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The NATO Brussels Communiqué and the Treaty on the Prohibition of Nuclear Weapons (TPNW): Stability of Custom and Legality of Deterrence

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Introduction

The North Atlantic Council met on June 14, 2021 in Brussels at heads of State and Government level and adopted a Summit Communiqué. This being the first such Summit since the entry into force of the Treaty on the Prohibition of Nuclear Weapons (TPNW), and nuclear weapons being of central importance to NATO strategy, it was timely to articulate the position of the Alliance in regard to that instrument. The Joint Communiqué affirmed the legality of nuclear weapons. It also made clear the position of the Alliance that the TPNW does not change general international law—i.e., customary international law—insofar as that law concerns nuclear weapons. In connection with this important point concerning customary international law, the Joint Communiqué also addressed a related but more arcane matter: the process by which rules of customary international law come into being, including the circumstances in which we can confidently infer that no new rule has arisen. Considering NATO's ongoing reliance on nuclear weapons—the long continuity in NATO's "principles of extended nuclear deterrence" that a recent contributor to this *Information Series* described[1]—and keeping in mind the commitment

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of the Alliance and every one of its Member States to rule of law, the Brussels Communiqué merits remark.

Customary international law results not from a formal procedure of entering into a written agreement, but from the overall practice of States—including statements that the authoritative agents and officers of States make. Indeed, the formation of customary international law may be affected by practically any of the actions and policies that States carry out. It is in view of the influence of *that* mode of conduct—what a State's officers and agents *say* and what the State's entire range of instrumentalities *do*—that those who speak for their countries, or might be seen to, as well as those who set policies for their countries' actual conduct "on the ground," should study the Communiqué's statement on the legality of nuclear weapons, the non-applicability of the TPNW to NATO doctrine, and the current, stable state of customary international law as regards the lawfulness of nuclear weapons.

The Brussels Summit Communiqué and the TPNW

The Brussels Summit Communiqué, paragraph 47, said as follows:

> We reiterate our opposition to the Treaty on the Prohibition of Nuclear Weapons (TPNW) which is inconsistent with the Alliance's nuclear deterrence policy, is at odds with the existing non-proliferation and disarmament architecture, risks undermining the NPT [1968 Treaty on the Non-Proliferation of Nuclear Weapons], and does not take into account the current security environment. The TPNW does not change the legal obligations on our countries with respect to nuclear weapons. We do not accept any argument that the TPNW reflects or in any way contributes to the development of customary international law.

The TPNW is a multilateral treaty opened for signature on August 9, 2017 and entered into force on January 22, 2021. As of June 2021, eighty five states had signed the TPNW. It is a short treaty, containing a preamble and twenty articles. The prohibitions that it sets down are indicated in Article 1:

> **Prohibitions**
>
> 1. Each State Party undertakes never under any circumstances to
>
> > (a) Develop, test, produce, manufacture, otherwise acquire, possess or stockpile nuclear weapons or other nuclear explosive devices;

(b) Transfer to any recipient whatsoever nuclear weapons or other nuclear explosive devices or control over such weapons or explosive devices directly or indirectly;

(c) Receive the transfer of or control over nuclear weapons or other nuclear explosive devices directly or indirectly;

(d) Use or threaten to use nuclear weapons or other nuclear explosive devices;

(e) Assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Treaty;

(f) Seek or receive any assistance, in any way, from anyone to engage in any activity prohibited to a State Party under this Treaty;

(g) Allow any stationing, installation or deployment of any nuclear weapons or other nuclear explosive devices in its territory or at any place under its jurisdiction or control.

Article 4 requires "[e]ach State Party that after 7 July 2017 owned, possessed or controlled nuclear weapons or other nuclear explosive devices and eliminated its nuclear-weapon programme" to cooperate with "the competent international authority" (to be designated by the States Parties in accordance with Article 4, paragraph 6) for the purpose of verification. No State Party of the TPNW, nor any signatory, to date falls into the category to which Article 4 refers.

Article 12 of the TPNW obliges each State Party to "encourage States not party to [the TPNW] to sign, ratify, accept, approve or accede to the Treaty, with the goal of universal adherence...".

The Preamble says that the States Parties are "[m]indful... that these risks [posed by nuclear weapons] concern the security of all humanity, and that *all States* share the responsibility to prevent any use of nuclear weapons" (emphasis added). The Preamble also refers to "ethical imperatives for nuclear disarmament." The States Parties "[c]onsider[...] that any use of nuclear weapons would be contrary to the rules of international law applicable in armed conflict, in particular the principles and rules of international humanitarian law."

Legality of Nuclear Weapons and Customary International Law

The International Court of Justice (ICJ), famously, in an advisory opinion in 1996 addressed the legality of the threat or use of nuclear weapons. In its consideration of the question, the Court observed that "[t]he emergence, as *lex lata* [i.e., an existent law in force at present], of a

customary rule specifically prohibiting the use of nuclear weapons as such is hampered by the continuing tensions between the nascent *opinio juris* [i.e., the acceptance that a practice is required by law) on the one hand, and the still strong adherence to the practice of deterrence on the other."[2] The Court also noted that "the members of the international community are profoundly divided on the matter of whether non-recourse to nuclear weapons over the past 50 years constitutes the expression of an *opinio juris*."[3] In that light, the Court "[did] not consider itself able to find that there is such an *opinio juris*." The ICJ concluded, eleven votes to three, that "[t]here is in neither customary nor conventional [i.e., treaty-based] international law any comprehensive and universal prohibition of the threat or use of nuclear weapons."[4] Unanimously, the Court concluded that "[a] threat or use of nuclear weapons should... be compatible with the requirements of the international law applicable in armed conflict."[5]

In a seven-to-seven split, the Court set out the following statement as well:

> [T]he threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law;
>
> However, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake.[6]

Judge Schwebel, the U.S.-nominated Judge and Vice-President of the ICJ at the time of the *Nuclear Weapons* advisory proceedings, in his dissent from the Court's conclusion, expressed the understanding like this:

> This nuclear practice [of holding and developing nuclear weapons for purposes of deterrence] is not a practice of a lone and secondary persistent objector. This is not a practice of a pariah Government crying out in the wilderness of otherwise adverse international opinion. This is the practice of five of the world's major Powers, of the permanent members of the Security Council, significantly supported for almost 50 years [as of 1996] by their allies and other States sheltering under their nuclear umbrellas…[7]

The possession of nuclear weapons by this "large and weighty number of States" imparted legal gravity to the conclusion that international law had not prohibited them.[8] Judge Schwebel's observations are in line with the widespread understanding of how rules of customary international law are to be identified.

The TPNW entered into force almost a quarter century after the advisory opinion and Judge Schwebel's observations about customary international law and nuclear weapons. Much of the

doctrine regarding the legality of nuclear weapons under international law was articulated before the TPNW. And, while the legal effects of the TPNW, like those of any treaty, are restricted in the first instance to its parties, legal doctrine may invite contentions that the TPNW is bringing about a change in customary international law or that the TPNW supplies evidence of a change that has occurred, or is occurring, in that law on the wider legal landscape. A careful consideration of customary international law and its relation to the TPNW therefore is called for.

International law and where customary international law fits in

International law serves to regulate relations among sovereigns—an immediate paradox, as the term "sovereign" denotes an entity subject to no rules but its own. Serious thinkers concerned with law have puzzled over the matter,[9] but, for present purposes let us accept, as the United States does,[10] that countries are subject to a body of rules known as "international law" and that these rules apply to all countries and are analytically distinct from national law. To refer to international law as analytically distinct is not to deny that national law has rules and procedures of its own, only that international law is a system of law, and, as such, it has its own substantive rules—rules addressing the conduct of States—and its own rules about how rules are made.

The prevalent way that rules comprising international law are made is through treaty. Analogous to a contract in domestic law, a treaty is an agreement (though it must be in writing to be a treaty, which an ordinary contract need not be).[11] A treaty establishes legally binding obligations between or among the States that are party to it.[12] The law of treaties acknowledges that a certain degree of formality, especially in the shape of procedures for ratification under domestic law, attaches to how and when a treaty enters into force. The law of treaties also makes provision for how a treaty might cease to apply;[13] and for how a State might establish that a putative treaty has no force because its purported conclusion was in one or another way defective.[14]

While the prevalent way that rules comprising international law are made, treaties are not the only way. International law also emerges through a process of customary rule formation. Article 38 of the ICJ Statute acknowledges this part of international law as well: the ICJ shall apply "international custom, as evidence of a general practice accepted as law."[15] From the formulation in the Statute, one discerns that rules belonging to this part of international law have two elements—general practice and acceptance as law. "Customary international law," the UN's International Law Commission (ILC)[16] said in its *Draft conclusions on identification of customary international law*—the Commission's landmark effort to explain how States and others are to identify customary international law—"is *unwritten* law deriving from practice accepted as law."[17]

Some propositions of legally binding obligation clearly constitute rules of customary international law. Countries, including the United States, do not doubt that customary international law rules exist and that new ones may come to be.[18] For example, so widely accepted is the proposition that no State may subject the high seas to sovereign appropriation that little or no controversy attends treating that proposition as part of customary international law.[19] Difficulty arises when parties contend for or against the customary law character of propositions that neither obviously do nor obviously do not belong to the corpus of customary international law.[20]

In the competing contentions about particular propositions that may, or may not, have customary law status, a subsidiary problem sometimes arises. It is sometimes contended that the articulation of a legal obligation in a treaty—especially a treaty with wide subscription—suggests, or even establishes, that the obligation is a general international law rule. The contention, in other words, is that the parties, by having articulated the obligation in a treaty, have engaged not only in treaty-making but also in the formation of a customary international law rule—or at least that their treaty *is evidence of* such a rule. The rule, according to those contending for its customary status, was set down in a treaty to begin with, but now, because, after all, a treaty is a form of international practice, the rule is not confined in its application to the States that are parties to the treaty; it is a rule of general application, thanks to its (putative) customary character.

The attractiveness of the proposition that treaty rules might turn into customary international law rules owes, perhaps, to the existence of many rules that States have expressed in treaties and that are also rules of customary international law. States have made significant efforts in the modern era to codify international law. That is to say, they have searched international practice for rules that they agree are rules of customary international law; given those rules formal expression in a text; and adopted the text as a treaty. Treaty rules that have been set out in this way—i.e., as a codification of customary international law—are accepted with little controversy as *reflecting* customary international law. The Vienna Convention on the Law of Treaties of 1969 (VCLT), to give a well-known example, contains, in Article 31,[21] the general rule guiding the interpretation of treaty texts. Article 31 reflects customary international law (or, perhaps, a general principle of international law), and, so, the rule it states applies whether or not a State adheres to the Convention.[22] To give another well-known example, the United States not only accepts but devotes considerable resources to protecting freedom of navigation on the high seas—a key correlate to the rule, recalled above, that the high seas are subject to no sovereign. General international law requires respect for freedom of the seas; so does the UN Convention on the Law of the Sea of 1982.[23] This is a rule of general application that now, as a result of codification, is also expressed in a treaty. Its customary or general status came before the treaty, the treaty serving to place more definite terms on the rule than it had in its unwritten form.

Treaties do not necessarily codify customary international law rules. Indeed, the vast majority of treaties do nothing of the sort. In most treaties, the terms are chosen by the parties for their particular needs, not induced from general practice as a reflection of some pre-existing rule. Treaties set down terms specific and limited to the parties, much in the way a contract binds *its* parties and its parties *only*. It is true that *some* treaties aim to promote the "progressive development" of international law—i.e., they articulate rules intended to have general application. But the effect that a treaty has in that direction, if any, depends on its terms, the breadth of participation in the treaty, and the context in which it has been adopted and is applied.[24]

A customary international law rule does not come into being unless the practice of adherence to the rule is general, "meaning that it must be sufficiently widespread and representative."[25] It must also be consistent.[26] Generality and consistency constitute a crucial aspect of the practice needed to establish that a customary international law rule has come into being. Their absence is a common defect in claims advancing that a particular proposition is a customary international law rule.

Treaties and the formation of customary international law

The relationship between treaties and customary international law is sometimes fraught with controversy. Conclusion 11 of the ILC's *Draft conclusions* addresses treaties and their relationship overall with customary international law. According to Conclusion 11,

> **Treaties**
>
> 1. A rule set forth in a treaty may reflect a rule of customary international law if it is established that the treaty rule:
>
> *(a)* codified a rule of customary international law existing at the time when the treaty was concluded;
>
> *(b)* has led to the crystallization of a rule of customary international law that had started to emerge prior to the conclusion of the treaty; or
>
> *(c)* has given rise to a general practice that is accepted as law (*opinio juris*), thus generating a new rule of customary international law.
>
> 2. The fact that a rule is set forth in a number of treaties may, but does not necessarily, indicate that the treaty rule reflects a rule of customary international law.[27]

The ILC emphasised, in connection with the above considerations, that "*in and of themselves, treaties cannot create a rule of customary international law or conclusively attest to its existence or content*."[28] In other words, the treaty might establish the *opinio juris* that is one prerequisite to the formation of a customary international law rule, but the treaty, in itself, is not likely to furnish evidence of the *practice* that is the other prerequisite. States, in their action and statements in the world at large, would have to engage in a practice that accords with the putative rule and has a general scope, if it were to be established that that rule is one of customary international law, and not just of the treaty.[29]

Context

An important aspect in the identification of a customary international law rule is context. The ICJ noted this, when it gave its advisory opinion on the World Health Organization (WHO) and Egypt in 1980: "a rule of international law, whether customary or conventional, does not operate in a vacuum; it operates in relation to facts and in the context of a wider framework of legal rules of which it forms only a part."[30]

Given the intricate relationship between deterrence strategy and nuclear weapons, and given how that relationship pervades modern geopolitics, the admonition here to have regard to context is all the more salient when considering any contention that a customary international law rule concerning nuclear weapons may have emerged.

The TPNW and applying the ILC *Draft conclusions*

No pre-existing or emergent customary international law prohibition against nuclear weapons

Customary international law, as of 1996, did not contain a general prohibition against nuclear weapons. This was as described by the International Court of Justice. Half the members of the Court seemed to believe that the threat or use of nuclear weapons was unlawful in all but the most extreme circumstances, yet even among themselves, those members could not agree to an unambiguous declaration that the law goes further than that.[31] Where the Court was unanimous, it was in stating that humanitarian law applies to the threat or use of nuclear weapons,[32] a statement that implies that the weapons are a proper subject for regulation, but not the object of a prohibition. The Court voted eleven to three that there is no customary international law prohibition against nuclear weapons.[33]

The only suggestion in the TPNW—but a faint one—that the parties there intended to codify a pre-existing rule of customary international law is in the preamble, where they "[c]onsider[...] that any use of nuclear weapons would be contrary to the rules of international law applicable in armed conflict, in particular the principles and rules of international humanitarian law." If the parties here were saying anything about customary international law, then they were not

saying it very clearly: the principles and rules that they "consider[ed]" entail the unlawfulness of "any use of nuclear weapons" could just as well have been rules set out in the main treaties addressing the law of armed conflict—that is to say, the rules that the ICJ held to address nuclear weapons but not to contain a general prohibition against them. Moreover, the TPNW statement here about international humanitarian law is in the preamble, not an operative provision of the treaty. Such a statement, while perhaps open to the interpretation that it expresses the parties' view about a particular legal obligation, in any event is not in itself evidence of a practice having the requisite generality to satisfy the first element for the identification of customary international law.[34]

Insufficient evidence has accumulated since 1996 to support the conclusion that a prohibition against nuclear weapons is emerging as a general practice, accompanied by a conviction on the part of States that that practice is followed because it is legally obliged.[35]

The TPNW does not give rise to a general and consistent practice that is accepted as law

The ILC suggested that a rule of customary international law may emerge, where a treaty rule "has given rise to a general practice that is accepted as law."[36] A treaty having universal, or near-universal, subscription may be "particularly indicative" of the customary status of a rule expressed in the treaty.[37] These observations have no relevance to the TPNW, however. The TPNW has reached nowhere near universal subscription, barely a quarter of the Member States of the UN having become party to it. In this light, the statement, in the European Parliament's Briefing paper on the TPNW, that the limited number of participants in the Treaty "raises doubts about the impact of this new instrument and its ability to create normative values," is an understatement.[38]

There is also the requirement that a practice display *generality*, if it is to satisfy the requirement of the practice element of customary international law—the "general practice that is accepted as law."[39] The scope of TPNW participation is modest as measured by a count of States. The scope is also lacking generality in the relevant sense. No nuclear-weapon State accepts the proposition that the threat or use of nuclear weapons is prohibited in all circumstances. The States espousing the prohibition include no nuclear-weapon State; they are not "particularly involved in the relevant activity."[40] In this obvious way, the States espousing the prohibition therefore are not representative in the sense that is required to form a new rule of customary international law.[41]

Even if one takes a broad view of what it means to be "particularly involved" with the possession of nuclear weapons, there is still no evidence of generality of practice such as would give evidence of a customary law prohibition. A number of States besides the nuclear-weapon States may be said to be particularly involved, by way of the extended protection that the nuclear deterrent supplies. NATO doctrine relies on that deterrent. NATO has thirty member

States. NATO functions on consensus[42] and, so, a statement such as the Brussels Communiqué reflects the support of thirty States. That means that a further twenty-seven States in addition to the three nuclear-weapon NATO members (the United States, United Kingdom, and France) are "particularly involved" in the activity concerned. Those twenty-seven particularly involved States are not adherents to the prohibitionist view. To the contrary, those States all have made clear that they understand the nuclear deterrent to accord with international law, the Communiqué being the most recent in a long and consistent practice in that regard. South Korea and Japan—not NATO members—are also long-term beneficiaries of the deterrent and, thus, also participants in the consistent practice.[43]

As noted above, *consistency* in State practice is also required in order to establish the existence of a customary international law rule.[44] There are significant inconsistencies in the practice of the TPNW participants.

The participants in the TPNW include only two States that held nuclear weapons and relinquished them. South Africa had its own, locally-developed weapons; Kazakhstan had weapons of the former Soviet arsenal. No general prohibition against nuclear weapons existed at the time that these two States relinquished their weapons. Moreover, each relinquished their nuclear weapons on different terms and for different reasons, neither in order to comply with a purported general rule banning those weapons. Brazil and Libya are TPNW participants (a party and a signatory, respectively) that had nuclear weapons development programs that they discontinued, but, there, too, the practice was not obviously in response to a conviction that the law required it.[45] Ukraine and Belarus relinquished former Soviet nuclear weapons at the same time and on similar terms as Kazakhstan[46]; neither are TPNW participants. Argentina discontinued a development program and is not a TPNW participant either. No State signing the TPNW has had nuclear weapons at the time of signature. To suggest that a coherent juridical picture can be distilled from this practice is untenable.

Contradictions in the practice of TPNW parties come into particularly stark relief when considering the legal commitments that many of those parties made, and continue to hold, under the Treaty on the Non-Proliferation of Nuclear Weapons (NPT). Perhaps the intention of NPT parties that have signed the TPNW is that the later treaty will supersede the earlier one. Such a position would be unsatisfactory. The NPT is a full-fledged regulatory régime for nuclear weapons and civil nuclear technologies; is implemented by a half-century long system of international conferences and standing institutions, including the International Atomic Energy Agency (IAEA) having crucial verification responsibilities; and has been the touchstone for arms control and disarmament progress since its inception. The TPNW—thinly drafted, bereft of institutional apparatus, and rejected by every nuclear-weapon-holding State in the world—is no substitute for the NPT. As the Brussels Communiqué of June 14, 2021 notes, the TPNW "is at odds with the existing non-proliferation and disarmament architecture... [and]

risks undermining the NPT." Yet several score NPT parties have put their signatures to the TPNW.

Whatever one is to make of these divergences among TPNW parties and contradictions among their stated commitments, they further deprive the TPNW of evidentiary value in regard to customary international law.

Context, exclusion, and abstention

Finally, a few words are in order about context, and in particular as regards the practice of States adhering to nuclear-weapon-free zones (exclusion) and States refraining from the possession of nuclear weapons (abstention).

Advocates of a general prohibition of nuclear weapons might identify the participation of States in nuclear-weapon-free zones as evidence of the generality of a practice, or at least as the emergence of such a practice. They might also draw attention to the many States that abstain from the possession of nuclear weapons. But customary international law does not arise through practice alone. In addition to the practice (which must be general and consistent), there must be the conviction that the practice is a matter of legal right or obligation. Certain prudential reasons favor free zones, not connected to any such conviction; and so too do such reasons favor refraining from possession.

It is to be considered that the widespread caution about nuclear weapons owes to States' appreciation that a situation in which *more* States had them and they were *more* widely deployed would introduce instability and further risk.[47] States might well reach such an appreciation without having formed a view one way or the other as to the lawfulness of nuclear weapons. They might well even share NATO's view that customary international law contains no prohibition against them: the NATO Members that do not have nuclear weapons illustrate the point. The several nuclear-weapon-free zones, and the policies of many countries neither to hold nor to develop or acquire nuclear weapons, would not amount to the general practice necessary for the emergence of a customary prohibition, even if the practice were accompanied by clear expressions by the participants in that practice of *opinio juris*. It is simply too far from the required *general* practice to support the conclusion that a customary rule has emerged. And the actual position is likely further still from the emergence of a customary rule, for much of the practice—of exclusion and of abstention—likely owes to prudential calculations about the practical impact of proliferation, rather than to a conviction that the practice is legally obliged.

Conclusion

The North Atlantic Council's Brussels Communiqué of June 14, 2021 is well-grounded in international law where it says that the Treaty on the Prohibition of Nuclear Weapons, the

TPNW, has no effect on the legal obligations of Alliance members. In addition to the obvious point that Alliance members, not being parties to the TPNW, are not subject to that instrument as treaty law, the Council observes correctly that the TPNW does not reflect a customary international law rule prohibiting nuclear weapons, nor does it promote the emergence of such a rule.

The process by which new rules of customary international law come into being has received systematic description in the recent work of the UN's International Law Commission, the ILC. The contention that the TPNW reflects or promotes a customary international law rule prohibiting nuclear weapons has several deficiencies, each of them fatal. The nuclear-weapon States, in their conduct on the ground and in their statements, have consistently rejected a prohibition of nuclear weapons. The nuclear-weapon States are joined in this practice by a large number of further States that participate in and are beneficiaries of nuclear deterrence. Even the States that neither hold nuclear weapons nor formally participate in nuclear deterrence-based security strategy fail to give evidence of State practice having the consistency that would support the inference of the putative prohibition. Nor do those States give evidence of the requisite legal conviction—*opinio juris*—for the formation of a customary international law rule. From any one of these factors, taken on its own, the conclusion must be reached that no customary international law prohibition against nuclear weapons has emerged. Two elements are necessary to the formation of a new rule of customary international law—State practice and *opinio juris*. Each in this series of factors discussed above has independently prevented the two elements from emerging.

Situations exist where certain States, through their practice and the expression of the requisite legal conviction, *have* given rise to rules of customary international law but certain other States have objected to the rules. Where a State has objected persistently throughout the process of a rule's formation and continues to object after the rule has formed, the State remains as it was: the State is not subject to the rule.[48] By definition, this phenomenon of the "persistent objector" is relevant to international law only where it is established that a rule exists.[49] The NATO Member States and other States that participate in the deterrence-based system of security supplied by the United States are not persistent objectors against a customary rule prohibiting nuclear weapons, because no such rule exists. Public statements by officials of the United States and Allied countries should continue to emphasize that there exists no rule of customary international law that would prohibit nuclear weapons and no such rule is emerging.

The process by which customary international law comes into being lacks the definiteness and formality of treaty-making. However, that process is not entirely without clarity and limits. Policy-makers who speak and act on behalf of the United States and its NATO Allies serve the interests of strategic deterrence when they communicate with clarity about the international law rights of the Alliance and about the limits of aspirational projects such as the TPNW. The Brussels Communiqué serves those interests in that way.

[1] Michael Rühle, Head, Hybrid Challenges and Energy Security, NATO Emerging Security Challenges Division, *The Problem with Sole Purpose and No First Use, Information Series,* No. 493, June 23, 2021, available at https://nipp.org/wp-content/uploads/2021/06/IS-493.pdf.

[2] International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, July 8, 1996, p. 255, para. 73, available at https://www.icj-cij.org/public/files/case-related/95/095-19960708-ADV-01-00-EN.pdf.

[3] Ibid., p. 254, para. 67.

[4] Ibid., p. 266, para. 105.

[5] Ibid.

[6] Ibid.

[7] International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, *Dissenting Opinion of Vice-President Schwebel, 1996 I.C.J. Reports*, July 8, 1996, p. 312, available at https://www.icj-cij.org/public/files/case-related/95/095-19960708-ADV-01-09-EN.pdf.

[8] Not to mention the existence, and endorsement, of the NPT, which, as one writer noted, "is difficult to square... with the *opinion* that nuclear weapons are unlawful under all circumstances." See Nikolas Stürchler, *The Threat of Force in International Law* (Cambridge, UK: Cambridge University Press, 2007), p. 82.

[9] H.L.A. Hart, *The Concept of Law*, 2nd ed. (Oxford, UK: Oxford University Press, 1994), pp. 3-4, 214.

[10] The Constitution of the United States, in Art. I, Sec. 8, refers to the "Law of Nations," the term used in the Founders' time to mean international law. Thus, though controversies continue as to what propositions are rules of international law, U.S. courts refer to international law and its violation without any question of principle arising as to the binding character of international law. See *Federal Republic of Germany* v. *Philipp,* 141 S.Ct. 703, 707 (2021), available at https://scholar.google.com/scholar_case?case=4928837167769207627&q=Federal+Republic+of+Germany+v.+Philipp,+141+S.Ct+&hl=en&as_sdt=6,47&as_vis=1#p707. See also The American Law Institute, *RESTATEMENT (THIRD) FOR. REL. L.* (Philadelphia, PA: 1987), Ch. 1, Introductory Note.

[11] Vienna Convention on the Law of Treaties 1969 (VCLT), Art. 2(1)*(a)*, United Nations *Treaty Series*, Vol. 1155, p. 331, available at https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

[12] The American Law Institute, *RESTATEMENT (FOURTH) FOR. REL. L.* (Philadelphia, PA: 2021), Sec. 301(3). See also *Medellin* v. *Texas,* 128 S.Ct. 1346, 1356 (2008).

[13] VCLT, Part V, Sec. 3 (Termination and Suspension of the Operation of Treaties), Articles 54-64, United Nations *Treaty Series*, Vol. 1155, pp. 19-22, available at https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

[14] VCLT, Part V, Sec. 2 (Invalidity of Treaties), Articles. 46-53, in Ibid., pp. 17-18.

[15] *Statute of the International Court of Justice*, Art. 38(1)(b), available at https://www.icj-cij.org/en/statute.

[16] The ILC is a subsidiary organ of the UN General Assembly and holds a mandate to promote the progressive development of international law and its codification. See ILC Statute (1947), adopted in *Establishment of an International Law Commission*, General Assembly Resolution 174(II), November 21, 1947, p. 105, available at https://undocs.org/en/A/RES/174(II).

[17] ILC Draft conclusions on identification of customary international law, with commentaries (2018), General commentary, Comment (2): A/73/10 p. 122 (emphasis added) (hereinafter "ILC Draft conclusions").

[18] See United States Department of Defense, *Law of War Manual* (Washington, D.C.: Office of General Counsel, December 2016, pp. 29-34, section 1.8 (Customary international law) and especially p. 30 para. 1.8: "Customary international law is generally binding on all States..." Available at https://dod.defense.gov/Portals/1/Documents/pubs/DoD%20Law%20of%20War%20Manual%20-%20June%202015%20Updated%20Dec%202016.pdf?ver=2016-12-13-172036-190.

[19] See, for example, *United Nations Convention on the Law of the Sea* (UNCLOS) Art. 87 (Freedom of the high seas); Art. 89 (Invalidity of claims of sovereignty over the high seas), available at https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf; United Nations *Treaty Series*, Vol. 1833, pp. 432-433, available at https://treaties.un.org/doc/publication/UNTS/Volume%201833/v1833.pdf; and *U.S.* v. *Maine,* 106 S.Ct. 951, 956-958 (1986).

[20] The examples in international litigation and arbitration are many. See, for example, the disputation between Nicaragua and Colombia as to which provisions of UNCLOS Art. 76 form part of customary international law: International Court of Justice, *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), 2012 I.C.J. Reports,* November 19, 2012, p. 666, para. 118, available at https://www.icj-cij.org/public/files/case-related/124/124-20121119-JUD-01-00-EN.pdf.

[21] United Nations *Treaty Series*, Vol. 1155, p. 340.

[22] International Court of Justice, *Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast, Preliminary Objections, 2016 I.C.J. Reports*, Mar. 17, 2016, p. 116, para. 33, available at https://icj-cij.org/public/files/case-related/154/154-20160317-JUD-01-00-EN.pdf; *Legality of Use of Force (Serbia and Montenegro* v. *Netherlands), Preliminary Objections, 2004 I.C.J. Reports,* Dec. 15, 2004, p. 1011, 1049, para. 99, available at https://icj-cij.org/public/files/case-related/110/110-20041215-JUD-01-00-EN.pdf; *Case concerning the Territorial Dispute (Libya/Chad), 1994 I.C.J. Reports,* Feb. 3, 1994, p. 6, 21-22, para. 41, available at https://icj-cij.org/public/files/case-related/83/083-19940203-JUD-01-00-EN.pdf. See also The American Law Institute, RESTATEMENT (FOURTH) FOR. REL. L. (TENTATIVE DRAFT NO. 2 (MAR. 20, 2017)), Sec. 106, Reporter's Note 1.

[23] See UNCLOS Art. 87 (Freedom of the high seas): United Nations *Treaty Series*, Vol. 1833, p. 432.

[24] See *ILC Draft Conclusions*, p. 145 n. 751.

[25] United Nations International Law Commission, *Draft conclusions on identification of customary international law, with commentaries 2018,* Conclusion 8, para. 1, A/73/10, p. 135, available at https://legal.un.org/ilc/texts/instruments/english/commentaries/1_13_2018.pdf.

[26] Ibid.

[27] United Nations International Law Commission, *Draft conclusions on identification of customary international law, with commentaries 2018,* Conclusion 11 (Treaties), A/73/10, p. 143.

[28] United Nations International Law Commission, *Draft conclusions on identification of customary international law, with commentaries 2018,* Conclusion 11, Comment (3), A/73/10, p. 143 (emphasis added).

[29] "[E]stablishing whether a conventional rule does in fact correspond to an alleged rule of customary international law cannot be done just by looking at the text of the treaty; in each case the existence of the rule must be confirmed by practice (together with acceptance as law)." United Nations International Law Commission, *Draft conclusions on identification of customary international law, with commentaries 2018,* Conclusion 11, Comment (4), A/73/10, p. 144.

[30] *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, 1980 I.C.J. Reports*, Dec. 20, 1980, p. 73, 76, para. 10, available at https://icj-cij.org/public/files/case-related/65/065-19801220-ADV-01-00-EN.pdf.

[31] International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996,* p. 266, para. 105(2)E.

[32] Ibid., p. 266, para. 105(2)D.

[33] Ibid., p. 266, para. 105(2)B.

[34] Recall ILC Conclusion 4.

[35] To paraphrase the ICJ in *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996, I.C.J. Reports 1996,* p. 255, para. 73.

[36] United Nations International Law Commission, *Draft conclusions on identification of customary international law, with commentaries 2018,* Conclusion 11 (Treaties), A/73/10, p. 143.

[37] Ibid., p. 144.

[38] The European Parliament, *Briefing, Treaty on the prohibition of nuclear weapons — The 'Ban Treaty'*, January 2021, p. 1, available at https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/614664/EPRS_BRI(2018)614664_EN.pdf.

[39] United Nations International Law Commission, *Draft conclusions on identification of customary international law, with commentaries 2018,* Conclusion 8, Comment (4), A/73/10, pp. 136-37.

[40] Ibid., pp. 136-37.

[41] United Nations International Law Commission, *Draft conclusions on identification of customary international law, with commentaries 2018,* Conclusion 11, Comment (5), A/73/30, p. 145.

[42] International Court of Justice, *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece), Counter-Memorial of Greece*, p. 72, para. 5.10 (Jan. 19, 2010), available at https://icj-cij.org/public/files/case-related/142/16356.pdf.

[43] See Dr. Keith Payne, Thomas Scheber, and Kurt Guthe, *U.S. Extended Deterrence and Assurance for Allies in Northeast Asia* (Fairfax, VA: National Institute Press, 2010), available at https://nipp.org/wp-content/uploads/2021/05/US-Extend-Deter-for-print.pdf.

[44] United Nations International Law Commission, *Draft conclusions on identification of customary international law, with commentaries 2018,* Conclusion 8, para. 1, A/73/10, p. 136.

[45] See, generally, Amb. Robert G. Joseph, *Countering WMD: The Libyan Experience* (Fairfax, VA: National Institute Press, 2009).

[46] As to which, see Thomas D. Grant, "The Budapest Memorandum of 5 December 1994: Political Engagement or Legal Obligation?," *Polish Yearbook of International Law 2014* (Warsaw, Poland: Polish Academy of Sciences, 2015), pp. 89-114, available at https://poseidon01.ssrn.com/delivery.php?ID=705009006021025110004070068004071110033043005000058070028025102125005029119008090024019049032015010126055086031120000121030104055071011065053093012118022004114026094024010062069024096117123012111077121018064003027024004027030104024024072027119069096105&EXT=pdf&INDEX=TRUE.

[47] See Dr. Keith B. Payne, *Occasional Paper: Redefining 'Stability' for the New Post-Cold War Era* (Fairfax, VA: National Institute Press, 2021), pp. 43-54 (addressing stability and deterrence in a geopolitical environment entailing more variegated threats than during the Cold War).

[48] See United Nations International Law Commission, *Draft conclusions on identification of customary international law, with commentaries 2018,* Conclusion 15 (Persistent objector), A/73/10, p. 152.

[49] "The persistent objector is to be distinguished from a situation where the objection of a significant number of States to the emergence of a new rule of customary international law prevents its crystallization altogether (because there is no general practice accepted as law)." Ibid., Conclusion 15, Comment (2), A/73/10, p. 152, citing German Federal Constitutional Court, Judgment of 13 December 1977, 2 BvM 1/76, No. 32, pp. 34-404, at pp. 388-389, para. 6.

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