

AN APPRAISAL OF NUCLEAR WEAPONS LAW: WITH REFERENCE TO ITS ENFORCEMENT*

I. INTRODUCTION

Since 1970 when the most significant treaty on the control of the proliferation of Nuclear Weapons came into operation, the international community of states had steadfastly developed a body of laws which constitutes a framework for the control and eventual elimination of nuclear weapons from the face of the earth. However, four decades after the legal regime for the elimination of nuclear weapons was launched, states of the international community continue to possess and develop nuclear weapons. This state of affairs brings into question the efficacy or otherwise of the enforcement mechanism of nuclear weapons law.

A Nuclear Weapon is a device, such as a bomb or warhead that derives its force from either the fission or the fusion of atomic nuclei and is delivered by an aircraft, missile, earth satellite or other strategic delivery system.¹ It is a complete sequence, in its intended ultimate configuration that, upon completion of the prescribed arming, fusing and firing devices designed to release nuclear energy on a large scale.² Nuclear weapons are explosive United States of America.⁴ They were first produced in the world in 1945 by the

In 1945 during World War 2, the United States attacked the two Japanese cities of Hiroshima and Nagasaki in an attempt to end the Pacific War.⁵ This resulted in devastating loss of lives and damage that lasted decades.⁶ A horrid account of the effects of the bombings was given by a double survivor of the events, Tsutomu Yamaguchi. Yamaguchi described injured survivors of the bombings in the aftermath as:

Ant-walking alligators who were now eyeless and faceless with their heads transformed into blackened alligator hides, displaying red holes (indicating mouths). The alligator people did not scream. Their mouths could not form the sounds. The noise they made was worse than screaming. They uttered a continuous murmur like locusts on a midsummer night. One man, staggering on charred stumps of legs, was carrying a dead baby upside down.⁷

Tsutomu Yamaguchi was in 1945 three kilometers from Hiroshima on a business trip when the bomb was detonated. He was seriously burnt on his left side and spent the night in Hiroshima. He got back to his home city of Nagasaki on August 8, a day before the bomb in Nagasaki was dropped, and he was exposed to residual radiation while searching for his relatives. He died Monday, January 4, 2010 after a battle with stomach cancer. He was 93.⁸

The 1945 nuclear attack on Japan raised the consciousness of the international community about the danger of nuclear weapons to international peace and security. By 1968, when only five states⁹ of the international community possessed nuclear weapons, a multilateral move was made by members of the international community to forestall the proliferation

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¹ The New Encyclopaedia Britannica. 15th Edition. Volume 8 © 2007 By Encyclopaedia Britannica, Inc. p. 820.

² U.S. Military Dictionary. *The Oxford Essential Dictionary of the U.S. Military*. © 2001, 2002 by Oxford University Press Inc.

³ Encarta © World English Dictionary (North American Edition) © & (p) 2009. Microsoft Corporation. Developed for Microsoft by Bloomsbury Publishing Plc.

⁴ Development and Proliferation of Nuclear Weapons. http://nobelprize.org/educational_games/peacenuclear. Accessed on 19/01/2011.

⁵ Also known as World War 2; a global war that was underway by 1939 and ended in 1945. It involved the vast majority of the World's nations, including the great powers.

⁶ Rezelman, David; F.G Gosling and Terrence R.Fehner (2000). "The Atomic bombing of Hiroshima." The Manhattan Project: An Interactive History. U.S. Department of Energy. <http://www.cfo.doe.gov/Me70/Manhattan/hiroshima> Also see: Frequently Asked questions 1."Radiation Effects Research Foundation. <http://www.rerf.or.jp/general/qa> Accessed on 02/04/2011.

⁷ <http://www.nytimes.com/2010/01/20/books/20garner.html> Accessed 12, 04, 2010.

⁸ "Man who survived two atom bombs dies." CNN. <http://www.cnn.com/2010/WORLD/asiapct/01/06/japan.bomb.victim.dies/index.html> Accessed on 12, 04, 2010.

⁹ U.S.A, Russia, U.K, France and China.

of nuclear weapons by establishing the Nuclear Non-proliferation Treaty, which came into force in 1970.¹⁰ Other treaties both bilateral and multilateral have come into force after the NPT, seeking to limit nuclear weapons through various means like test-ban and declaration of nuclear-free-zones, and to eventually eliminate them thereby constituting a legal framework for nuclear weapons elimination. However, enforcement of the laws constituting this framework has been very slow. This paper presents the significant components of the framework for nuclear weapons elimination and examines some of the problems hindering the successful enforcement of nuclear weapons law with the objective of proffering suggestions for achieving the objectives of the law.

II. NUCLEAR WEAPONS LAW

The body of law that constitutes Nuclear Weapons Law consists of multilateral and bilateral treaties, judicial pronouncements, and principles of international humanitarian law as well as international customary law designed to achieve the elimination of nuclear weapons. There are currently in existence numerous international treaties which deal with the issue of nuclear weapons.¹¹ The Nuclear Non-Proliferation Treaty is the most significant multilateral anti-proliferation treaty.

The Nuclear Non-Proliferation Treaty (NPT)

The NPT became operative on 5 March, 1970. As at 2012, 189 states of the international community had ratified it.¹² Only four states are not parties to it viz., India, Pakistan, Israel and North Korea. All four are known or believed to possess nuclear weapons.¹³ Five nuclear weapon states are parties to the treaty viz., United States, U.K, Russia, China and France. They are also the five permanent members of the United Nations Security Council.¹⁴

The primary objectives of the treaty are to forestall the proliferation and spread of nuclear weapons and to achieve complete disarmament of nuclear weapons. While the non-nuclear weapon state parties undertake not to acquire nuclear weapons, the nuclear weapon state parties undertake not to spread nuclear weapons to non-nuclear weapon states, or among themselves, and to pursue negotiations towards cessation of the arms race and to nuclear disarmament.¹⁵ Another primary objective of the NPT is to facilitate the peaceful uses of nuclear energy.¹⁶

The Comprehensive Test Ban Treaty (CTBT)

The CTBT is the second most important treaty on nuclear weapons after the NPT. It was negotiated in Geneva by the Conference on Disarmament and was adopted by the General Assembly of the UN as a resolution¹⁷ on 10 September, 1996. It also opened for signature in September 1996.

¹⁰ Development and Proliferation of Nuclear Weapons. *Op.cit.* p.1

¹¹ The following are exhaustively the treaties on nuclear weapons; Treaty on the Non-Proliferation of Nuclear Weapons, ; the Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water; the Treaty for the Prohibition of Nuclear Weapons in Latin America and the Caribbean; the Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea and the Ocean Floor and in the Subsoil Thereof; the Agreement Governing the Activities of States on the Moon and Other Celestial Bodies; the South Pacific Nuclear Free Zone Treaty, the Southeast Asia Nuclear Weapon Free Zone Treaty; the Central Asia Nuclear Weapon Free Zone Treaty; the Comprehensive Test Ban Treaty; the Treaty between the U.S.A and the U.S.S.R on the Elimination of Their Intermediate-Range and Short-Range Missiles; the Treaty between U.S.A and the U.S.S.R on the Reduction and Limitation of Strategic Offensive Arms; the Treaty between U.S.A and Russia on Further Reduction and Limitation of Strategic Offensive Arms; the Treaty between Russia and the United States on Strategic Offensive Reductions; the International Convention for the Suppression of Acts of Nuclear Terrorism and the Statute of the International Atomic Energy Agency.

¹² What is the Non-Proliferation Treaty (NPT)? A Publication of Citizens for Global Solutions. Available at www.globalsolutions.org Accessed on 02/04/2012.

¹³ See Wright, T. *Status of World's Nuclear Arsenal*. In: International Humanitarian Law Magazine. Issue 2, 2011. A Publication of the Australian Red Cross. p.3.

¹⁴ What is the Non-Proliferation Treaty. *Op.cit.* p.3.

¹⁵ Articles I, II, and VI of the NPT.

¹⁶ Article IV, NPT.

¹⁷ A/RES/50/245..

The CTBT is the result of a long-term search for a permanent solution to the harmful effects of nuclear testing. The goal of prohibiting nuclear testing was first advanced in the early 1950's as a result of public apprehension over radioactive fallout from atmospheric nuclear tests.¹⁸ The treaty is significant because its principal goal is to ban all nuclear tests, anytime, anywhere and comprehensively.

The CTBT binds state parties by an undertaking not to carry out any nuclear weapon test explosions or any nuclear explosion, and to prohibit any such nuclear explosion at any place under its jurisdiction or control.¹⁹ Further to that, the state parties are prohibited from causing, encouraging or participating in any way, in the carrying out of any nuclear weapon test explosion or any nuclear explosion.²⁰

The objective of these prohibitions is unequivocally to forestall the proliferation of nuclear weapons by ensuring that no new or advanced nuclear weapons are produced by nuclear weapon states and that no non-nuclear weapon state launches a nuclear weapon. This is because testing of nuclear weapons is significant in determining the yield and potency of the weapons. Nuclear tests could be carried out for several purposes; for weapon development or improvement, to ascertain weapon effects, to study the phenomena of the explosion and for safety tests to study what would happen in an accident.²¹

With regards to implementation, the treaty has not been implemented to any degree or at all because it has not come into force since it opened for signature in 1996. The reason for this is attributed to the stipulation that all forty-four countries with nuclear plants as at 1996 must ratify it before it becomes legally binding or enters into force.²² So far it has been signed by 183 states and ratified by 157.²³ Out of those 44 nuclear capable states, 36 have ratified it. Three have not even signed it. The eight nuclear capable states that have not ratified it and are thus preventing the treaty from becoming operational are DPRK, Egypt, Iran, China, Israel, Pakistan, India and the U.S. The three states that have not signed it are India, Pakistan and DPRK.²⁴

The treaty however provides that if entry-into-force had not been achieved within three years, a conference of the states which had ratified the treaty could be convened to consider the extent to which the 44 accessions have been achieved and to consider and decide by consensus what measures consistent with international law may be undertaken to accelerate the ratification process in order to facilitate the entry-into-force of this treaty.²⁵ Fifteen years after the signing of the treaty however, this option has not been utilized by the state parties.

The Nuclear Weapon Free Zone (NWFZ) Treaties

A Nuclear-Weapon-Free-Zone is any zone recognized as such by the General Assembly of the United Nations, which any group of states, in the free exercises of their sovereignty, has established by virtue of a treaty or convention whereby:

- (a) The Statute of total absence of nuclear weapons, to which the zone shall be subject, including the procedure for the delimitation of the zone, is defined.

¹⁸ Preparatory Comm'n for THE COMPREHENSIVE NUCLEAR-TEST-BAN TREATY ORG., BASIC FACTS: THE COMPREHENSIVE NUCLEAR-TEST-BAN TREATY (CTBT) AT A GLANCE. (2001). Available at <http://www.ctbt.org/reference/outreach/booklet1a.pdf>. Accessed on 04/04/2012.

¹⁹ Article 1 (1) CTBT.

²⁰ Article 1 (2) CTBT.

²¹ Norris, R and Cochran T. Nuclear Weapons Tests and Peaceful Nuclear Explosions by the Soviet Union. A Publication of Natural Resource Defense Council, Inc. Washington. August 29, 1949 – October 24, 1990. Available at <http://docs.nrdc.org>. Accessed on 01/05/2011.

²² Article XIV CTBT.

²³ Status and Signature of Ratification of CTBT as at February, 2012. Prepared by the CTBTO Preparatory Commission. www.ctbto.org/the-treaty/status-of-signature-and-ratification/ Accessed on 27 April, 2012.

²⁴ Ibid.

²⁵ Ibid.

- (b) An international system of verification and control is established to guarantee compliance with the obligations deriving from that statute.²⁶

A nuclear-weapon-free-zone is therefore a regional undertaking not to indulge in the production, use and any other act related to nuclear weapons other than their destruction or conversion to peaceful uses. This kind of regional undertaking has been anticipated and encouraged by the Nuclear Non-Proliferation Treaty as part of the global participation in non-proliferation efforts viz., "Nothing in this treaty affects the right of any group of states to conclude regional treaties in order to assure the total absence of nuclear weapons in their respective territories"²⁷

There currently exist five nuclear weapon free zones (NWFZ) in the world by virtue of five multilateral treaties viz.:

1. Latin and Caribbean NWFZ created by the Treaty for Prohibition of Nuclear Weapons in Latin and the Caribbean (Treaty of Tlatelolco).²⁸
2. South Pacific NWFZ created by the Rarotonga Treaty, 1985.²⁹
3. Southeast Asia NWFZ created by the Bangkok Treaty, 1995.³⁰
4. African NWFZ created by the Pelindaba Treaty.³¹
5. Central Asian NWFZ created by the Semipalatinsk Treaty, 2006.³²

The African NWFZ Treaty (Treaty of Pelindaba) in view

This treaty contains elaborate provisions by which parties undertake not to conduct research on, develop, manufacture, stockpile or otherwise acquire, possess or have control over any explosive device by any means anywhere. In treaty prohibits seeking or receiving any assistance in any activity relating to the foregoing. Conversely, it prohibits assisting or encouraging any of the prohibited acts.³³

The treaty also prohibits the stationing of any nuclear explosive device on any African territory.³⁴ Furthermore it prohibits the testing of any nuclear weapon by a state party, as well as the testing of such on its territory and the assistance and encouragement of the testing of any nuclear explosive device by any state anywhere.³⁵ Other provisions of the treaty are for the declaration, dismantling, destruction or conversion of nuclear devices and the facilities for their manufacture and for the prohibition of dumping of radioactive wastes.

Other provisions of the treaty relate to the peaceful uses of nuclear technology in accordance with IAEA guidelines and safeguards. As mechanism for compliance with its provisions, the treaty created the African Commission on Nuclear Energy.³⁶

²⁶ General Assembly Resolution 3472B(1975).

²⁷ Article VII of the NPT.

²⁸ This treaty entered into force on October 23rd, 2002. It covers Antigua & Barbuda, Argentina, Bahamas, Barbados, Belize, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Saint Kitts & Nevis, Saint Lucia, Saint Vincent & Grenadines, Suriname, Trinidad & Tobago, Uruguay and Venezuela.

²⁹ This treaty entered into force on December 11th, 1986. It covers Australia, the Cook Islands, Fiji, Kiribati, Nauru, Papua New Guinea, the Solomon Islands, Tonga, Tuvalu, Vanuatu and Western Samoa.

³⁰ This treaty came into force on March 27th, 1997. It covers Brunei, Darussalam, Cambodia, Indonesia, Malaysia, Laos, Myanmar, Philippines, Singapore, Thailand and Vietnam.

³¹ This treaty came into force on July 15th, 2009. It covers Algeria, Angola, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Cape Verde, Central African Republic, Chad, Comoros, Congo, Cote D'ivoire, Democratic Republic of Congo, Djibouti, Egypt, Equatorial Guinea, Eritrea, Ethiopia, Gabon, Gambia, Ghana, Guinea, Guinea Bissau, Kenya, Lesotho, Liberia, Libyan Arab Jamahiriya, Madagascar, Malawi, Mali, Mauritania, Mauritius, Mozambique, Niger, Nigeria, Rwanda, Senegal, Seychelles, Sierra Leone, Somalia, South Africa, Sao Tome & Principe, Sudan, Swaziland, Togo, Tunisia, Uganda, United Republic of Tanzania, Zambia, Zimbabwe, Sahrawi Arab Democratic Republic.

³² This treaty came into force on March 21st, 2009. It covers Republic of Kazakhstan, the Kyrgyz Republic, the Republic of Tajikistan, Turkmenistan and the Republic of Uzbekistan.

³³ Article 3 (a-c) Treaty of Pelindaba.

³⁴ Article 4. Ibid.

³⁵ Article 5. Ibid.

³⁶ Article 12. Ibid.

The other nuclear **weapon free zone treaties** have basically the same provisions regarding the renunciation of nuclear weapons and the peaceful uses of nuclear weapons in accordance with the guidelines of the IAEA.

The Statute of the International Atomic Energy Agency (IAEA)

The IAEA Statute is primarily a statute for the regulation of the peaceful uses of nuclear energy; the agency itself was built for that purpose. The fact that nuclear technology is of multidimensional benefit to mankind³⁷ and has overtime acquired an indispensable status means that mankind has to find a way to enjoy its benefits and still avoid the harm that may accrue from its diversion from peaceful to military uses. This heralded the establishment of an agency whose objective is to seek to accelerate and enlarge the contribution of atomic energy to peace, health and prosperity throughout the world.³⁸

In its regulation of the use of atomic energy, to ensure that it is not used to further any military purpose, the IAEA prevents the proliferation of nuclear weapons. One of its functions under the statute, is to establish and administer safeguards designed to ensure that special fissionable or other materials, services, equipment, facilities and information made available by the agency or at its request or under its supervision or control are not used in such a way as to further any military purpose; and to apply safeguards, at the request of the parties, to any bilateral or multilateral arrangement, or at the request of a state, to any of that state's activities in the field of atomic energy.³⁹ It is by virtue of this authority that many non-proliferation treaties, for example, the nuclear weapon free zone treaties and the NPT, adopt the IAEA as a compliance verification agency. This provision also makes the IAEA's role inexhaustive and perennially relevant.

In carrying out its safeguards function, the agency is authorized to examine the design of specialized equipment and facilities of a state, including nuclear reactors, and to approve it from the view-point of assuring that it will not further any military purpose, among others.⁴⁰ The agency is further authorized to inspect the territories of states through its inspectors, but only after consultation with the state concerned. These inspectors shall have access to any person by virtue of whose occupation deals with materials, equipment, or facilities which are required to be safeguarded by the statute. In the context of ensuring non-proliferation, this is done to ensure that there is compliance with the undertaking against the use of special fissionable materials and fissionable products in furtherance of any military purpose.⁴¹

Where non-compliance by a state is observed by the agency, the agency has powers only to request within a reasonable time that the state corrects its acts or to suspend or terminate assistance and withdraw any materials and equipment it or a member state made available to the non-complying state.⁴² The agency's powers are therefore highly limited to inspections and by that, it is more of a watchdog over the affairs of states pertaining to nuclear technology. In verifying that nuclear energy is used for peaceful purposes and not diverted to military use, it substantially helps in the prevention of nuclear weapons production and proliferation, effectively being part of the framework for eliminating nuclear weapons totally.

The NPT expressly mandates non-nuclear weapon state parties to accept safeguards, as set forth in an agreement to be negotiated and concluded with the IAEA in accordance with the IAEA Statute and the agency's safeguard system.⁴³ This is part of the verification process poised to prevent diversion of nuclear energy from peaceful to military

³⁷Anderson, R.L. Beneficial Uses of Nuclear Technology. Nuclear Energy Institute – Washington DC. Accessed on 06/01/2011.

³⁸"Beneficial Uses of Nuclear Technology: The Role of the Regulator in Ensuring the Protection of Public Health and Safety." By Shirley A. J. Chairman, U.S.A Nuclear Regulatory Commission. A Paper delivered at the International Meeting on Nuclear Energy in Medicine and other Peaceful Applications. Held in Hanoi, Vietnam on March 29, 1999. Available at <http://www.nrc.gov/reading-rm/doc-collections/commission/speeches/1999/s99-09.html>. Accessed on 06/01/2011.

³⁹ Article II, IAEA Statute – Objectives.

⁴⁰ Article III (5) IAEA Statute.

⁴¹ Article XII (I) IAEA Statute – Agency Safeguards.

⁴² Article XII (6) IAEA Statute.

⁴³ Article III (I) NPT.

uses. Hence the NPT permits non-nuclear weapon state parties to individually or collectively with other states conclude such agreements with the IAEA but however mandates the agreement to be commenced within 180 days from the original entry into force of the NPT; and for those who accede to the treaty after the stipulated timeline, negotiation of the safeguards shall commence immediately after accession. Such agreements shall enter into force not later than eighteen months after the date of initiation of negotiations.⁴⁴

As at 2011, 157 NPT non-nuclear weapon states, out of a total of 184, have NPT Safeguards Agreements in force with the IAEA; 134 states have signed the Additional Protocol (AP). For 102 of them, the AP has entered into force.⁴⁵ IAEA safeguards are generally acknowledged as the single credible means by which the international community can be assured that nuclear material and facilities are being used exclusively for peaceful purposes.⁴⁶

III. ELIMINATION OF NUCLEAR WEAPONS UNDER INTERNATIONAL HUMANITARIAN LAW (IHL) AND THE ADVISORY OPINION OF THE INTERNATIONAL COURT OF JUSTICE ON NUCLEAR WEAPONS

The International Court of Justice in 1996 delivered an Advisory Opinion on the question put to it by the United Nations General Assembly viz., "Is the threat or Use of Nuclear Weapons Permitted in any circumstance under International Law?"⁴⁷ The court stated in its opinion that "a threat or use of nuclear weapons is governed by the international law applicable in armed conflict, particularly those of the principles and rules of international humanitarian law as well as specific obligations arising from treaties and other undertakings that expressly deal with nuclear weapons"⁴⁸ The court thereby identified IHL as a substantial source for the determination of the legality of nuclear weapons.

The core principles that regulate the use of weapons in warfare under IHL are the principles of distinction and proportionality.⁴⁹ The principle of distinction prohibits the use of weapons whose effects do not distinguish between military objectives and civilian objects. The principle of proportionality prohibits the use of weapons which cause unnecessary or superfluous injury.⁵⁰ The court examined the magnitude of the effects of nuclear weapons and observed significantly that "the destructive power of nuclear weapons cannot be contained in either space or time. They have the potential to destroy all civilization and the entire ecosystem of the planet"⁵¹

The potential destructive effects of the use of nuclear weapons do not meet the threshold of the requirements of distinction and proportionality. Similarly the effects of the production, testing and storage of nuclear weapons are harmful to the natural environment. Therefore nuclear weapons violate the essential principles of international humanitarian law.

Soft Laws on the Elimination of Nuclear Weapons

Soft laws on the elimination of nuclear weapons pertain to those aspects of the legal framework of nuclear weapons' elimination which though not legally binding, act in diverse ways to supplement the framework. These include commitments made by state parties to the NPT at review conferences, to pursue the goal of disarmament and elimination, for example the 1995 "Principles and Objectives for Nuclear Non-Proliferation and Disarmament" and the 'Thirteen Practical Steps to Nuclear Disarmament' adopted at the 2000 NPT Review Conference. The following also constitute soft law on nuclear weapons:-

1. United Nations General Assembly Resolutions. Examples are:

⁴⁴ Article III (4) NPT.

⁴⁵ International Atomic Energy Agency Safeguards. Inventory of International Nonproliferation Organizations and Regimes. © Center for Nonproliferation Studies Website. Last Updated 27/01/2011. iaea_dept_of_safeguards.pdf

⁴⁶ *Ibid.* p.2.

⁴⁷ Legality of the Threat or Use of Nuclear Weapons. General List No. 95 (Advisory Opinion of July 8, 1996).

⁴⁸ *Ibid.*

⁴⁹ See Gasser, H.P. International Humanitarian Law. An Introduction. Paul Haupt Publishers Berne, Vienna. (1993).

⁵⁰ *Ibid.*

⁵¹ Legality of the Threat or Use of Nuclear Weapons. *Op.cit.*p.9.

- (a) "Towards a Nuclear-Weapon-Free World: The Need for a New Agenda,"⁵²
 (b) "Follow-up to the Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons,"⁵³
 (c) "The Renewed Determination" Resolution.⁵⁴

2. The Report of the Canberra Commission on the Elimination of Nuclear Weapons

The Canberra Commission was established as an independent commission by the Australian Government in November 1995 to propose practical steps towards a nuclear weapon free world including the related problem of maintaining stability and security during the transitional period and after this goal is achieved.⁵⁵ It is one of the unique efforts undertaken by a sovereign state towards the elimination of nuclear weapons. The commission presented its report in 1996 and the report provides significant suggestions for successfully achieving the elimination goal of Article VI of the NPT.

3. Resolutions of the International Red Cross and Red Crescent Movement

The International Red Cross and Red Crescent Movement have since the 1945 bombing of Hiroshima and Nagasaki expressed their concern about the destructive effects of nuclear weapons and the need for their elimination, through resolutions. In 1948 with Resolution XXIV of the 17th International Conference of the movement, the movement called on states to undertake to prohibit absolutely all recourse to so called "non directed weapons" (i.e. atomic weapons and to the use of atomic energy or any similar force for purposes of warfare.⁵⁶ The 1948 Resolution was reiterated in international conferences of the movement in 1952, 1957, 1969, 1977, and 1981. Their most recent resolutions were passed in 2009 and 2011.⁵⁷

IV. ENFORCEMENT OF NUCLEAR WEAPONS LAW

The act of enforcing a law or regulation entails the activity of compelling obedience to such law or regulation.⁵⁸ An effective enforcement of nuclear weapons law entails the observance of the non-proliferation rule by all the states of the international community as well as the total elimination of nuclear weapons by nuclear weapon states. Ambassador Richard Butler⁵⁹ cited two important aspects of enforcing nuclear weapons law. First is a very effective system of verification of compliance with whatever instruments have been adopted to bring about a world without nuclear weapons. Second is a reliable system of enforcement against those who may have decided to defy or cheat upon the system.⁶⁰ Enforcing international law of nuclear weapons means that the international community is prepared to use persuasive and, if non-violent measures do not succeed in bringing a rule-breaker back to compliance, coercive means to prevent any actor to acquire nuclear weapons or to dig out concealed weapons which are clandestinely exempted from the disarmament process.⁶¹

⁵² A/RES/55/33C.

⁵³ A/RES/60/76.

⁵⁴ A/RES/60/65.

⁵⁵ Report of the Canberra Commission on the Elimination of Nuclear Weapons. November, 1995. Australian Government, Department of Foreign Affairs and Trade. www.dfat.gov.au/publication/security/canberra-commission-report/index.html Accessed on 14/04/2012.

⁵⁶ Working Towards the Elimination of Nuclear Weapons. Draft Resolution and Background Document. Council of Delegates of the International Red Cross and Red Crescent Movement. Geneva, Switzerland. [Council-delegates-2011-nuclear-weapons-report-eng.pdf](http://www.icrc.org/eng/doc/assets/public/council-delegates-2011-nuclear-weapons-report-eng.pdf). Accessed on 14/04/2012.

⁵⁷ *Ibid.*

⁵⁸ See Encarta Online Dictionary. *Op.cit.* p.1.

⁵⁹ Distinguished Scholar for International Peace and Security at Penn State University. Also Chair of the Canberra Commission on the Elimination of Nuclear Weapons.

⁶⁰ Steven Miller et al. Enforcing a World Without Nuclear Weapons. Carnegie International Nonproliferation Conference. Tuesday, April 7, 2009. Transcript by Federal News Service, Washington, D.C.

⁶¹ Muller, H. M. ISODARCO, 2011. A Publication of the Peace Research Institute, Frankfurt. Andalo, 2011.

In the present framework for the elimination of nuclear weapons, the International Atomic Energy Agency is the body charged with the first aspect of enforcement: the verification of compliance with the provisions of the NPT. Its powers are limited to verifying whether or not a state has exceeded its bounds in the peaceful uses of nuclear energy, to the military uses; its role being more of a fact-finding body. If a state is in violation, the IAEA reports the violation to the United Nations Security Council (UNSC) to take appropriate action regarding that state.⁶² The UNSC is thereby the second component of the enforcement system, the component that enforces against non-compliance.

The UNSC under Chapter VII of the UN Charter is mandated to take enforcement measures to maintain or restore international peace and security. Such measures range from economic and/or other sanctions not involving the use of armed force to international military action.⁶³ The use of mandatory sanctions is intended to apply pressure on a state or entity to comply with the objectives set by the Security Council without resorting to the use of force. Sanctions thus offer the Security Council an important instrument to enforce its decisions.⁶⁴ It follows therefore that a state which violates its obligations under the NPT, thereby threatening world peace and security, can suffer the sanctions imposed by the UNSC. Sanctions in this respect represent the enforcement tool of the UNSC.

The appropriate question at this stage of the discourse is whether or not the enforcement mechanism of nuclear weapons law has been effective or is adequate to achieve the objective of the law. An appropriate response to the foregoing must observe that it has been four decades since the most significant nuclear weapons law came into force with the objective of achieving a nuclear weapons free-world, yet all the states of the international community that possessed nuclear weapons at 1970 still possess them and more states not party to the NPT: India, Pakistan and Israel, have openly joined the nuclear club since then.⁶⁵ The IAEA has also alleged that some non-nuclear weapon state parties to the NPT are secretly enhancing their nuclear capabilities. The IAEA officially accused Iran of carrying out activities relevant to the development of a nuclear device in November 2011.⁶⁶ The IAEA had made the same allegation against Iraq in 1991 whereby Iraq was accused of having a clandestine nuclear weapons development programme and thereby violating its safeguards agreement with the IAEA.⁶⁷

What the sum of the foregoing reflects is the inefficiency or inadequacy of the enforcement mechanism of nuclear weapons law. The enforcement mechanism is not without its challenges or impediments. One of the significant impediments to the enforcement of nuclear weapons law derives from the nature of international law itself, since nuclear weapons law operates in the international law context. While it has regulated international intercourse for centuries, in myriad ramifications, international law nonetheless has its salient shortcomings.

The Consensual Character of International Law: an Impediment to Enforcement.

The most common and direct source of international law, treaty, is based on the agreement between states.⁶⁸ States transact a vast amount of work by using the device of the treaty.⁶⁹ There is no singular world legislature which competently drafts law in the best interest of all the nations of the world and makes it equally binding on all. International law does not have the machinery to compel a state to sign and ratify a treaty. Not only is this a practical premise but it owes also to the concept of state sovereignty under the law. The law recognizes as a fundamental principle that all independent states are sovereign and it frowns on the interference by any state or organization into the internal affairs of a sovereign state.⁷⁰

⁶² See the IAEA Statute, Article III at www.iaea.org

⁶³ www.un.org/sc/committee. Accessed on 4 April, 2012.

⁶⁴ *Ibid.*

⁶⁵ See Wrigt, T. Status of World Nuclear Arsenal *Op.cit.* p.3

⁶⁶ Iran's Nuclear Program. *The New York Times*, Thursday, March 8, 2012. Available at http://topics.nytimes.com/top/news/international/countriesandterritories/iran/nuclear_program/inc, Accessed on 03/04/2012

⁶⁷ IAEA Safeguards: Stemming the Spread of Nuclear Capabilities of Iraq. IAEA Website. http://www.iaea.org/Publications/Factsheets/English/SL_Safeguards.Pdf. Accessed on 02/04/2012.

⁶⁸ Shaw, M.N. *International Law* (5th Ed.) Cambridge University Press, United Kingdom. (2003) p.817.

⁶⁹ *Ibid.* p.810.

⁷⁰ See Article 2 of the UN Charter.

A sovereign state is assumed to possess the capability to make its own decisions and accordingly, with the consent of its decision-makers, independently enter bilateral and multilateral agreements with other states. The right of entering into international engagements is an attribute of State sovereignty.⁷¹ When a state deems that a particular multilateral treaty or some components thereof do not support or enhance its national interests, it may validly refrain from being a party to or ratifying that treaty. This is irrespective of whether or not the treaty seeks to benefit the world at large and has a large subscription.

This element of state consent and agreement under international treaty law projects the blunt fact that some states that own nuclear weapons can never be compelled to be under the ambit of disarmament obligations. Real examples abound with nuclear-weapon states like India and Pakistan who are not parties to the NPT and CTBT. While the states that ratified these treaties can be accused of violating its terms when they perform acts contrary to it, those that have not cannot be regarded as violators when they perform the same acts because as a general rule, a treaty binds only those who choose to be bound by it, "consent."⁷²

Another example is the retardation of the Comprehensive Test Ban Treaty. Being an excellent mechanism to forestall the production of nuclear weapons by new states and also the further production or sophistication of nuclear weapons by nuclear weapon states, it has been prevented from coming into force by eight of the states that own nuclear plants and even some nuclear weapons states, like the United States; thereby not fulfilling a pre-requisite condition for its entering into force. And there is no way whatsoever under international law to legally bind them to become parties to the treaty.

There is however an exception to the international law concept that a state cannot be compelled to obey the laws of a treaty it is not a party to. This exception is in respect of a treaty provision that has also become international customary international law exist, forming a body of *jus cogens*.⁷⁴ *Jus cogens* are peremptory norms of international law. A Peremptory norm of international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted, and which can be modified only by a subsequent norm of general international law having the same character.⁷⁵ As a result they are generally interpreted as restricting the freedom of states to contract while 'voiding' treaties whose object conflicts with norms which have been identified as peremptory.⁷⁶ It therefore follows that notwithstanding the requirement of consent to be bound by international obligation, a state cannot escape responsibility in respect of a peremptory norm of international law just because it did not sign a treaty representative of it. Examples of peremptory norms have been cited viz., prohibition of the use of force, the law of genocide, crimes against humanity and the principle of racial non-discrimination.⁷⁷ With respect to the present discourse however, it could be said that the principle against the non-possession of nuclear weapons has neither attained the status of customary international law nor does it fall within the class of peremptory norms of which states cannot derogate.

V. THE WEAKNESS OF THE NUCLEAR WEAPONS LAW ENFORCEMENT SYSTEM

Unlike municipal law, international law does not have a legislature, judiciary, executive and a police force. What represents all these can be found in the United Nations System, The highest decision-making body of the UN is the Security Council and therefore mimics the role of the municipal executive. However, unlike a democratically elected

⁷¹ Brownlie, I. *Principles of Public International Law* (6th Ed.) Oxford University Press, New York (2003) p.288

⁷² Shaw, M.N. p.817 *Op.cit.* p. 13.

⁷³ *Ibid.*

⁷⁴ Brownlie, 488. *Op.cit.* p. 14.

⁷⁵ Article 53, Vienna Convention on the Law of Treaties, 1969.

⁷⁶ Navia, R. *International Peremptory Norms (Jus Cogens) and International Humanitarian Law.* www.iccnw.org Accessed on 15/06/2012.

⁷⁷ Brownlie, 489. *Op.cit.* p.14.

executive, the five permanent members of the Security Council with veto power are never elected.⁷⁸ Since the establishment of the UN by those five, they had assumed that position and like the name suggests, it is permanent.

The Security Council represents both the Executive and Legislative arms of the world Assembly. Its most powerful authority derives from Article 27 of the UN Charter which states that "Decisions of the Security Council on all matters shall be made by an affirmative vote of seven members including the concurring votes of the permanent members, provided that, in decisions under Chapter VI, and under paragraph 52, a party to a dispute shall abstain from voting." By simply refusing to vote therefore, a permanent member of the Security Council effectively veto's any resolution passed by the Council.

By having a monopoly of role in the international law enforcement system, the Security Council plays the most significant role in the system. This monopoly of power is not divorced from the Council's historical bearings. The most powerful nations at the decline of the Second World War naturally assumed a universal executive stance to establish a World Assembly for the assurance of world peace and security through the United Nations Organization.⁷⁹ Not surprisingly too, they not only constituted themselves as the permanent executive members of that organization with enforcement powers but bestowed on themselves the power to make binding laws on nations through resolutions and to award punishment by sanction.⁸⁰ The United Nations Charter, thereby reflecting the realities of the time of its inception contains no provisions whereby members of the United Nations General Assembly may have meaningful checks on the powers of its most powerful members.

Similarly the Charter does not answer the question how the permanent members of the Council may be brought to compliance with their obligations under international law by simply being silent on it or not envisaging it at all. It then appears that the UN Charter was established with the underlying assumption of Security Council supremacy.⁸¹

It follows therefore that the extent to which the Council may be conceived in practice as representing the interests of a few or is self-motivated and incorrigible has significant implications for its efficacy as a component of the international law enforcement system. This is because since on the international scene states' compliance to authority is generally consensual hence a law enforcement body that is perceived as representing self-interests may on the reverse; evoke the rebellion, rather than the reverence of its members. An active violation of international law by a member or members of the Security Council and the failure of the Council to adequately deal with its offending member(s) as was witnessed in the U.S-led unauthorized invasion of Iraq in 2003, and the failure of the Security Council to deal punitively with U.S,⁸² reveals the unequal balance of power in the international system. To illustrate its undemocratic nature, Kirgis, an analyst, stated:

The Security Council's enforcement powers are troublesome to many UN member states because the Council is not regarded as an adequately representative body. Its five permanent, unelected members – China, France, Russia, the United Kingdom and the United States – can veto any substantive measure. One of them – the United States – has dominated the Council in recent years. To the extent that law enforcement finds its legitimacy in democratic institutions, the Security Council is vulnerable to criticism. This, of course, is not so much a question of the effectiveness of

⁷⁸ How was the United Nations Formed? <http://www.enotes.com/history/q-and-a/how-was-the-united-nations-formed-287680> Accessed on 14/04/2012.

⁷⁹ In August 1944 during World War 2, at the Dumbarton Oaks Conference in Washington D.C, Representatives of Britain, the United States, the Soviet Union and China met to make plans for a peacekeeping organization. The outcome of the meeting which lasted into October, was the basic concept for the UN Security Council, the World's major powers would have permanent seats on the Council and a limited and rotating membership after that. <http://www.enotes.com/history/q-and-a/how-was-the-united-nations-formed-287680> Accessed 14/04/2012.

⁸⁰ See Article 41 UN Charter.

⁸¹ See generally the UN Charter.

⁸² See Sponeck, G. *Iraq and the United Nations, Post-War and Pre-Peace – The Dilemma of the Future.* Essex Human Rights Review. Vol. 2, No 1. p.87.

