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Use of Nuclear Weapon in the International Humanitarian Law

Tomasz Szemraj, Urszula Wojtaszczyk
Military University of Technology in Warsaw

Abstract:

Authors have taken up the problem of application of International Humanitarian Law in legality aspect of threat of use or use of nuclear weapon in armed conflicts. Analyzing issues related to the use of nuclear weapons in accordance with the law, it can be concluded that the mere use of nuclear weapons is prohibited due to the violation of many laws. However, it is not obvious whether nuclear weapons can be used for self-defense in accordance with international law. It should be pointed out that the International Court of Justice has given an opinion on the use of nuclear weapons in armed conflicts. It is certain that the effects of nuclear weapons are in violation of provisions related to environmental protection, the principle of proportionality, the principle of humanitarianism or the principle of differentiation, due to the scale of its usage effect.

Keywords: International Humanitarian Law, Nuclear Weapon, International Court of Justice, Armed Conflicts, Proliferation

Introduction

Nuclear weapons are a means of warfare which is using at every step in the history of the 20th century. It is aroused much controversy alongside other weapons of mass destruction such as chemical or biological weapons. Since the founding of it, especially the first use, it has been shown her real power. It was something that has not been before, and humanity has not known what damage it can cause. The suffering that people has been afflicted, very often was too hard to talked about and described. Proliferation of nuclear weapons, as well as it has used in combat or as part of the test, led to the introduction of regulation in international law. Armaments and disarmament of weapons of mass destruction were quite problematic. There are several ways of looking at this issue. On the one hand countries were favorable to prohibit using Nuclear Weapon, but on the other hand they wanted to have their own weapon in their area. Therefore, it was necessary to create international regulations which would impose restrictions and define what can or what cannot be used, in case holding nuclear weapons.

Basic theses in the studied area

The incident which touched the world and violated International Humanitarian Law was the use of nuclear weapons in armed conflict against civilians on August 6, 1945, when the United States dropped the atomic bomb

called „Little Boy” from the plane B-29¹ straight into the Japanese city, Hiroshima. It is assumed that as a result of the bomb explosion in a short term, about 30 percent of the city’s population has died, and another 30 percent suffered serious injuries. At that time lived there 245,000 people. Moreover, not only civilians, but also health care units died. Apart from that, also hospitals and other health care buildings have been destroyed². The atomic bomb was used by the United States for the second time on August 9, 1945, where Nagasaki was bombed, it also took place in Japan. An American bomber used then a bomb named „Fat Man” which was much stronger than the previous one³. Fortunately, it did not cause major losses in people like „Little Boy”. To sum up this incident, we can see how destructive power has nuclear power and why The International Law should make every effort immediately and minimize it is possession and use.

Using nuclear bombs in Hiroshima and Nagasaki shows what abuses and violations of International Law has occurred. This led to the breaking provisions of the Geneva First Convention and the Fourth Hague Convention on the Law and Customs of Land War: article 23, which prohibits the use of a weapon dealing unnecessary suffering; article 25 forbidding bombing defenseless villages and towns, and also article 27 about not bombing cultural, religious or health buildings⁴. The above case „opened discussions regarding legality of using such a weapon and on the potential consequences of nuclear conflict. Bipolar division of the world and the threat of the outbreak of another World War, effectively inhibited the development of the treaty which directly prevented the use of nuclear weapons focusing exclusively on the problem of it is proliferation and the issue of giving a specific framework to the arms race”⁵. What it comes down to was necessary to extend international humanitarian law to aspects related to the use of nuclear weapons. The international conventions, agreements and treaties introduce legal regulations imposing restrictions on the proliferation and use of nuclear weapons.

The first document introducing restrictions on nuclear weapons was *Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under*

¹ The flight of the B-29 aircraft called „Enola Gay” lasted about five hours without any problems. Plane flew at 25.590 feet, making it invisible from the ground. His Commander, Col. Paul. W. Tibbets was supposed to be the one who at 8:16 am has dropped the first ever atomic bomb for a city.

² U. S. Strategic Bombing Survey: *The Effects of the Atomic Bombings of Hiroshima and Nagasaki*, Chairman's Office, 19 June 1946, p. 3-6

³ Atomic Heritage Foundation <https://www.atomicheritage.org/history/little-boy-and-fat-man> (access 07.01.2019)

⁴ Treaties and Other International Agreements of the United States of America, *Laws and Customs of War on Land* (IV Hague Convention)(Treaty Series No. 539; 36 Stat. 2277; Malloy Treaties, Vol. II, 2269)

⁵ Falkowski Z.(red.), Marcinko M.(red.), *Międzynarodowe Prawo Humanitarne Konfliktów Zbrojnych*, Wojskowe Centrum Edukacji Obywatelskiej, Warszawa 2014, p. 252

Water, Moscow, August 5, 1963⁶. Main goal was „to reach an agreement on universal and total disarmament under strict international control (...), to put an end to the contamination of the surrounding environment with human radioactive substances”⁷. This Agreement prohibits each of its participants from making any test explosions of nuclear and other similar weapons in any place under jurisdiction or control including „the atmosphere, beyond its borders, including space, underwater, including territorial waters and the high seas” (art. 1, par. a), and also any other environment „if this kind of explosion causes the release of radioactive waste out of the territory of the country under whose jurisdiction or control this explosion is made”(art. 1, par. b)⁸. The information provided, that testing weapons of mass destruction is unacceptable even offshore, because it has serious consequences for the environment in which a person lives, which may lead to disruption of his existence and cause unnecessary suffering. It mainly concerns the radiation spreading after a bomb explosion, which is long-lasting and often covers very large areas, and people under its influence are not able to notice and do not realize that they have been irradiated.⁹ Another action to improve international law was the "*Treaty on the Non-Proliferation of Nuclear Weapons*" drafted in Moscow, Washington and London on July 1, 1968. It includes issues such as: the ban on the proliferation of nuclear weapons by countries possessing them or the ban on their possession by non-nuclear states¹⁰. Therefore, this system, limits any activities between atomic nation and non-atomic, to increase the number of places where it may be. "*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*" drafted in London, Moscow and Washington on February 11, 1971.¹¹ indicates that states can not install and place on the bottom of the seas and oceans and in its base, outside the external zone of the seabed nuclear weapons, as well as structures, launchers, and other devices that serve to store or use it (art.1, par. 1); however, the commitments do not apply to the coastal State or the seabed located under its territorial waters (art.1, par. 2)¹². State Parties have the right to control the operation and operation of another State Parties at the bottom of the seas and oceans, but they must not

⁶ *Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water August 6, 1963* (Dz.U. 1963, nr 52, poz. 288)

⁷ *ibidem*

⁸ *ibidem*

⁹ Kubowski J., *Broń Jądrowa*, Instytut Technologii Eksploatacji w Radomiu, Warszawa 2003, p. 55

¹⁰ *Treaty on the Non-Proliferation of Nuclear Weapons, July 1 1968*(Dz.U. 1970, nr 8, poz. 60)

¹¹ Rosyjskie nuklearne drony podwodne, See, Dura M., *Rosyjskie atomowe drony. czy obawy Waszyngtonu są słuszne? [analiza]*, Defence24.pl, 2018,(access. 09.01.2019)

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, London, Moscow, Washington, February 11, 1971(Dz. U. z 1972 r., nr 44, poz 275., załącznik)

interfere with this activity. (art. 3)¹³. Non-proliferation of weapons of mass destruction should be considered as a basic for total disarmament and prohibition due to the fact that its possession can lead to disputes and uncontrolled actions, and the use of looking from the perspective of events from the past shows how much damage leaves and what suffering brings suffering negating humanitarianism.

For the sake of human safety and environmental contamination, as well as limiting the possibility of using nuclear weapons in any way, non-nuclear zones have been created. That is, where the area is free of nuclear weapons, i.e. there is a ban on its possession, storage and use, and all this is subject to the international control system of this prohibition¹⁴. "There are five of them treaty: in Latin America and the Caribbean (Tlatelolco, 1968), in the South Pacific (Rarotonga, 1986), in Southeast Asia (Bangkok, 1997), in Africa (Pelindaba, 2009) and in Central Asia (Semipalatinsk, 2009)¹⁵. The Treaty of Tlatelolco led to the creation of the Organization for the Prohibition of Nuclear Weapons in Latin America, which is one of the systems for controlling the peaceful use of atomic energy. The agreement contains obligations regarding exclusively peaceful use under the jurisdiction of the above-mentioned nuclear system, materials and installations and proliferation of nuclear technology¹⁶. It was also ratified by the nuclear powers, which affected for the possibility of effective implementation of the provisions. It was also directed to countries that are not parties to the agreement. All states are obliged to observe the Latin American statute as a denuclear zone.¹⁷. It can be noticed that there is a total ban on nuclear weapons, and nuclear energy can only exist in nuclear technologies related to the development of civilization and used for legitimate purposes. International humanitarian law also contains environmental principles and norms such as *Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques*; May 18, 1976. *Protocol Additional I of 1977 (Article 35 par. 3 and Article 55)*¹⁸. It can not be overlooked that nuclear-free zones, in accordance with the various nuclear test bans, are also the deep seabed and oceans, as well as air and space. Antarctica is also recognized as a nuclear-free zone, meaning that "all nuclear explosions in Antarctica are prohibited and that radioactive waste is disposed of

¹³ ibidem

¹⁴ Agency For The Prohibition of Nuclear Weapons in Latin America and The Caribbean, *Resolutions 3472(XXX)*, June 27, 2002, p. 3-4

¹⁵ Lachowski Z., *Nuklearne rozbrojenie i nieproliferaacja: geneza, stan i perspektywy*, Biuro Bezpieczeństwa Narodowego 2012, p. 80

¹⁶ Espiell G. H. *Układ o zakazie broni jądrowych w Ameryce Łacińskiej, sytuacja aktualna i perspektywy*, in *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 43, 1981, p. 59-64, Wydział Prawa i Administracji UAM

¹⁷ ibidem, p. 60-61

¹⁸ Lankosz K.(red.), *Międzynarodowe Prawo Humanitarne Konfliktów Zbrojnych*, WSOSP, Dęblin 2006, p. 148-149

in this area, (art. 5, par. 1)", but it does not specify the issue of possession"¹⁹. It can be deduced that the denuclearization of particular areas helps to eliminate threats to people and the natural environment that is associated with the use of nuclear weapons. Moreover it is causes that zones where prohibition applies are covered by legal regulations under international humanitarian law of armed conflicts and are controlled by relevant organizations.

The question of the legality of the use or threat of nuclear weapons has been examined and reviewed by the International Court of Justice in connection with the notification of this problem by the General Assembly of the United Nations at the end of December 1994. He presented his position on 8 July 1996.²⁰ According to the Tribunal: "International law and international treaty law do not contain any prohibition of the threat or use of nuclear weapons...."²¹(par. 52); "There is also no rule of international law causing the legality of the threat or use of nuclear weapons..."²². He also notes that the threat or use of nuclear weapons against another state violates art. 2 pairs 4 of the United Nations Charter, unless it was a self-defense action (par. 38)²³. The International Court of Justice was also unable to resolve in the light of the international law on the legitimacy of the threat or use of nuclear weapons in extraordinary circumstances during self-defense by a state whose existence and sovereignty are at risk (par. 97)²⁴. However, the Tribunal unanimously ruled that "the threat or use of nuclear weapons should comply with the requirements of international law applicable in armed conflicts, particularly with the norms and principles of international humanitarian law." This opinion means that the rules on methods of warfare as well as general rules on the use of weapons apply to nuclear weapons"²⁵. The influence of the International Court of Justice on international humanitarian law cannot be ignored. The opinion of the above-mentioned institutions also shows how many issues are unspecified or not included in international law at all. The discussion about nuclear weapons as it can be seen raises a lot of controversy in terms of the legality of its possession, and in particular of its use.

Analyzing the sources of international humanitarian law as well as the above discussion about nuclear weapons, it is worth noting that "there is still no international convention that would explicitly prohibit the use of nuclear weapons"²⁶. However, it is worth mentioning that this applies only to nuclear

¹⁹ *Antarctic Treaty System, Washington, December 1, 1959* (Dz. U. z 1961 r., nr 46, poz. 237, z 2000r., nr 100, poz. 1087 i z 2001 r., nr 6, poz. 52)

²⁰ Kalshoven F., Zegveld L., *Constraints on The Waging of War, An Introduction to International Humanitarian Law*, Cambridge University Press, Cambridge 2011, p. 227-228

²¹ International Court of Justice, *Legality of The Threat or Use of Nuclear Weapons*, I.C.J Reports 1996, p. 25

²² *ibidem*

²³ *ibidem*, p. 22

²⁴ *ibidem*, p. 41

²⁵ Lankosz K.(red.), *op cit.*, p. 137

²⁶ *ibidem*, p. 135

weapons in themselves as a concept, because the effects of using has already subject to humanitarian law. The Martens clause, which is included in the preamble to the Fourth Hague Convention, cannot be ignored. It requires that in cases which are not subject to the regulations in force, apply the principles of the law of nations, the principles of humanity and social requirements.²⁷ International humanitarian law prohibits the use of a weapon that inflicts unnecessary suffering, and nuclear weapons is like that; prohibits the use of weapons affecting the environment; prohibits attacking civilians; prohibits the destruction of buildings of a cultural, religious and health nature. It can be concluded that the use of nuclear weapons violates too many provisions of international humanitarian law, because, as everyone knows, its use causes death and destruction at the site of an explosion in a fairly large area. In addition, it is not able to cover only military purposes, therefore it destroys everything that covers the area of the explosion. Just like historical events from Hiroshima or Nagasaki. A step in the direction of non-proliferation of nuclear weapons was the "Treaty on the Complete Prohibition of Testing with Nuclear Weapons", which was opened for signature on September 24, 1996²⁸. „It is heading to introduce a total ban on trial nuclear explosions, irrespective of the environment in which it would take place, on the entire territory subject to the jurisdiction of a particular State Party"²⁹. This document has not obtained the status of binding international law because it has not been ratified by the required number of countries. In mid-2017, the UN presented a draft treaty on total nuclear weapons ban at a conference in New York. Each State Party will under no circumstances "develop, test, produce, produce, acquire, own or store nuclear weapons or other nuclear explosives" (art. 1)³⁰. The organization undertook negotiations on developing a measure leading to the elimination of the abovementioned weapon, however, as the previous treaty also did not enter into force.³¹ It can be concluded that nuclear states still wants to be able to own and test nuclear weapons, so it gives them the possibility of technological development. Although some legal regulations have been introduced, there is no certainty that they will someday want to use nuclear weapons in armed conflict. They show this through reluctance to sign and ratify treaties, breaking the principles and norms of international humanitarian law.

Conclusion

To sum up, the extension of international humanitarian law of armed conflicts to issues related to weapons of mass destruction, which is nuclear

²⁷ ibidem, p. 121

²⁸ Falkowski Z.(red.), Marcinko M.(red.), op. cit., p. 253

²⁹ ibidem

³⁰ *Treaty on the prohibition of nuclear weapons*

https://treaties.un.org/doc/Treaties/2017/07/20170707%2003-42%20PM/Ch_XXVI_9.pdf(access. 10.01.2019)

³¹*Treaty on the prohibition of nuclear weapons* <http://www.nti.org/learn/treaties-and-regimes/treaty-on-the-prohibition-of-nuclear-weapons>(access. 10.01.2019)

weapons, was an essential move. Humanitarianization of wars and armed conflicts is the foundation for creating a more human world, devoid of brutality and unnecessary suffering. The use of nuclear weapons over the last century has shown why it should be banned or limited in a proper way. In the light of international law, it infringed too many laws, in particular those concerning civilians and non-military objects. It still lacks specific provisions relating to the use of nuclear weapons, except those which concern the principles of humanitarianism, so they are not aimed directly at weapons of mass destruction, but only refer to the consequences that they bring. The only right action using nuclear energy is to use it only for scientific purposes and those that will benefit without harming people and the environment. International humanitarian law should be developed and updated on an ongoing basis ³², so that the situation that took place with the use of nuclear weapons would not be repeated.

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³² Lavoyer J. P., *International Humanitarian Law: Should It Be Reaffirmed, Clarified or Developed?*, <https://www.icrc.org/eng/assets/files/other/lavoyer-01-05-04.pdf>(access. 11.01.2019), p. 23-24

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About authors

1. Urszula Wojtaszczyk, email: wojula@gmail.com

A second year student in the field of defence at the Faculty of Logistics of the Military University of Technology. Chairwoman of the Student Scientific Circle "Securitas et Defensio"

2. Tomasz Szemraj, email: szemrajek@gmail.com

A second year student in the field of defence at the Faculty of Logistics of the Military University of Technology. Vice Chairman of the Student Scientific Circle "Securitas et Defensio"