects. There seem to be two major reasons for the United States to have used atomic bombs: (i) to force Japan to surrender and end World War-II, and (ii) to establish its supremacy in the power game. Regardless of the reasons, the United States could not be justified in using atomic bombs, as the cumulative effect of the blast, the firestorm, and the radiation made it a highly dangerous act of an unprecedented magnitude.

² Curtis LeMay and Paul Tibbets, *Bombings of Hiroshima and Nagasaki – 1945*, ATOMIC HERITAGE FOUNDATION, <https://www.atomicheritage.org/history/bombings-hiroshima-and-nagasaki-1945> (last visited July 15, 2020).

³ *Id.*

⁴ *Securing Our Common Future: An Agenda for Disarmament*, OFFICE FOR DISARMAMENT AFFAIRS, UNITED NATIONS (New York, 2018), ¶ 15 (*hereinafter* “UNODA”).

It is a matter of great satisfaction that in the last 75 years, no nuclear weapon has been used by any State. However, the lust to become nuclear capable has continued among States. Some of the States manufactured nuclear weapons and stockpiled them, some conducted nuclear weapon tests, some proliferated nuclear technology and some modernised their nuclear arsenals in order to get “*new military capacities*” and to lower the “*threshold for their battlefield use*”.⁵ Since 2006, North Korea has conducted six nuclear tests to make itself a nuclear capable State.⁶ As of May 2020, there are 13,410 nuclear weapons possessed by 9 countries: Russia–6,370; the United States–5,800; China–320; France–290; the United Kingdom–195; Pakistan–160; India–150; Israel–90; and North Korea–35. It is noteworthy that when the Cold War was going on in 1986, this number was around 70,300.⁷ It is also noteworthy that Ukraine, Kazakhstan and Belarus repatriated the nuclear weapons, which came in their possession on the disintegration of the Union of Soviet Socialist Republics [*hereinafter* referred to as the “**USSR**” or “**Soviet Union**”]. South Africa dismantled its nuclear weapons unilaterally, whereas France and the United Kingdom also took steps to minimize their nuclear weapons.⁸ However, the aforesaid nine States continue to have an urge to retain their nuclear weapons.

⁵ *Id.* ¶ 17.

⁶ *North Korea*, NUCLEAR THREAT INITIATIVE, (last updated July, 2020), <https://www.nti.org/learn/countries/north-korea/>.

⁷ Hans M. Kristensen and Matt Korda, *Status of World Nuclear Forces*, FEDERATION OF AMERICAN SCIENTISTS, (April, 2020) <https://fas.org/issues/nuclear-weapons/status-world-nuclear-forces/>.

⁸ UNODA, *supra* note 4.

The concept of nuclear disarmament is not to eradicate the nuclear technology, as the technology is also required for peaceful purposes, such as to generate power, for medical and industrial purposes, etc. Broadly speaking, nuclear disarmament is basically the idea of “*zeroing the nuclear weapons*”. Further, nuclear disarmament is not only confined to the elimination of nuclear weapons, but also to the production of “*weapon-grade uranium*”.⁹ There is an important issue of “*nuclear terrorism*”. A country like India, which shares its border with China and Pakistan, must be cautious. While both, China and Pakistan, are nuclear powers, Pakistan is also a State notorious for promoting cross border terrorism. There is always an apprehension that the terrorists may get possession of nuclear weapons. India, therefore, has to be vigilant in this regard. However, if there is complete nuclear disarmament, the issue of nuclear terrorism will also come to an end.¹⁰

The issue of nuclear disarmament got attention in the year following the Hiroshima-Nagasaki bombings. The General Assembly of the United Nations [*hereinafter* referred to as “**General Assembly**”] adopted a resolution as early as 1946 wherein it focused on the elimination of atomic bombs. Subsequently, many more resolutions were adopted by the General Assembly and the United Nations Security Council [*hereinafter* referred to as “**Security Council**”]. Three binding multilateral international instruments

⁹ Aatif Rahnuma and Aman Tenguria, *Nuclear Hegemony and the Indian Project*, 1(1) J. OF INT’L L. & COMITY 22 (2020); *see also* Omkar Upadhyay and Ujjawal Dixit, *From Past to Present: India’s Nuclear Narrative*, 1(1) J. OF INT’L L. & COMITY 42 (2020).

¹⁰ For information on “nuclear terrorism”, *see* Kalyani Rathi, *Pre-emptive Nuclear Agenda: Strategies and Challenges*, 1(1) J. OF INT’L L. & COMITY 32-41 (2020).

were adopted to ban nuclear weapon testing and proliferation of nuclear weapons. These instruments consisted of – (i) the Partial Test Ban Treaty, 1963 [*hereinafter* referred to as “**PTBT**”];¹¹ (ii) the Treaty on the Non-Proliferation of Nuclear Weapons, 1968 [*hereinafter* referred to as “**NPT**”];¹² and the Comprehensive Test Ban Treaty, 1996 [*hereinafter* referred to as “**CTBT**”].¹³ Together, they established a regulatory framework. Besides, five Nuclear-Weapon-Free Zones [*hereinafter* referred to as “**NWFZs**”] were created by various treaties at regional levels.

The regulatory framework so established, coupled with the NWFZs, the Advisory Opinion of International Court of Justice [*hereinafter* referred to as “**ICJ**”] of 1996, and various resolutions of the General Assembly and the Security Council, created a positive environment to achieve the goal of nuclear disarmament. Finally, the Treaty on the Prohibition of Nuclear Weapons, 2017 [*hereinafter* referred to as “**TPNW**”]¹⁴ was adopted aiming to achieve the aforesaid goal. The TPNW seems to be a promising treaty. This article discusses the international legal regime with respect to nuclear disarmament, particularly the obligations of State Parties under TPNW. It will also discuss whether nuclear powered

¹¹ Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer space and under water, Aug. 5, 1963, 14 U.S.T. 1313, 480 U.N.T.S. 43.

¹² Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968 21 U.S.T. 483, 729 U.N.T.S. 161.

¹³ Comprehensive Nuclear Test Ban Treaty, Sept. 24, 1996, S. TREATY DOC. NO. 105-28 (1997), 35 I.L.M. 1439.

¹⁴ Treaty on the Prohibition of Nuclear Weapons, Treaty on the Prohibition of Nuclear Weapons, July 7, 2017, 729 UNTS 161.

States would like to be bound by it or instead find excuses for not becoming Parties to the same.

II. NUCLEAR DISARMAMENT: HISTORICAL BACKGROUND

The issue of nuclear disarmament, as already stated, was taken up for the first time by the General Assembly back in 1946. The ICJ while referring to the General Assembly Resolution of 1946 in its Advisory Opinion on “*Legality of the Threat or Use of Nuclear Weapons*”,¹⁵ stated that even the first resolution of the General Assembly, which was adopted on January 24, 1946, proposed to set up a commission to make a specific proposal for the elimination of nuclear weapons and other weapons of mass destruction.

Subsequently, in another resolution adopted in 1954, the General Assembly re-emphasised that States must reach to an agreement on a proposal which was comprehensive enough to be included in a draft international disarmament convention, providing for the complete prohibition of manufacture and use of nuclear weapons and also all other weapons of mass destruction. The General Assembly also required that nuclear weapons stocks which then existed should be converted for peaceful purposes.¹⁶ In 1963, the first multilateral treaty, PTBT, was adopted to regulate the testing of nuclear weapons.

¹⁵ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. Rep. 226 (July 8, 1996).

¹⁶ *Id.* ¶ 264.

A. PARTIAL TEST BAN TREATY (PTBT), 1963

The Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water (also known as the Partial Test Ban Treaty) was signed on 5 August 1963 and it came into force on October 10, 1963. The United States, the United Kingdom and the USSR were referred to as the “*Original Parties*” under the PTBT. The principal aim, as proclaimed by the parties in the Preamble, was to achieve an agreement on complete nuclear disarmament at the earliest under a system of stringent international control. Further, the parties sought that there should be a complete discontinuance of nuclear weapons test explosions.

The PTBT is a short treaty consisting of just five Articles. Under PTBT, the Parties undertook that they shall prohibit, prevent and shall not carry out test explosion of nuclear weapons at a place which is under its control or jurisdiction – (i) either in atmosphere or beyond its atmospheric limit at a place which may include outer space; or (ii) underwater which may include territorial sea as well as high seas. Such a test explosion is also prohibited for the Parties in an environment if it is likely to cause radioactive debris outside its territorial limits.¹⁷ The PTBT, thus, prohibits nuclear weapon test prohibition only in atmosphere, outer space and underwaters. It does not prohibit such testing underground. It is for this reason that it is called as ‘Partial’ Test Ban Treaty.

¹⁷ Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer space and under water, Aug. 5, 1963, 14 U.S.T. 1313, 480 U.N.T.S. 43, art. I.

As aforesaid, the PTBT is the first multilateral treaty to regulate the nuclear weapon test explosions. Though it does not ban nuclear weapon test explosions in a comprehensive manner, it definitely refers to the aim of achieving nuclear disarmament. Thus, the PTBT paved the way for the international community to go ahead with the objective of banning nuclear weapon testing completely and ultimately achieving complete nuclear disarmament.

B. TREATY ON THE NON-PROLIFERATION OF NUCLEAR WEAPONS

(NPT)

After PTBT, another treaty, namely the Treaty on the Non-Proliferation of Nuclear Weapons was adopted in 1968 to prevent the proliferation of nuclear weapons. The NPT was adopted “*believing that the proliferation of nuclear weapons would seriously enhance the danger of nuclear war*”¹⁸ and “*to undertake effective measures in the direction of nuclear disarmament*”.¹⁹ It was also desired by NPT that efforts should be made to bring to an end the manufacturing of nuclear weapons, liquidation of the existing stockpiles, and the elimination of nuclear weapons. All this should be done in pursuance of a treaty which may provide for total disarmament under an international system of control which is effective and strict at the same time.²⁰

¹⁸ Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968 21 U.S.T. 483, 729 U.N.T.S. 161.

¹⁹ *Id.*

²⁰ *Id.*

The NPT made it prohibitory for the nuclear weapon State Parties to transfer either the nuclear weapons/devices or control over them in any manner either directly or indirectly.²¹ Not only that, but the NPT also prohibited nuclear-weapon State Parties from assisting, encouraging or inducing non-nuclear-weapon States to acquire or manufacture such weapons or devices in any manner. It is also prohibitory for nuclear-weapon State parties to make non-nuclear-weapon State get control over aforesaid weapons or devices.²²

A similar obligation has also been created by the NPT for non-nuclear-weapon State Parties. They also undertake not to receive the transfer of nuclear weapons/other nuclear explosive devices or of their control, directly or indirectly. They further undertake not to manufacture/acquire/seek/receive any assistance in the manufacture of nuclear weapons or devices.²³ Further, they also undertake to “*accept safeguards*” as set forth by International Atomic Energy Agency [*hereinafter* referred to as “**IAEA**”].²⁴ “*The inalienable right of all ... to develop research, production and use of nuclear energy for peaceful purposes*” shall remain intact under the NPT.²⁵

²¹ Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968 21 U.S.T. 483, 729 U.N.T.S. 161, art. IX.

²² *Id.* art. I.

²³ *Id.* art. II.

²⁴ *Id.* art. III.

²⁵ *Id.* art. IV.

The NPT not only obligates the Parties to prevent nuclear proliferation but also to pursue negotiations to achieve nuclear disarmament. Article VI makes it obligatory to bring to an end the nuclear arms race at the earliest and also the nuclear disarmament. For this purpose, the Parties are required to negotiate on effective measures in good faith. They are required to pursue negotiation on a disarmament treaty providing for an international system of control which is effective and strict at the same time.

Article VI creates an obligation on all Parties whether they possess nuclear weapons or not. It does not lay down any specific time limit for bringing nuclear arms race to an end. Further, this provision may be understood as “*considering the obligation as one of erga omnes nature*”.²⁶

In order to ensure complete nuclear disarmament in regions, States are entitled to conclude treaties at regional basis. The NPT does not affect the rights of States in this regard. This is quite reasonable because the goal of complete nuclear disarmament is to be achieved globally and for this purpose, States should be encouraged to make their regions nuclear weapons free. All regional treaties on nuclear disarmament should be encouraged by the entire international community, so that the other regions may also take the similar initiatives on disarmament.²⁷

²⁶ Daniel Rietiker, *Background Note*, 1(1). J. OF INT'L L. & COMITY IV (2020).

²⁷ Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968 21 U.S.T. 483, 729 U.N.T.S. 161, art. VII.

Originally, the NPT was adopted as an interim measure to prevent the dissemination of nuclear weapons. However, after achieving “*near universal status*”, it came to be regarded as a “*key pillar of the international security architecture*”.²⁸ Initially, it was adopted for 25 years,²⁹ but was extended indefinitely on 11 May 1995.

The NPT has been successful only in limited manner, as the five permanent members of the Security Council did not come forward wholeheartedly to dismantle their nuclear arsenals despite the fact that non-nuclear-weapon States performed their obligations well under the Treaty.³⁰ Unfortunately, the NPT is discriminatory in the sense that it allows the nuclear-weapon States to continue holding their nuclear weapons. This ultimately results in a setup which facilitates “*a nuclear-technological monopoly instead of serving to achieve substantive disarmament*”.³¹ It is noteworthy that in 1965, India strongly advocated a nuclear non-proliferation treaty which was “*just, equitable and non-discriminatory*”, however, it parted ways the moment NPT took final shape as it was not in accordance with India’s views.³²

C. COMPREHENSIVE TEST BAN TREATY (CTBT)

²⁸ UNODA, *supra* note 4, ¶ 18.

²⁹ Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968 21 U.S.T. 483, 729 U.N.T.S. 161, art. X (2).

³⁰ Aastha Ananya and Aparna Tiwari, *Rewriting India’s Nuclear Strategy: A Path to Reset the Global Order*, 1(1) J. OF INT’L L. & COMITY 3 (2020).

³¹ *Id.* ¶ 10.

³² Astha Nahar and Shirin Jaiswal, *Nuclear Ambivalence: Addressing India’s Disarmament Fault Lines*, 1(1) J. OF INT’L L. & COMITY 54 (2020).

The CTBT was adopted on 10 September 1996. It bans “*all nuclear explosions*” whether for “*military*” or for “*peaceful purposes*”.³³ In its Preamble, the CTBT noted the aspirations expressed in PTBT “*to seek to achieve the discontinuance of all test explosions of nuclear weapons for all time*”.³⁴ Further, emphasis is made on the need to make continuous efforts for the reduction of nuclear weapons, keeping in mind the ultimate goal that those weapons have to be eliminated from the Earth. It is also emphasised that there is a need for complete nuclear disarmament which should be done under the international control which is strict and effective. It is also stated in the Preamble that the nuclear testing can be brought to an end by concluding a ‘comprehensive nuclear test ban treaty’ which is universal in nature and effectively verifiable at the same time.

Article I of the CTBT lays down “*basic obligations*” for the State Parties. It prevents the State Parties from carrying out any nuclear explosion or any test explosion of nuclear weapons. It also obligates them “*to prohibit and prevent any such nuclear explosion at any place under its jurisdiction or control*”.³⁵ The State Parties are duty bound not to cause, encourage or participate in any manner in the conduct of nuclear explosion or test explosion of nuclear weapons. The provision makes it clear that no nuclear weapon test

³³ *Multilateral agreements in nuclear energy*, NUCLEAR ENERGY AGENCY, <https://www.oecd-nea.org/law/multilateral-agreements/comprehensive-test-ban-treaty.html#:~:text=The%20CTBT%20bans%20all%20nuclear,for%20military%20or%20peaceful%20purposes> (last visited Aug. 31, 2020).

³⁴ Treaty on the Prohibition of Nuclear Weapons, Treaty on the Prohibition of Nuclear Weapons, July 7, 2017, 729 UNTS 161.

³⁵ *Id.* art I.

explosion/other nuclear explosion is allowed for the State Parties under any circumstances.

The CTBT established the Comprehensive Nuclear-Test-Ban Treaty Organisation [*hereinafter* referred to as “**CTBTO**”] at Vienna. The object and purpose of the CTBT is to be achieved by the Organisation. The Organisation is also to ensure the implementation of the CTBT provisions, which include international verification of compliance. For the purpose of consultation and cooperation, it is also to provide a forum. All the State Parties to the CTBT are members of the aforesaid Organisation. Three organs of the Organisation have been established – (i) the Conference of the States Parties; (ii) the Executive Council; and (iii) the Technical Secretariat, which includes the International Data Centre. The State Parties are required to “*cooperate with the Organization in the exercise of its functions*”.³⁶

As the CTBT provides for cooperation between the UN and the CTBTO, the General Assembly adopted the Agreement to Regulate the Relationship between the United Nations and the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization in 2000, to enable the CTBTO to work in relationship with UN to achieve the objectives of the CTBT.³⁷

³⁶ *Id.* art. II.

³⁷ G.A. Res. 54/280 (June 30, 2000).

Article III obligates the State Parties to take “*necessary measures to implement its obligations*” under CTBT. Article IV lays down detailed provisions with respect to the verification of compliance under the CTBT.

The CTBT was a good initiative by the international community banning all nuclear explosions. The Treaty went a step further by establishing CTBTO, which is mandated to achieve the objectives of CTBT. The CTBTO is to ensure not only the implementation of the CTBT provisions, but also international verification of compliance. The Agreement between the UN and the CTBTO gives an additional strength to CTBTO to achieve its objectives and to ensure that there is no violation of CTBT provisions by any State Party. The flaw in the CTBT is that there is no commitment from the nuclear-weapon States that they would eliminate their nuclear weapons in a time-bound manner. This formed one of the bases for India for not joining the CTBT.³⁸

D. OTHER TREATIES

In 1974, the United States and the USSR signed the Treaty on the Limitation of Underground Nuclear Weapon Tests. The purpose of the Treaty, *inter alia*, was to bring to an end the nuclear arms race, reduce strategic arms and achieve nuclear disarmament under an effective system of control.³⁹ The Treaty is popularly known as “Threshold Test Ban Treaty”

³⁸ Treaty on the Prohibition of Nuclear Weapons, Treaty on the Prohibition of Nuclear Weapons, July 7, 2017, 729 UNTS 161.

³⁹ Treaty on the Limitation of Underground Nuclear Weapon Tests, U.S.-U.S.S.R., July 3, 1974, 13 I.L.M. 906 (*commonly known as* Threshold Test Ban Treaty, Preamble, 1974).

[*hereinafter* referred to as “**TTBT**”]. Under TTBT, both the Parties undertook “*not to carry out any underground nuclear weapon test having a yield exceeding 150 kilotons at any place under its jurisdiction or control*” after 31 March 1976.⁴⁰ Thus, the TTBT established a nuclear ‘threshold’, as it prohibited the Parties from conducting tests which had a yield exceeding 150 kilotons. Militarily, this threshold is important as the possibility of nuclear weapons testing, which crosses the “*fractional-megaton range*”, is removed.⁴¹

Another Treaty was adopted between the United States and the USSR, called the Treaty on Underground Nuclear Explosions for Peaceful Purposes [*hereinafter* referred to as “**PNE Treaty**”] in 1976.⁴² Under the PNE Treaty, both the Parties agreed that they would not carry out certain activities – (i) no nuclear explosions which had a yield of more than 150 kilotons, (ii) no group explosion which had a yield of more than 1500 kilotons in aggregate, and (iii) no group explosion which had a yield of more than 150 kilotons in aggregate unless the individual explosions in that group were identifiable and measurable. It was also agreed between them that they would be free to conduct nuclear explosions in other countries for peaceful purposes if so requested by them. However, such explosion was to be conducted in compliance with the PNE Treaty obligations keeping in mind the yield limitations and also in accordance with the NPT.⁴³

⁴⁰ *Id.* art. I.

⁴¹ *Threshold Test Ban Treaty*, FEDERATION OF AMERICAN SCIENTISTS, <https://fas.org/nuke/control/tbt/intro.htm> (last visited June 1, 2020).

⁴² Treaty on Underground Nuclear Explosions for Peaceful Purposes, U.S.-U.S.S.R., May 28, 1976, 15 I.L.M. 891 (1976), 1714 U.N.T.S. 387.

⁴³ *Id.* art. III.

The TTBT and the PNE Treaty were a self-imposed restriction by the United States and the USSR on the conduct of nuclear tests and nuclear non-proliferation. Certain provisions of these treaties including, *inter alia*, provisions for “*data exchanges, national technical verifications and on-site visit for confirmation*” ultimately contributed to the transparency with respect to nuclear possession.⁴⁴

III. ADVISORY OPINION OF ICJ OF 1996

Before referring to the Advisory Opinion of ICJ on the *Legality of the Threat or Use of Nuclear Weapons*⁴⁵ of 8 July 1996, it will be appropriate to refer the dissenting opinion of Judge Weeramantry in the *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court’s Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case* of 1995.⁴⁶ Judge Weeramantry emphasised on the duty of the ICJ to protect the rights of future generations. He stated that when New Zealand complained that its rights were affected, it did not mean that those rights were related only to the rights of people living at that moment, it also included the rights of “*unborn posterity*”. He further stated that those were the rights which “*a nation is entitled, and indeed obliged, to protect*”.⁴⁷ He also quoted the work of Brown Weiss, who wrote that “*each generation is both a custodian and a user of our common*

⁴⁴ See Tenzin Jangchup Khampa, *The Legal instruments on Eliminating Use of Nuclear Weapons: Confronting Power Game Play through Equipped Weapon Technology and Prohibiting its Use as Warfare/Warheads*, 5(1) LEXIGENTIA 36, 42 (2018).

⁴⁵ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226 (July 8, 1996).

⁴⁶ [1995] ICJ Rep 288.

⁴⁷ Nuclear Tests (NZ v. Fr.), Judgment, 1995 I.C.J. Rep. 228 at 341 (Dec. 20, 1995) (Weeramantry, J., dissenting).

natural and cultural patrimony. As custodians of this planet, we have certain moral obligations to future generations which we can transform into legally enforceable norms".⁴⁸

In its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* also, the ICJ stated that the nuclear weapons have the characteristics of releasing "*not only immense quantities of heat and energy, but also powerful and prolonged radiation*", which make them "*potentially catastrophic*". Thus, the Advisory Opinion noted that nuclear weapons may destroy the civilisation as well as the ecosystem on the Earth. They cause serious harm to the future generation including genetic defects in them.⁴⁹

The General Assembly sought an advisory opinion from the ICJ on the question: "*Is the threat or use of nuclear weapons in any circumstance permitted under international law?*" in December 1994. The ICJ decided to give its Advisory Opinion on the request of General Assembly and replied in the following manner:⁵⁰

- (i) The ICJ replied unanimously that regarding the use or threat of nuclear weapons there was no specific authorisation either in the customary international law or conventional law.
- (ii) At the same time, the ICJ also stated by 11:3 votes that there was no comprehensive and universal prohibition of the use or

⁴⁸ E. BROWN WEISS, IN FAIRNESS TO FUTURE GENERATIONS: INTERNATIONAL LAW, COMMON PATRIMONY AND INTERGENERATIONAL EQUITY 21 (1989).

⁴⁹ See *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. Rep. 226 ¶¶ 243-44.

⁵⁰ *Id.* ¶ 265.

threat of nuclear weapons in customary international law or convention law.

- (iii) The ICJ unanimously replied that any use or threat of nuclear weapons which was contrary to Article 2(4) of the UN Charter and which also failed to meet Article 51 requirements was not lawful.
- (iv) The ICJ unanimously replied that it is necessary that there is a compatibility between the use or threat of nuclear weapons and international law related to armed conflict, more particularly international humanitarian law along with other treaties obligations and undertakings regarding nuclear weapons.
- (v) The ICJ continued stating that generally the use or threat of nuclear weapons would be contrary to aforesaid laws. However, it could not conclude in a definite manner whether the use or threat of nuclear weapons would be unlawful or lawful in a situation where the action was required in self-defence in an extreme circumstance where survival of such State was at stake. This reply was made by “*seven votes to seven*”, and the President gave the deciding vote.
- (vi) The ICJ unanimously replied that an obligation existed for the international community to pursue and conclude negotiations which should lead to nuclear disarmament under a system of international control, which was effective and strict at the same time.

The Advisory Opinion of the ICJ created more confusion than solutions. Since the Court did not prohibit the use of nuclear weapons completely, it was a blow to the efforts of the international community to achieve complete nuclear disarmament. Some of the replies, particularly the (v) point above, was delivered by seven votes to seven with the deciding vote of the President. This shows how the judges were divided in their opinions on the matter. Unfortunately, this was a case of missed opportunity for the ICJ.

However, there was one good thing in the Advisory Opinion – the reiteration by the Court about the obligation of States to negotiate a regime which may lead to nuclear disarmament. The Court made the following observations with respect to the obligations laid down in Article VI of the NPT:

“The legal import of that obligation goes beyond that of a mere obligation of conduct; the obligation involved here 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”.⁵¹

The Court further stated that the “*two-fold obligations*”, i.e., “*to pursue*” and “*to conclude negotiations*” concern all State Parties to the NPT, which are 182 in number and constitute “*vast majority of the international community*”. “*Virtually the whole of this community appears moreover to have been involved when*

⁵¹*Id.* ¶ 263.

resolutions of the United Nations General Assembly concerning nuclear disarmament have repeatedly been unanimously adopted'.⁵²

The Security Council also in its Resolution of 1995 urged every State, as provided in NPT Article VI, to pursue negotiations regarding nuclear disarmament and to work effectively for a treaty on complete disarmament.⁵³

The Court had very rightly emphasised on the need of negotiating an effective binding regime to achieve the goal of nuclear disarmament. After the Advisory Opinion by the ICJ in 1996, many more resolutions were adopted in which the international community was reminded of its obligation under Article VI of the NPT. However, the breakthrough came only in 2017 with the adoption of TPNW, which has been discussed later. The adoption of TPNW took 21 years from the adoption of CTBT as well as the delivery of Advisory Opinion (both in 1996).

IV. NUCLEAR-WEAPON-FREE ZONES

The NWFZs are welcome steps at the regional level as they are established with an objective, *inter alia*, to strengthen global nuclear non-proliferation and disarmament norms and consolidate international efforts towards peace and security.⁵⁴ The NPT also supports the rights of States to

⁵²*Id.* ¶ 264.

⁵³S. C. Res. 984, (Apr. 11, 1995).

⁵⁴ *Nuclear Weapon Free Zones*, OFFICE OF DISARMAMENT, UNITED NATIONS, <https://www.un.org/disarmament/wmd/nuclear/nwzf/> (last visited Aug. 18, 2020).

conclude regional treaties in order to assure the total absence of nuclear weapons in their respective territories.⁵⁵

An NFZW is defined by the General Assembly as any zone recognised by it which has been established by a group of States through a convention or treaty, whereby the statute of such zone and the procedure for its delimitation is defined. Further, there should be establishment of an “*international system of verification and control*” which is to guarantee compliance of the obligations arising out of the aforesaid statute.⁵⁶

Till date, five NWFZs have been established by – (i) Treaty for the Prohibition of Nuclear Weapons in Latin America and the Caribbean, 1967, which is also known as ‘Treaty of Tlatelolco’; (ii) South Pacific Nuclear-Free Zone Treaty, 1985, which is also known as ‘Treaty of Rarotonga’; (iii) Treaty on the Southeast Asia Nuclear-Weapon-Free Zone, 1995, which is also known as ‘Treaty of Bangkok’; (iv) African Nuclear-Weapon-Free Zone Treaty, 1996, which is also known as ‘Treaty of Pelindaba’; and (v) Treaty on a Nuclear-Weapon-Free Zone in Central Asia, 2006. The NWFZs are also considered as an effective step towards achievement of the goal of complete nuclear disarmament at the international level.

In addition to NWFZs, there are other treaties which deal with the “*denuclearization of certain areas*”. These are – (i) Antarctic Treaty, 1959; (ii)

⁵⁵ Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968 21 U.S.T. 483, 729 U.N.T.S. 161, art. 7.

⁵⁶ See G.A. Res. 3472 (XXX) B.

Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, 1967; (iii) Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, 1979; and (iv) Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea-Bed and the Ocean Floor and in the Subsoil Thereof, 1971.⁵⁷

V. TREATY ON THE PROHIBITION OF NUCLEAR WEAPONS (TPNW)

The Treaty on the Prohibition of Nuclear Weapons was adopted in 2017 by 122 votes in favour, one against and one abstention. The TPNW negotiations aimed at achieving a legally binding instrument to prohibit nuclear weapons, leading towards their total elimination.⁵⁸

The TPNW in its Preamble has shown concern over “*the slow pace of nuclear disarmament*”. It recognises that for a nuclear-weapons-free world, there should be a prohibition of nuclear weapons which is legally binding. It reaffirms that there should be an effective implementation of the NPT in its entirety, which is the cornerstone of the non-proliferation regime and nuclear disarmament. It also recognises the significant importance of the CTBT and its verification regime which is an essential element in this

⁵⁷ Nuclear Weapon Free Zones, *supra* note 54.

⁵⁸ *Treaty on the prohibition of nuclear weapon*, OFFICE FOR DISARMAMENT AFFAIRS, UNITED NATIONS, <https://www.un.org/disarmament/wmd/nuclear/tpnw/> (last visited June 2, 2020).

regard. The TPNW, however, recognises the alienable right of State Parties regarding nuclear energy for peaceful purposes.

A. PROHIBITED ACTIVITIES

The TPNW lays down certain prohibited activities for the Parties to the Treaty. Article 1 of the TPNW obligates every Party to the treaty to undertake not to do the following seven acts under any circumstances whatsoever; the State Parties are prohibited from developing, testing, producing, manufacturing, acquiring, possessing or stockpiling nuclear weapons/devices. They are also prohibited from transferring or receiving nuclear weapons/devices or control over them in any manner. Further, they are prohibited from using or threatening to use nuclear weapons/devices. Assisting, encouraging or inducing someone, or seeking or receiving any assistance from someone in any manner whatsoever to engage in prohibited activity is also prohibited under TPNW. In addition, allowing any stationing, installing, or deploying of nuclear weapons/devices in the State Party territory or any place which is under the jurisdiction or control of such State Party is also a prohibited activity.

The prohibited activities, therefore, are very comprehensive and include in relation to nuclear explosive devices, the prohibition of their development, test, manufacture, acquisition, possession, etc.; their transfer; their receiving; their use or threat to use; to assist someone to engage in prohibited activity; to seek or receive any assistance; and to allow their stationing, installation or deployment in their territories.

B. OBLIGATION TO MAKE DECLARATION

Every State Party is obligated under the Treaty to submit a declaration to the UN Secretary General [*hereinafter* referred to as “UNSG”] within 30 days from the date of coming into force of that Treaty for the concerned State Party.

In the declaration, every State Party is obligated to declare the nuclear weapons/devices it “*owned, possessed or controlled*” prior to the TPNW. It shall also declare the information with respect to elimination of its “*nuclear-weapon programme*”. This will include information relating to nuclear-weapons-related facilities and their elimination or irreversible conversion. Every State Party is also obliged to make declaration with respect to nuclear weapons/devices it is owning, possessing, or controlling. The State Parties are also to declare whether any nuclear weapons/devices owned, possessed, or controlled by a State are present in their territory or in any other place which is under their jurisdiction.⁵⁹

The declarations so received are transmitted to the States Parties by the UNSG.⁶⁰

C. OBLIGATION TO MAINTAIN SAFEGUARDS.

The TPNW obligates State Parties to maintain its IAEA safeguards obligations. The State Parties are further obligated to conclude “*a comprehensive safeguards agreement*” [*hereinafter* referred to as “CSA”] with

⁵⁹ Treaty on the Prohibition of Nuclear Weapons, Treaty on the Prohibition of Nuclear Weapons, July 7, 2017, 729 UNTS 161.

⁶⁰ *Id.* art. 2(2).

IAEA. For the purpose of CSA, negotiations are to commence “*within 180 days*”. Within 18 months, such agreement is to enter into force. The State Parties are required to maintain such obligations thereafter. These obligations, however, will be “*without prejudice to any additional relevant instruments that it may adopt in the future*”.

D. COMPLETE ELIMINATION OF NUCLEAR WEAPONS

Article 4 of the TPNW⁶¹ lays down comprehensive provisions towards the total elimination of nuclear weapons. All those State Parties that were owning, possessing or controlling nuclear weapons/devices and had eliminated after 7 July 2017 their nuclear-weapon programme, which also include the elimination or irreversible conversion of their facilities which were related to nuclear weapons, prior to the coming into force of TPNW, are also required to cooperate with the designated international authority for the purpose of verification. They are also required to enter into a ‘safeguard agreement’ with the IAEA providing assurance that they did not divert declared nuclear material from the nuclear activities which were meant for peaceful purposes.⁶² The rules relating to CSA above with respect to negotiation and entering into force shall be applicable *mutatis mutandis* to the Safeguard Agreement.

Every State Party which is in possession or control of nuclear weapons/nuclear explosive devices is required to remove them from operational status immediately and also destroy them at the earliest in

⁶¹ *Id.* art. 4.

⁶² *Id.* art. 3.

accordance with Article 4(2) of TPNW. The plan in this regard is to be submitted by such State Party to other State Parties or to a designated international authority. The plan, thereafter, shall be negotiated for approval.

It is, however, noteworthy that the States Parties shall bear the cost which is related to the verification measures and destruction of nuclear weapons/devices and elimination of nuclear facilities.⁶³

Such State Party is required to “*conclude a safeguards agreement*” with IAEA regarding non-diversion of nuclear material from peaceful nuclear related activities. The agreement shall also provide for the “*absence of undeclared nuclear material*”.

In a situation where nuclear weapons or devices are lying with a State Party under its control or jurisdiction but belong to some other State, the former is required to remove them from their jurisdiction at the earliest. Once such weapons/explosive devices are removed by the State Party, then that State Party is obligated to submit to the UNSG a declaration in this regard.

E. OBLIGATION OF STATE PARTY FOR NATIONAL IMPLEMENTATION

Article 5 of the TPNW⁶⁴ obligates State Parties for the national implementation of the provisions arising out of the TPNW. In order to

⁶³ *Id.* art. 9(3).

⁶⁴ *Id.* art. 5.

prevent any prohibited activity in their territories which has been undertaken by any person, the State Parties are required to take all measures which are appropriate including legal, administrative or others. The aforesaid necessary measures may also include “*penal sanctions*”.

As a principle of international law, the States are duty bound to make or amend their domestic/national laws to bring them in conformity with the provisions of the treaty/convention to which they have become parties. Article 5 obligates the State Parties to make new laws or amend their existing laws or otherwise ensure that prohibited activities do not take place in their jurisdiction. They must ensure that prohibited activities are prevented by all appropriate measures which may include legal, administrative or others including penal sanctions. The purpose of Article 5 is that the State Parties cannot remain mute spectators if one is undertaking any of the prohibited activities in their jurisdiction; they are duty bound to prevent it through all means.

**F. OBLIGATIONS WITH RESPECT TO “VICTIM ASSISTANCE” AND
“ENVIRONMENTAL REMEDIATION”**

Article 6⁶⁵ imposes obligations on the State Parties with respect to two issues – (i) to provide assistance to people affected by use of testing of nuclear weapons; and (ii) to do environmental remediation of areas which became contaminated due to testing or use of nuclear weapons. All those individuals who have been affected by testing or use of nuclear weapons

⁶⁵ *Id.* art. 6.

are to be provided assistance which may include medical assistance, rehabilitation of such people and psychological support by the State Parties in accordance with Article 6. They are also obligated to “*provide for their social and economic inclusion*”. The assistance is to be provided to affected individuals “*in accordance with applicable international humanitarian and human rights law*”.

In addition, they are also required to take measures which are necessary and appropriate for the purpose of environmental remediation of areas under their jurisdiction or control which has become contaminated due to the testing or use of nuclear weapons/other nuclear explosive devices.

Article 7(6), which practically is an extension of Article 6, fixes the responsibilities of the State Party with respect to victim assistance and environmental remediation of other affected State Parties, where it is testing or use of nuclear weapons/other nuclear explosive devices has adversely affected the territory of another State Parties. It therefore provides that it is the responsibility of the State Party to provide adequate assistance, to other State Parties which have been affected by the use of testing of nuclear weapons/devices by the former. This is required for the purpose of “*victim assistance*” and “*environmental remediation*”. This obligation is in addition to its obligations which may arise under the international law.

It is noteworthy that the international law on state responsibility shall also be applicable to the State who has done wrong to others. The law

on state responsibility is applicable to all the states irrespective of the fact whether they are parties to the TPNW or not. The codification and progressive development of international law on state responsibility is contained in International Law Commission Draft Articles on Responsibility of States for Internationally Wrongful Acts, 2001.⁶⁶ The draft articles as such are not binding as it is not a binding instrument but its provisions may be binding to the extent of being customary in nature.⁶⁷ The responsibilities laid down in Article 7(6) are additional responsibilities meant for the State Party who has adversely effected the territory of another State Party.

G. INTERNATIONAL COOPERATION AND ASSISTANCE UNDER TPNW

The TPNW under Article 7⁶⁸ makes it obligatory for every State Party to “*cooperate with other States Parties to facilitate*” its implementation. Further, “*in fulfilling its obligations*” under TPNW, every State Party is entitled “*to seek and receive assistance, where feasible, from the other states parties*”. Every State Party which is “*in a position to do so*” is required to “*provide technical, material and financial assistance to the state parties affected by nuclear-weapons use or testing, to further the implementation*” of the TPNW. Further, such State Party is also required to “*provide assistance for the victims of the use or testing*” of nuclear weapons/devices. The assistance may also be provided through various organisations or institutions such as UN system, organisations which may

⁶⁶ INTERNATIONAL LAW COMMISSION, DRAFT ARTICLES ON RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS (November 2001).

⁶⁷ V. K. AHUJA, PUBLIC INTERNATIONAL LAW, 101 (1st ed. 2016).

⁶⁸ Treaty on the Prohibition of Nuclear Weapons, Treaty on the Prohibition of Nuclear Weapons, July 7, 2017, 729 UNTS 161, art. 7.

be national, regional or international, NGOs, Red Cross, etc. It may also be provided on a bilateral basis.

H. MISCELLANEOUS

The TPNW seeks to achieve the goal of universality. For this purpose, the State Parties are obligated to encourage the non-State Parties to become a party to the TPNW to achieve the goal of universal adherence of all States to the TPNW.⁶⁹ The TPNW does not allow States to make reservations to its provisions. Therefore, the States will have to accept all the obligations under the TPNW without any reservations.⁷⁰ The TPNW which is of “*unlimited duration*”, allows State Parties to withdraw from it. Ordinarily, such withdrawal will be effective only after 12 months. However, in a case where a State Party withdrawing itself from the TPNW is a party to an armed conflict at the expiry of 12-month period, it will continue to be bound by its obligations until it is no longer party to an armed conflict.⁷¹

The TPNW will come into force 90 days after getting ratification by 50 states. As on 20 July 2020, there are 40 States Parties to the TPNW, meaning thereby that it has not come into force. Not to talk of ratification, none of the 9 states who possess the nuclear weapons had even signed the TPNW. Nevertheless, the TPNW is considered to be an expression of a new generation of treaty, human-centric, equity based and very democratic,

⁶⁹ *Id.* art. 12.

⁷⁰ *Id.* art. 16.

⁷¹ *Id.* art. 17.

initiated in large part by civil society.⁷² To sum up, the efforts of international community over the last 70 years have culminated in the adoption of TPNW which intends to maintain a “*nuclear weapon free*” world. Undoubtedly, it is a commendable effort of the international community towards the realisation of the goal of nuclear disarmament.

VI. CONCLUSION

The PTBT, the NPT and the CTBT laid down the foundation of a regulatory regime on nuclear non-proliferation and testing of nuclear weapons and other devices. The ICJ also got an opportunity to give its advisory opinion on the legality of the uses of nuclear weapons. The ICJ emphasised the need of achieving the goal of nuclear disarmament. In addition, the creation of five NWFZs at regional level was also a step aimed at global nuclear disarmament. However, the cumulative effect of the aforesaid treaties, the Advisory Opinion and the NWFZs could not bring a desirable result for the nuclear disarmament at international level. Nuclear disarmament which was one of the top priorities of the United Nations could not be achieved as the efforts to achieve this objective remained in a state of severe crisis.

As far as the use of nuclear weapons is concerned, the time has come when the use of nuclear weapons must be considered contrary to the customary rules of international law as they are weapons of mass

⁷² Daniel Rietiker, *Background Note*, 1(1) J. OF INT'L L. & COMITY XIV (2020).

destruction and their use will be contrary to laws of war and international humanitarian laws. Further, there is a near-universal acceptance in the international community in this regard. There is now a state practice of 75 years concerning non-use of nuclear weapons. The legally binding instruments also prohibit the testing and proliferation of nuclear weapons. Further, widespread support may also be found in the General Assembly regarding elimination of nuclear weapons.

The latest development is the adoption of TPNW which was negotiated with an aim to achieve the goal of complete nuclear disarmament. It is a commendable initiative of the United Nations. It is, however, to be noted that the TPNW will remain a mere piece of paper unless all the nuclear powers become party to it, leaving behind their vested interests. It is appropriate to refer the Final Document of the Tenth Special Session of the General Assembly dated 28 June 1978, where it was stated that all the nuclear-weapon states had a special responsibility to achieve the goal of nuclear disarmament.⁷³ Unfortunately, the nuclear-weapon states are yet to show their will and to come forward for this noble cause and eliminate their nuclear arsenal to make the world free of nuclear weapons. For this purpose, they will have to leave their hegemony and work honestly and in a transparent manner towards the nuclear disarmament. With respect to nuclear weapons, the world cannot be divided into two groups – haves and have-nots. It is expected of nuclear-powered states that they will not use nuclear weapons; not develop advanced techniques in this regard; not

⁷³ See G.A. Tenth Special Session Supplement no. 4(A/S-10/4) at 48 (May 23 - June 30, 1978) <https://www.un.org/disarmament/wp-content/uploads/2017/05/A-S10-4.pdf>.

have their operational readiness; establish the system of transparency regarding their nuclear programmes; ensure that there is mutual trust and confidence building among them; and finally eliminate the nuclear weapons completely. However, only time will tell how long they will take to come out of the power game leaving behind their supremacy and embrace this treaty. Unless they become Parties to the TPNW and comply with their obligations, nuclear disarmament will remain a distant dream.