

India and the Legitimacy of Nuclear Weapons

By Varadharajan Udayachandran

FICHL Policy Brief Series No. 87 (2018)

1. Nuclear Proliferation Undermines Collective Security

Nuclear weapons may be the most inhumane weapons known to man. They do not inherently discriminate in who they kill and maim,¹ and they cause everlasting impact upon the survivors and their future generations. The suffering of thousands of hibakusha – the Japanese survivors affected by the atomic bombing of Hiroshima and Nagasaki – are dark pages in the history of mankind that must never be repeated.² Humanity would cease to exist should there be a global, multi-frontal nuclear war. As Mahatma Gandhi observed in 1946: “So far as I can see, the atomic bomb has deadened the finest feeling that has sustained mankind for ages”.³

The United Nations (‘UN’) – primarily tasked with saving “succeeding generations from the scourge of war”⁴ – has long confronted the challenge of nuclear weapons. Proliferation of nuclear weapons and the threat of their use weaken the very foundations of the UN, insofar as the use of nuclear weapons is a “flagrant breach of international law”.⁵ Judge Sebitunde, in his dissenting opinion in *Marshall Islands v. Republic of India*, observed that, “[t]oday there is no greater threat to international peace and security, or indeed to humanity, than the threat or prospect of a nuclear war”.⁶

At the time of writing, there are approximately 22,000⁷

¹ Steven P. Lee, “Ethics and Weapons of Mass Destruction”, in Patrick Hayden (ed.), *The Ashgate Research Companion to Ethics and International Relations*, Ashgate, 2009.

² See, generally, Dr. Masao Tomonaga, “The human cost of nuclear weapons”, in *International Review of the Red Cross* (2015), vol. 97, no. 899, pp. 507–525.

³ Mahatma Gandhi, “Atom Bomb and Ahimsa”, *Harijan*, 7 July 1946 (<http://www.legal-tools.org/doc/cf2583/>).

⁴ Charter of the United Nations, Preamble (<http://www.legal-tools.org/doc/6b3cd5/>).

⁵ International Court of Justice, *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament* (*Marshall Islands v. The Republic of India*), Dissenting Opinion of Judge Antônio Augusto Cançado Trindade, 5 October 2016, para. 143 (<http://www.legal-tools.org/doc/52fb00/>).

⁶ *Marshall Islands v. India*, *supra* note 5, Separate Opinion of Judge Sebitunde, para. 3.

⁷ UN Office for Disarmament Affairs, “Nuclear Weapons” ([http://](http://www.legal-tools.org/doc/0f7463/)

www.legal-tools.org/doc/0f7463/).

nuclear weapons among states, including those under the 1968 Non-Proliferation Treaty.⁸ Some states, such as Pakistan, have directly integrated nuclear weapons into their national security strategy, while others, such as India (and the five permanent members of the UN Security Council, the ‘P5’), have done so indirectly, emphasizing so-called no-first-use.

The Non-Proliferation Treaty categorises states into Nuclear Weapon States (‘NWS’) and Non-Nuclear Weapon States (‘NNWS’). Under the Treaty, only the former may possess nuclear weapons, but they have an obligation not to transfer nuclear weapons to NNWS or encourage such states to produce. NNWS have an obligation not to receive or manufacture nuclear weapons. Among all nuclear-armed states that are not NWS, India and Pakistan have not signed the Treaty, North Korea has unilaterally terminated it, and Israel does not officially claim to be a nuclear-armed state although evidence suggests otherwise. Apart from the NWS, the international community has not recognized other nuclear-armed states as NWS, and have always treated them as “Outliers”.

This brief argues that India is a responsible nuclear-armed state, and considers why India⁹ – the only such state that has long promoted the Comprehensive Nuclear-Test-Ban Treaty¹⁰ – has not played her role up to her full potential. It proposes that India should be in the vanguard of the global movement for non-proliferation and disarmament, and eventually lead towards a world free of nuclear weapons. This is of vital importance for international peace and security.

2. India as an Outlier State

India has played a significant role in concluding the 1968 Non-Proliferation Treaty and within the UN Conference on

www.legal-tools.org/doc/0f7463/).

⁸ Treaty on the Non-Proliferation of Nuclear Weapons (<http://www.legal-tools.org/doc/82c583/>).

⁹ N.D. Jayaprakash, “Nuclear Disarmament and India”, in *Economic and Political Weekly*, 2000, vol. 35, no. 7, p. 526.

¹⁰ Comprehensive Nuclear-Test-Ban Treaty (<http://www.legal-tools.org/doc/1bbcd6/>).

Disarmament.¹¹ But India refused to sign the Treaty when it became clear that she could be considered a NWS as she had not conducted nuclear weapons tests prior to 1967.¹² India has since regarded the Treaty as discriminatory and imbalanced as it leaves four states as Outliers¹³ without adequately considering their security aspirations.¹⁴

India was provoked to find alternative measures to protect her national security.¹⁵ India's detonation of a nuclear bomb in 1968 – the Pokhran-II test¹⁶ – expressed India's security fears, especially in relation to China.¹⁷ Maintaining strategic stability,¹⁸ India has not tested a nuclear weapon since. On the other hand, India has consistently been vociferous about the perils of nuclear weapons.

There are two arguments why India could be termed as a responsible nuclear state within the non-proliferation regime. First, the only reason why India possesses nuclear weapons is to create a credible minimum deterrence¹⁹ against her adversaries, and to protect herself from external aggression, without any intention of initiating a nuclear strike. Pakistan, on the other hand, has a first-use policy to counter India's more advanced military. India has long advocated for a no-first-use treaty which could stabilize the non-proliferation regime.

Secondly, India's credentials as a responsible nuclear state resulted in the Indo-US Civil Nuclear Agreement 2005,²⁰ signed between a NWS and an Outlier.²¹ The United States thus brought India partially within the non-proliferation regime. In 2016, a similar agreement was signed between Japan and India. As there were uncertainties on India's development of nuclear arsenals,²² it took longer than expected

to conclude.²³ Japan is the only country that has suffered the senseless brutality of nuclear weapons, so the Agreement arguably shows Japan's faith in India and her credibility within the non-proliferation regime. India has expressly committed in both agreements not to divert or use the nuclear materials for weapons development.²⁴

Despite these arguments, India is still an Outlier and a proliferation problem, mainly because of its status as a non-party to the Non-Proliferation Treaty. If India adopts the Treaty, other states could be persuaded to rethink their nuclear strategy, eventually leading the way to a world free of nuclear weapons.

3. India and the 2017 Treaty on the Prohibition of Nuclear Weapons

After the conclusion of the 1968 Non-Proliferation Treaty, it became obvious that its universal acceptance is not foreseeably attainable, for three main reasons: 1) As regards the Outlier states, India and Pakistan are not willing to be recognized as NNWS under the Treaty, Israel has not recognized itself as a nuclear power, and North Korea has exited the Treaty; 2) the permanent five members of the UN Security Council would probably never accept India or Pakistan as a NWS within the Treaty-system, as this is a privilege that only the permanent five hold; and 3) the Treaty as it stands makes accession impossible.²⁵

However, at the time of writing, it seems that nuclear states would not be willing to renounce nuclear weapons unless all nuclear-armed states agreed to do so by legally binding commitments. The international community thus seems reliant on nuclear weapons to maintain world order.

Strengthening the collective security system under the UN could lead nuclear-armed states to abolish their nuclear weapons. The 2004 UN Secretary-General's *High-Level Panel on Threats, Challenges and Change*²⁶ warned the international community of the "erosion and possible collapse of the whole [nuclear non-proliferation] Treaty regime",²⁷ adding that "[w]e are approaching a point at which the erosion of the non-proliferation regime could become irreversible and result in a cascade of proliferation".²⁸

India has consistently argued that more restraints on the use of nuclear weapons would reduce the probability of their use. She has therefore long advocated for a universal Nuclear

¹¹ For a brief outline, see Leonard Weiss, "India and the NPT", in *Strategic Analysis*, 2010, vol. 34, no. 2, pp. 255-271.

¹² *Ibid.*, p. 260.

¹³ See A. Vinod Kumar, *India and the Nuclear Non-Proliferation Regime: The Perennial Outlier*, Cambridge University Press, 2014.

¹⁴ See, generally, B. Goldschmidt, "The Negotiation of the Non-Proliferation Treaty", in *IAEA Bulletin*, 1980, vol. 22, no. 3/4.

¹⁵ See, Amartya Sen, "India and the Bomb", in *The New Republic*, 25 September 2000, pp. 32-38.

¹⁶ Zachary Keck, "Why India Tested Nuclear Weapons in 1998", in *The Diplomat*, 20 September 2013.

¹⁷ *Ibid.*

¹⁸ Balraj Nagal, "Strategic Stability – Conundrum, Challenge and Dilemma: The Case of India, China and Pakistan", in *Claws Journal*, 2015, Summer 2015.

¹⁹ Opening Remarks by National Security Adviser Mr. Brajesh Mishra at the Release of the Draft Report of National Security Board on Indian Nuclear Doctrine, 17 August 1999 (<http://www.legal-tools.org/doc/70efe4/>).

²⁰ See Surabhi Ranganathan, "The Value of Narratives: The India-USA Nuclear Deal in Terms of Fragmentation, Pluralism, Constitutionalism and Global Administrative Law", in *Erasmus Law Review*, 2013, vol. 1, pp. 17-31. Also, see, generally, Ministry of External Affairs, Government of India, "Civil Nuclear Cooperation" (<http://www.legal-tools.org/doc/06fb64/>).

²¹ *Ibid.*

²² Shamshad A. Khan, "Indo-Japan Memorandum on Civil Nuclear Cooperation", in *Economic and Political Weekly*, 2016 vol. 51, no. 14; see also, The Coalition for Nuclear Disarmament and Peace, "Hiroshima and Nagasaki Mayors Oppose India-Japan Nuclear

Agreement" (<http://www.legal-tools.org/doc/7da73c/>).

²³ Agreement between the Government of Japan and the Government of the Republic of India for Cooperation in the Peaceful Uses of Nuclear Energy, 11 November 2016 ("Japan-India Agreement") (<http://www.legal-tools.org/doc/546fc4/>). See, generally, P.S. Suryanarayana, "The Japan-India Agreement: An Exceptional Nuclear Pact", in *ISAS Brief*, 21 November 2016, no. 455.

²⁴ *Ibid.*, Japan-India Agreement, Article 3(1).

²⁵ NPT, *supra* note 8, Article VIII.

²⁶ "A more secure world: Our shared responsibility – Report of the High-level Panel on Threats, Challenges and Change", UN Doc. A/59/565, 2 December 2004 (<http://www.legal-tools.org/doc/b7add1/>).

²⁷ *Ibid.* para. 109.

²⁸ *Ibid.*, para. 111.

Weapons Convention.²⁹ The recently concluded 2017 Treaty on the Prohibition of Nuclear Weapons³⁰ outlaws “developing, testing, producing, manufacturing, possessing, transferring, receiving, encouraging, stockpiling, using or threatening to use nuclear weapons by State Parties after 7 July 2017”.³¹ It shows the commitment of the international community to making the world safer through nuclear disarmament. It could potentially result in the emergence of nuclear prohibition as a preemptory norm in international law.³²

Nevertheless, contrary to its earlier assurances, India abstained from voting on the resolution calling for the Prohibition Treaty, and she has since refused to adopt the Treaty. India asserts that the Treaty does not impose any obligations on India, and its provisions do not as such constitute or contribute to the “development of any customary international law”.³³ No other nuclear-armed state has participated in the negotiations or adopted the Treaty-provisions in letter and spirit.

4. India and Fissile Material Cut-Off

More production of fissile materials may lead to more nuclear weapons, and sometimes more advanced weapons. The nuclear-armed states have increased their stockpiles of nuclear weapons despite the common wisdom that a nuclear war can hardly be won.³⁴ Ceasing the production of fissile materials could seriously reduce the number of new weapons. Fissile material cut-off may therefore be one step towards disarmament.

A fissile material cut-off treaty could be an instrument against both horizontal and vertical proliferation.³⁵ While the NWS – except China whose status is unclear³⁶ – have stopped producing fissile materials, India vigorously does. India’s weapons-grade plutonium-producing reactor is still operational.³⁷ Even though India insists on a fissile material

cut-off treaty, she would not be ready to become a party to it, as she does not seem sure how many nuclear weapons constitute deterrence.³⁸

The Indo-US agreement was the first arrangement that obligates India to negotiate and conclude a legally binding, multilateral cut-off treaty for fissile material.³⁹ India should therefore eventually cease the production of fissile materials for nuclear weapons,⁴⁰ and phase out its stockpile of nuclear weapons. This would require assurances from other nuclear-armed states on fissile cut-offs, which would be hard. If India joined such a treaty, she would have to review comprehensively her national security strategy which is based on nuclear weapons. Alternatively, India could continue confidence-building measures with Pakistan and try to persuade her neighbour to sign such a treaty jointly.⁴¹

5. India Should Ratify the 1996 Comprehensive Nuclear-Test-Ban Treaty

While a fissile material cut-off treaty could quantitatively limit the development of new nuclear weapons, the 1996 Comprehensive Nuclear-Test-Ban Treaty prohibits the testing of new weapons. On the occasion of its twentieth anniversary, UN Secretary-General Ban Ki Moon called upon the remaining states under Annex II of the Treaty (including China and India) to sign and ratify the Treaty without further delay, so that “we can leave a safer world, free of nuclear tests, to our children and to succeeding generations of this world”.⁴² According to Evans and Kawaguchi, the 1996 Treaty

sets in effect, a qualitative cap on the capacity of both existing weapons possessors and potential new ones to develop new nuclear weapons. In doing so, it complements and reinforces the

tre, “Research Reactors: Apsara, Cirus, Kamini, Purnima I, Purnima II, Purnima III and Zerlina: Dhruva Reactor” (<http://www.legal-tools.org/doc/e0649e/>). See also, Hans M. Kristensen and Robert S. Norris, “Indian Nuclear Forces, 2017”, in *Bulletin of the Atomic Scientists*, 2017, vol. 73, no. 4.

²⁹ D.B. Venkatesh, “Statement by Ambassador Amandeep Singh Gill, Permanent Representative of India to the Conference on Disarmament during the formal plenary meeting of the Conference on Disarmament on August 22, 2017”, para. 9 (<http://www.legal-tools.org/doc/62078d/>).

³⁰ Treaty on the Prohibition of Nuclear Weapons, UN Doc. A/CONF.229/2017/8., 7 July 2017 (“The Prohibition Treaty”) (<http://www.legal-tools.org/doc/904f7b/>). For more about the Treaty, see <https://www.un.org/disarmament/ptnw/>.

³¹ *Ibid.*, Article I.

³² See Dr. Mohamed ElBaradei, “Nuclear Non-Proliferation: Global Security In A Rapidly Changing World” (<http://www.legal-tools.org/doc/478bc1/>).

³³ Ministry of External Affairs, Government of India, “Response by the Official Spokesperson to a Media Query regarding India’s view on the Treaty to Ban Nuclear Weapons”, 18 July 2017 (on file with the author).

³⁴ Cf. Kenneth Waltz, “The Spread of Nuclear Weapons: More May Better,” in *Adelphi Papers*, 1981, no. 171.

³⁵ Kumar, 2015, see *supra* note 13.

³⁶ See, generally, International Panel on Fissile Materials, “Fissile material stocks”, available at <http://fissilematerials.org/>, last accessed on 23 September 2017.

³⁷ That is, 100 MW Dhruva, a part of the Bhabha Atomic Research Centre; for details on *Dhruva*, see Bhabha Atomic Research Cen-

³⁸ International Panel on Fissile Material, *Banning the Production of Fissile Material for Nuclear Weapons: Country Perspectives on the Challenges to the Fissile Material (Cut-off) Treaty: Companion Volume to Global Fissile Material Report*, IPFM, Princeton, NJ, 2008, p. 24 (<http://www.legal-tools.org/doc/f3b165/>).

³⁹ Office of the Press Secretary, “Joint Statement by President George W. Bush and Prime Minister Manmohan Singh”, 18 July 2005, para. 12 (<http://www.legal-tools.org/doc/1abe20/>); Agreement for the Cooperation between the United States of America and the Government of India Concerning Peaceful Uses of Nuclear Energy (123 Agreement), 3 August 2007 (<http://www.legal-tools.org/doc/460bd6/>); Agreement between the Government of India and the International Atomic Energy Agency for the Application of Safeguards to Civilian Nuclear Facilities, INFCIRC/754, 29 May 2009 (<http://www.legal-tools.org/doc/460bd6/>).

⁴⁰ Ranganathan, 2013, see *supra* note 21.

⁴¹ Claire Mills, *Nuclear Weapons: Disarmament and Non-Proliferation Regimes (Briefing Paper Number 7634)*, House of Commons Library, London, 2016; see also Zia Mian and A.H. Nayyar, “Playing the nuclear game: Pakistan and the Fissile Material Cut-off Treaty”, in *Arms Control Today*, 2010, vol. 40, no. 3.

⁴² “Secretary-General Calls Anniversary ‘a Call to Action’, Reminder of Work Remaining, at Event Marking 20 Years of Comprehensive Test-Ban Treaty”, 27 April 2016, para. 10 (<http://www.legal-tools.org/doc/1a6793/>).

role of another crucial building block, the yet to be negotiated FMCT, which sets a quantitative cap.⁴³

India has termed the Nuclear-Test-Ban Treaty discriminatory. Given that India has imposed a unilateral moratorium since 1998, and does not intend to test new nuclear weapons, it is surprising that she is still hesitant to sign the Treaty, contrary to its commitment stated in the Indo-US Deal.⁴⁴

Any step towards signing the 1996 Treaty would prove India's commitment towards non-proliferation and disarmament. However, since China is also an Annex II-state that has yet to ratify, and has given no assurances to do so, the chances that India will sign are bleak.

6. India Should De-Legitimize Nuclear Weapons

India has for decades criticized the 1968 Non-Proliferation Treaty for its weak disarmament obligation.⁴⁵ The Treaty has only partially prevented proliferation. It has never been able to curb vertical proliferation to NWS. With no stringent measures under the Treaty, it actually facilitates a nuclear race by the NWS, and other nuclear-armed states decided they had to reciprocate to protect their national security, resulting in a nuclear weapons 'cartel'.⁴⁶ Even if India does not test new weapons, her existing nuclear weapons still pose a threat to international peace and security.

States should move towards de-legitimization of nuclear weapons, reduce the role of these weapons in their security policies, and eventually reach a point where a global zero is within reach. Each stage would take many years to achieve. The nuclear-armed states, India in particular, should emphasize the importance of nuclear disarmament to achieving international peace and security. India will only have moral standing to lead the way when she has performed her own disarmament, like South Africa. Disarmament goals should take into account that nuclear wars cannot meaningfully be won. At the end of the day, retaining nuclear weapons as a part of national security strategies would seem rather futile.

⁴³ Gareth Evans and Yoriko Kawaguchi, *Eliminating Nuclear Threats: A Practical Agenda for Global Policymakers*, International Commission on Nuclear Non-Proliferation and Disarmament, Canberra, 2009.

⁴⁴ Reshi Kazi, "India is a de facto member of the Comprehensive Test Ban Treaty", in *IDSIA Issue Brief Series*, 2014 (<http://www.legal-tools.org/doc/8d8a6f/>). Also see, generally, Lassina Zerbo, "India and the CTBT", in *The Hindu*, 14 February 2015 (<http://www.legal-tools.org/doc/7c172d/>).

⁴⁵ NPT, see *supra* note 8, Article VI.

⁴⁶ Andrew Berger, "The P5 Dialogue: Five years on", in *RUSI Occasional Paper*, 2014, 29 July 2014, p. 3.

7. Time for India to Assume Global Leadership

An earlier policy brief by SHI Bei in this Series,⁴⁷ pointed out how nuclear weapons pose the greatest threat to the right to life. The main nuclear powers have collectively failed both in their attempts to curb vertical proliferation and in integrating states like India, Pakistan, Israel and North Korea in the nuclear regime. Commitments to non-proliferation and disarmament have almost become mere lip-service, not respected in letter and spirit, as confirmed by their non-participation in the negotiation of the Prohibition Treaty.

Judge Trindade observed that all UN Member States:

are juridically equal. The strategy of a few States pursuing their own 'national security interests' cannot be made to prevail over a fundamental principle of international law set forth in the UN Charter: factual inequalities between States cannot, and do not prevail over the juridical equality of States.⁴⁸

It is time for India to assume global leadership in this area, by helping to salvage the non-proliferation regime from its possible collapse. Any of the steps discussed in this policy brief could significantly increase international pressure on other nuclear-armed states to follow suit. The prohibition against chemical and biological weapons gives ground for optimism in this respect. India has a proud tradition of moral leadership to live up to. As Mahatma Gandhi said about the arrival of nuclear weapons back in 1946: "unless now the world adopts non-violence, it will spell certain suicide for mankind".⁴⁹

Varadharajan Udayachandran is an Assistant Professor at the Institute of Law, Nirma University, Ahmedabad. He secured his LL.M. (2011) from the Indian Law Institute, New Delhi, and also holds a Post-Graduate Diploma in International Law from the Indian Society of International Law. He is a recipient of a 2016 City of The Hague Scholarship for Public International Law and a 2017 CILRAP scholarship.

ISBN: 978-82-8348-076-4.

TOAEP-PURL: <http://www.toaep.org/pbs-pdf/87-udayachandran/>.

LTD-PURL: <http://www.legal-tools.org/doc/02d634/>.

⁴⁷ SHI Bei, "Protecting the Right to Life from Nuclear Weapons", in FICHL Policy Brief Series No. 22 (2014), p. 4 (<http://www.legal-tools.org/doc/1b0954/>).

⁴⁸ Marshall Islands v. India, see *supra* note 5, Dissenting Opinion Dissenting Opinion of Judge Antônio Augusto Cançado Trindade, 5 October 2016, para. 143.

⁴⁹ Gandhi, 1946, see *supra* note 1.