

# NUCLEAR NORMS AND INTERNATIONAL LAW: HAS THE NPT CROSSED THE CUSTOMARY THRESHOLD?

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In the field of International Relations (IR), the ‘Treaty on the Non-Proliferation of Nuclear Weapons, 1968’<sup>1</sup> (NPT) created an international regime based on three pillars: (i) non-proliferation of nuclear weapons, technology and materials; (ii) peaceful use of nuclear energy; and (iii) nuclear disarmament. For a world reeling from the horrors of the use of nuclear weapons by the US against Japan in 1945 and the nuclear brinkmanship between the US and the then USSR during the ‘Cuban Missile Crisis’ of 1962, the NPT sought to provide a roadmap that would prevent a nuclear confrontation, while allowing the scientific harnessing of nuclear energy—all the while moving towards the ultimate goal of disarmament. The biggest success of the NPT, since its entry into force in 1970, can be measured by the formation of several arms and technology control mechanisms that limit proliferation, and the building of international cooperation through

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1 UN, *Treaty on the Non-Proliferation of Nuclear Weapons*, 1968, 729 UNTS 161, 7 ILM 8809 (1968), [1973] ATS 3, 21 UST 483. Available at <https://treaties.unoda.org/t/npt>. Accessed on June 1, 2023.

**The biggest success of the NPT, since its entry into force in 1970, can be measured by the formation of several arms and technology control mechanisms that limit proliferation, and the building of international cooperation through a ‘safeguards mechanism’ in the field of nuclear energy.**

a ‘safeguards mechanism’ in the field of nuclear energy. The biggest failure of the NPT regime has been its failure to move towards disarmament.

In this context, it is pertinent to analyse the NPT through the lenses of IR and International Law, in order to understand the correlation between the formation of international norms related to the NPT and state behaviour— and whether the same has crossed the customary threshold in International Law. To this end, the paper is divided into six sections. The first section looks into the various characteristics of international norms and the processes of norm formation. The second section traces the formation of international norms related to nuclear weapons and technology—from norms on placing limitations on testing to the formation of norms prohibiting proliferation of nuclear weapons, materials and technology. The third section analyses the sustainability of the norms and the role of state practice. The fourth section seeks to analyse whether international norms, once formed, can change over time by focussing on the normative influence of the NPT. The fifth section seeks to assess the position of International Law on the question of nuclear weapons. The last section questions whether the norms related to the NPT (especially disarmament) can be considered customary, especially in the backdrop of adoption of the Treaty on the Prohibition of Nuclear Weapons in 2017.

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## **CHARACTERISTICS OF INTERNATIONAL NORMS**

In the most basic sense, norms can be conceptualised as any rule of behaviour, violation of which can trigger a punishment or a prohibitive reaction.<sup>2</sup> Thus,

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2. Jonathan Bendor, and Piotr Swistak, “The Evolution of Norms”, *The American Journal of Sociology*, 2001, p. 1494.

as Bendor and Swistak assert, norms are more than merely behavioural rules for a group: they are rules that should be backed by a sanctions that compel the members of the group to conform to them. Two important aspects of norms can be deduced from this explanation. Firstly, that norms pertain to rules that guide behaviour in a group, i.e. emphasis on how norms evolve depends on behaviour that is acceptable across a particular group rather than at different individual levels. Here, the group takes precedence over the individual. The second aspect flows from the first one. This very behavioural rule confines the behaviour of the individuals that constitute the group by punishing those who do not adhere to it. Thus, a negative outcome for those who violate the norms is a must to prohibit further violations. These two aspects, emphasis on the functional rules of a group and that on negative outcomes if behavioural rules are violated, form two main pillars on which a norm rests.

**Norms pertain to rules that guide behaviour in a group, i.e. emphasis on how norms evolve depends on behaviour that is acceptable across a particular group rather than at different individual levels.**

Taking this conceptualisation further to the realm of political science and IR, one can find a plethora of definitions regarding what constitutes norms. Robert Axelrod asserts that norms are standards of behaviour which activate punishments when they are violated.<sup>3</sup> Hence, norms restrict options from a behavioural pool by their capacity to activate negative outcomes. Ann Florini finds a problem with Axelrod's definition, as, according to her, it cannot explain why states choose to behave in the way they do. According to her, it is imperative for a definition of norms to take into account the role of social construction which aids in conditioning the way that states behave in international society.<sup>4</sup> In doing so, she claims that the most significant factor that distinguishes norms from other forms of acceptable

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3. Robert Axelrod, "An Evolutionary Approach to Norms", *The American Political Science Review*, 1986, pp. 1095-1111.

4. Ann Florini, "The Evolution of International Norms", *International Studies Quarterly, Special Issue: Evolutionary Paradigms in the Social Sciences*, 1996, pp. 363-389.

and encouraged behaviour is the aspect of 'legitimacy' attached to them and, hence, acceptable behaviour can only take the form of a norm if it is seen as legitimate and not merely enforced.<sup>5</sup> An interesting definition of a norm comes from Martha Finnemore. Here, norms can be viewed as a set of inter-subjective understandings that are readily apparent on actors and that take a claim to their behaviours.<sup>6</sup> Thus, norms can be viewed as values of behaviour which are perceived as being shared. Stephen D. Krasner broadens the ways in which norms are conceptualised by addressing them as one of the four components of regimes. According to him, norms are standards of behaviour defined in terms of rights and obligations, changes in, and challenges to which, can either change or weaken the existing regime.<sup>7</sup> Thus, according to him, norms bring about conformation to the set standards of behaviour when actors view them as their right to behave in a particular way or as an obligation to do so. In this definition, the aspect of 'punishment' is diminished because the focus of norms (constituted within a regime) is more on the convergence of actor expectations in a specific issue area than on those where divergence of actor expectations is present.

Thus, three main aspects of norms can be extracted from all the definitions that have been briefly outlined above. Firstly, a norm can be viewed as a legitimised standard of behaviour which compels adherence as it is seen as acceptable as well as obligatory rather than merely imposed. Here, if the standard of behaviour lacks legitimacy and is seen as discriminatory, challenges to this standard will arise, thus, weakening its status as a norm. Thus, the norm should be perceived as beneficial in order to facilitate the achievement of the group's goal. Secondly, norms pertain to specific issue areas which are of importance to a certain group and may vary across groups and across different issue areas. Thus, the universality of norms across different groups and on different issues remains contested. For example,

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5. Ibid., pp. 364-365.

6. Martha Finnemore (1994), as quoted by Florini, Ibid., p. 364.

7. Stephen D. Krasner, "Structural Causes and Regime Consequences", in Krasner, ed., *International Regimes* (NY: Cornell University Press, 1983).

in the international system, the universal norm of sovereignty too is being repeatedly contested by the activities of various non-state actors that transcend state boundaries. Here, the value of the norms remains undiluted if norms pertaining to a specific issue area remain the same and are not challenged. Thirdly, legitimised standards of behaviour pertaining to a specific issue area cannot ensure the adherence of all the group members if they are not backed by sanctions and negative outcomes which follow violations. Thus, the aspect of punishment is imperative to strengthen behavioural conformity to norms. All three elements form the foundation on which a norm is built and adherence to the norm depends greatly on whether these three factors remain accepted and unchallenged over time. If these basic foundations are altered or challenged, it might render the norm ineffective and, thus, engender its dissolution.

#### **FORMATION OF INTERNATIONAL NORMS RELATED TO NUCLEAR WEAPONS AND TECHNOLOGY**

Pertinently, the NPT was more of a norm-forming treaty rather than an existing international norm informed and formed by state practice. Therefore, the NPT can be viewed equally as a culmination of international efforts to prepare a future roadmap of international relations, which had been introduced to nuclear weapons; as also a beginning of international efforts to regulate and limit nuclear testing and transfer of technology.

Under International Law, various instruments<sup>8</sup> dealing with nuclear weapons or technology have focussed on two main aspects: (i) placing limitations on testing; and (ii) prohibition on proliferation of nuclear weapons, materials and technology.

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8. SK Verma, *An Introduction to Public International Law*, 3rd ed., (New Delhi: Satyam Law International 2019), p. 583.

### *Limiting Testing of Nuclear Weapons*

The immediate focus following World War II were efforts to limit testing of nuclear weapons<sup>9</sup>. To this end, many instruments such as the Partial Nuclear Test Ban Treaty 1963<sup>10</sup>, Outer Space Treaty 1967 and Treaty on The Prohibition of The Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Subsoil Thereof 1972; (also called the Seabed Treaty) were concluded<sup>11</sup>.

The 1963 Treaty was a culmination of eight years of negotiations among the US, UK, and the then USSR—directed at ending the testing of nuclear weapons—which was a mammoth task in the backdrop of ‘Cold War’ politics. It was the ‘Cuban Missile Crisis’ of 1962, wherein the US and the then USSR came very close to a nuclear confrontation after the US purportedly discovered that the USSR was creating missile bases in Cuba, that accelerated the signing of the treaty. According to the Partial Test Ban Treaty, limitations were placed on some forms of testing, which included prohibition on tests or explosions of nuclear weapons underwater, in the atmosphere, or in outer space. It further placed conditions on underground testing.

The 1967 Treaty prohibited placing nuclear weapons in outer space, besides prohibiting military activities on celestial bodies<sup>12</sup>. Meanwhile, the Seabed Treaty of 1971 prohibited the placement of any Weapon of Mass Destruction (WMD, to including nuclear, chemical and biological weapons) on the seabed and ocean floor to eliminate the possibility of a militarised sea/ocean bed<sup>13</sup> and a new front of modern warfare. Here, the prohibition was extended beyond a radius of the 12-mile territorial zone of countries<sup>14</sup>.

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9. Ibid., p. 582.

10. UN, *Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water*, Treaty signed between the UK, US and USSR (August 5, 1963).

11. Verma, n. 8., p. 582.

12. Arms Control Association, “Outer Space Treaty at a Glance”, available at <https://www.armscontrol.org/factsheets/outerspace#:~:text=The%201967%20Outer%20Space%20Treaty,exploration%20and%20use%20of%20space>. Accessed on June 28, 2023.

13. *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* (1972).

14. Ibid. Also see Nuclear Threat Initiative for explanation of the treaty, available at <https://www.nti.org/education-center/treaties-and-regimes/treaty-prohibition-emplacement-nuclear-weapons-and-other-weapons-mass-destruction-seabed-and-ocean-floor-and-subsoil-thereof-seabed-treaty/>. Accessed on June 28, 2023.

There were efforts to coopt the 1963 Treaty into a more comprehensive arms control treaty called the Comprehensive Test Ban Treaty 1996<sup>15</sup> that would ban any nuclear weapon test or explosion or any other nuclear explosion, and establish a verification and monitoring mechanism as well as a punitive component in case of violations<sup>16</sup>. This treaty has not yet entered into force.

### *Prohibiting Proliferation of Nuclear Weapons, Technology and Materials*

The NPT is the key treaty that formed the basis of the nuclear non-proliferation regime. It was concluded on July 1, 1968, and it entered into force on March 5, 1970. Currently, the NPT has 191 state-parties<sup>17</sup>. The NPT was formulated on three main pillars<sup>18</sup>:

1. Prevention of the spread of nuclear weapons, material and technology from nuclear weapon states to states which did not possess nuclear weapons (Article 1).
2. Promoting the peaceful uses of nuclear energy and securing the requisite technology transfers between states for this purpose (Article 3).
3. Moving towards global nuclear disarmament (Article 6).

The NPT, in over 50 years since its entry into force, has held up the principles related to non-proliferation and peaceful usage of nuclear energy and institutionalised mechanisms related to it—especially embedding the safeguards regime under the International Atomic Energy Agency<sup>19</sup> (IAEA), which preceded the NPT by a decade.

However, the move towards operationalising ‘disarmament’ has remained elusive under the NPT. This is for a multitude of reasons. First, ‘Cold War’

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15. Krasner, n. 7, p. 582.

16. See Nuclear Threat Initiative, n. 14.

17. n. 1.

18. Ibid.

19. The IAEA Statute was approved on October 23, 1956. It came into force on July 29, 1957.

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politics and its proxy conflicts dictated the need to consolidate conventional and unconventional power between the two blocs led by the US and the then USSR. Hence, even though arms control talks such as the Strategic Arms Reduction Talks<sup>20</sup> (START I, from 1969-1971—Anti-Ballistic Missile Treaty and

Interim Agreement) were put in place, disarmament was off the table. Even after the disintegration of the USSR, the US and Russia continued efforts to limit their arms race by concluding START I in 1991 and START II in 1992 towards reducing the deployment of strategic arsenals, nuclear warheads and delivery vehicles<sup>21</sup>—however, the question of disarmament has not been addressed.

Second, many important states have remained outside the ambit of the NPT, while some others have withdrawn from it. India's refusal to join the NPT was based on two factors:

1. **The Discriminatory Nature of the NPT:** This was evident by the superficial cut-off date of January 1, 1967, for determining which states were considered Nuclear Weapon States (NWS—those that had manufactured or exploded a nuclear weapon or a nuclear explosive device by this date) and those that were not (Article 9). In addition, the safeguards regime was meant only for Non-Nuclear Weapon States (NNWS) (Article 3). In the backdrop of the Cold War, many proxy wars were being fought by the US and USSR, but these P-5 states or NWS under the NPT were let off from the safeguards regime and the burden of the same was placed on the NNWS.

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20. Arms Control Association, "U.S.-Russian Nuclear Arms Control Agreements at a Glance", available at <https://www.armscontrol.org/factsheets/USRussiaNuclearAgreements#:~:text=The%20Strategic%20Arms%20Reduction%20Treaty,warheads%20as%20counted%20using%20the>. Accessed on June 23, 2023.

21. Ibid.

2. **No Clear Path for Global Disarmament was Provided in the NPT:** The NPT's Article 6 only stated, "Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control"<sup>22</sup>.
- Nuclear weapons have continued to be used for deterrence purposes against conventional attacks. They have been political weapons to deter and dissuade instead of warfighting ones.**

Third, nuclear weapons have continued to be a symbol of power in the international system. Though their use or threat of use has been delegitimised to an extent with the International Court of Justice (ICJ) opining that it is contrary to the law of armed conflict and only permissible if the very survival of a state is at stake<sup>23</sup>, their symbolic value has not changed. This is because nuclear weapons have continued to be used for deterrence purposes against conventional attacks. They have been political weapons to deter and dissuade instead of warfighting ones. This is quite a polar opposite of chemical weapons, which have not only been delegitimised under the Chemical Weapons Convention of 1992 but also stigmatised<sup>24</sup> as the 'weapon of the weak' for centuries.

## STATE PRACTICE AND SUSTAINABILITY OF NORMS

Analysing the nexus between norms and state behaviour is a difficult task in itself as it is impossible to draw direct causal links between the two. Hence, the role played by 'perception' should be taken into account in order to understand the ways in which norms and behaviour are interlinked. This

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22. n. 1, Article 6.

23. ICJ, "Legality of the Threat or Use of Nuclear Weapons", *Advisory Opinion*, ICJ Reports 1996.

24. Richard Price, "A Genealogy of the Chemical Weapons Taboo", *International Organization*, 1995, pp. 73-103.

form of subjectivity is often ignored when efforts to understand outcomes are garbed in the quest for objectivity which entails theorisation solely on the basis of observable behavioural foundations. Perceptions of basic differences between right and wrong, legitimate and illegitimate, acceptable and unacceptable, beneficial and detrimental, all aid in evaluating behavioural choices that the actors have, and further shape the way they finally choose to act. Taking a cue from this, perception can influence norm formation and shape behaviour in three different ways.

First, the formation of norms can be motivated purely by the perception of the self-interests of a powerful actor. Here, corresponding to the concept of 'hegemonic norm', as was formulated by Goertz and Diehl (1992), the formation of a norm remains in a few powerful hands and only a moderate consolidation among the other actors is required.<sup>25</sup> Accordingly, norms that are found under this category use 'punishment' as a tool to prohibit and decrease the number of defectors.<sup>26</sup> Thus, the self-interest of powerful actors, moderate support of the other less powerful actors, and dire implications if the norm is violated account for the formation of the norms that serve the self-interest of powerful actors. An example in this case, as forwarded by Goertz and Diehl, is of the norms that are associated with the Bretton Woods System. Hence, in the formation of norms that is guided by self-interest, the quotient of 'power' as understood in *realpolitik* plays a significant role. In the NPT, the division of the NWS and the NNWS created an international order that was favourable to the NWS, which, in turn, were also the P-5 countries under the UN system. Since the inception of the NPT over 50 years ago, the playing field has not been levelled as disarmament has not been operationalised.

Second, it is important to understand the role played by 'learning' in evolving and maintaining norms. Social learning ingrains typical perceptions regarding what is acceptable and desirable, and what is not. This leads to the generation of forms of knowledge that work towards drawing a distinction

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25 Gary Goertz and Paul F. Diehl, "Toward a Theory of International Norms: Some Conceptual and Measurement Issues", *The Journal of Conflict Resolution*, 1992, p. 640.

26. *Ibid.*

between behaviour which is preferable and that which should be avoided. Such perceptions which stress on evolving patterns of behaviour which lead to universal goodness and decrease the chances of factors that might hinder the same, shape the behavioural choices made by the actors. Here, universality of preferred outcomes rather than emphasis on the self-interest of a handful is more prominent in the formation of a norm. The inspiration to prohibit the use and transfer of nuclear weapons and technology which emerged after the death and destruction caused by their use by the US on Hiroshima and Nagasaki in 1945 played a significant role in the formation of a norm which sought to denounce and decrease the possibility of a nuclear war. Here, the idea of nuclear weapons being 'bad' because they had the potential of inflicting terrible destruction emerged after the world witnessed the aftermath of their use in 1945. Thus, this idea which rendered the existence of nuclear weapons as perilous for the international society arrived at the forefront of the nuclear talks. However, it was not sufficient to lead to the formation of a norm which would compel the international society to ban nuclear weapons—the onus was on curbing the use and spread of nuclear weapons.

Third, the continuous practice of a certain form of behaviour lends a perception of legitimacy to it, thus, imparting to it a normative value. This normative value aids in replicating the practised behaviour and bringing it conformity. Here, more than power and universality, ordinary behaviour becomes a norm due to its continuous practice and also due to the lack of challengers. It is, however, not to be implied that power and interest play no role in the formation of the norm in this case. The point to be noted is that continuous practice facilitates the formation and sustenance of the norm where power may play a much lesser role.

An example in this category is that of colonialism as it had emerged as a norm especially between the 17th and 19th centuries when acquisition of colonies was viewed as an enhancement to the pride of the colonisers. Two factors aided this practice. The Treaty of Westphalia in 1648 had hardened the borders in Europe and, thus, brought forth a notion of sovereignty which

was almost alien to the regions that were colonised in the global South. These regions were ruled by princely states which often exchanged hands. Thus, on the one hand, where colonialism developed as a practice for the European states, on the other, less resistance to the same was offered by both the other European states as well as colonised states as the concept of nationalism had not yet taken a solid ground. Thus, the practice of colonialism by the European states gave this form of behaviour legitimacy, thereby entailing it to become a norm. In addition to the practice, another important factor distinguishes it from norms based on self-interest and learning. Here, non-conformity to the norm does activate a 'punishment' but impinges at a more normative and subjective level.

In the context of the NPT, the norm formation that affected, and thereafter informed, state practice was that of non-proliferation of nuclear weapons, material and technology. This is the biggest contribution of the NPT as a norm forming treaty. Even the non-signatories to the NPT adhere to this principle.

All three factors—self-interest, learning and repetitive behaviour—can play a role in the evolution of norms. However, the maintenance of norms over a period of time depends greatly on whether the perceptions regarding the same remain constant. Weakening of norms and their dissolution are brought forth if the basic characteristics of norms, as discussed in the first section, are challenged. In an effort to elucidate this point, the following section intends to draw on the creation and ensuing challenge to the non-proliferation norm as embedded in the NPT.

#### **TRANSFORMATION OF NORMS: A BRIEF ANALYSIS OF THE NPT**

The use of atomic bombs by the US in Hiroshima and Nagasaki in 1945 brought forth death and destruction on a scale which was never before witnessed by the world. It was during this time that the contestations between power and morality took a new stage in the international society. On one side, where nuclear weapons were viewed as desirable additions to state power, the other was marked by their undesirability because they

could easily jeopardise peace and security. Whichever be the stand one wished to take on the issue of nuclear weapons, the main agreement which encompassed all the positions was that a nuclear war was detrimental for all, universally. Hence, the possession and spread of nuclear weapons was seen as hazardous, and could bring about the destruction of humanity and the values cherished by it.

Thus, at the end of World War II, the perception of nuclear weapons as being 'bad' took centre-stage, as discussions revolving around how to curb the spread of nuclear technology and ways to eliminate nuclear weapons followed. Thus, the norm regarding nuclear weapons which denounced their use emerged right after 1945 when the world sought to 'learn' from its mistakes.

However, the way in which this norm was conceptualised in the NPT was viewed as being vastly different from the way it had evolved in the mid-1940s. Therefore, there was a basic difference in the emergence of the norm and its conceptualisation in an international regime. On the one hand, where the emergence of the norm propelled the international society to look for ways of elimination and also to curb its spread, on the other, the concentration on non-proliferation rather than elimination, as was conceptualised in the NPT, diminished the significance it had gained in 1945. In a sense then, there was a gap in the way the norm emerged and the way it was conceptualised. It is argued in this paper that this gap impinged on the three foundations on which the norm is formed and, thus, aided in weakening this norm. This is elucidated below by looking at how the basic tenets of the NPT bring it into contestation with the norm regarding nuclear weapons as it emerged post-1945 nuclear detonations. Three points are outlined which show how the NPT impinged on the basic characteristics of the norm regarding nuclear weapons as it evolved post 1945.

### *Specific Issue Areas and the Multiplicity of Meanings*

As discussed earlier, if the norms pertaining to a specific issue area remain constant, they are strengthened, and if they are challenged, they are

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weakened. In the case of nuclear weapons, the issue area remained the same but the focus of norms shifted from one most preferred outcome to another. Immediately after 1945, when the norm regarding nuclear weapons directed the behaviour of states to work towards their elimination, conceptualisation of the NPT shifted the focus of this norm

from that of elimination to that of curtailing the spread of sensitive nuclear technology. This shift in focus of a norm pertaining to a specific issue area weakened its effectiveness as there was less consolidation on the restriction of nuclear technology to only the states that possessed it before 1967 rather than on universal disarmament. Here, nuclear weapons were seen as more undesirable than nuclear technology as the latter held the potential to aid the fulfilment of the energy requirements of states. Hence, the norm pertaining to nuclear weapons was weakened by the multiplicity of meanings attached to it. The shift in the norm regarding nuclear weapons from universal elimination to the conceptualisation of non-proliferation in the NPT only added to its weakness.

Nuclear non-proliferation as embedded in the NPT is a much-contested norm in the present times. The decline of this much-coveted IR norm after World War II can be attributed to two main factors. Firstly, the increasing number of challengers to this norm since the 1970s; and, secondly, the preference to adhere to a policy of counter-proliferation instead of non-proliferation by the U.S. since 9/11—both, in their own ways, have worked towards diminishing the value of the non-proliferation norm as depicted by the nuclear behaviour of states, especially since the 1970s.

### *Issues of Legitimacy and Discrimination*

The emergence of norms depends on them being seen as legitimate standards of behaviour rather than merely impositions of values which are not desirable. Thus, if a form of behaviour is seen as illegitimate and discriminatory, it

loses its normative value and encourages deflections and challenges to the same. The way in which the norm regarding nuclear weapons was conceptualised in the NPT was seen as discriminatory by states such as India, which perceived it as an instrument that divided the world into the nuclear haves and have-nots. This factor, in addition to the shift in the focus of the norm from elimination to non-proliferation, brought many challengers to it, thus, questioning its universality and legitimacy.

**Conformity to norms is achieved through the implementation of sanctions and activation of punishments if the behavioural standard, as prescribed by the norms, is not adhered to.**

### *The Effectiveness of Sanctions*

Conformity to norms is achieved through the implementation of sanctions and activation of punishments if the behavioural standard, as prescribed by the norms, is not adhered to. In the case of the NPT, the ineffectiveness of sanctions adversely impacted the normative value of the NPT regime. The most significant example is that of North Korea. Following North Korea's nuclear tests in 2006, the UN Security Council passed Resolution 1718, which prohibited supply of some classes of weapon systems and missile technology to the country.<sup>27</sup> The sanctions against North Korea were further strengthened by a slew of similar steps and UN Security Council Resolutions after its nuclear tests in 2009, 2013, 2016 and 2017, besides several missile tests. However, this did not deter North Korea's nuclear and missile tests, thereby eroding the NPT's normative strength.

Thus, the effectiveness of the nuclear norm as embedded in the NPT to shape state behaviour has been widely contested since the 1970s. Three factors, namely, multiplicity of meanings pertaining to the norm, lack of legitimacy, and ineffectiveness of the sanctions have all worked towards weakening the nuclear norm that emerged post-1945. Whereas in the

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27. Council on Foreign Relations, "What to Know About Sanctions on North Korea", July 27, 2022.

beginning (right after the nuclear explosions in Hiroshima and Nagasaki in 1945) the nuclear norm focussed on elimination and non-use of nuclear weapons, later, in the 1960s, the emphasis was more on non-proliferation than disarmament. Thus, it can be seen that the normative values weaken when the basic characteristics of the norms are impinged on.

### **NUCLEAR WEAPONS AND INTERNATIONAL LAW**

Nuclear weapons are currently in the possession of, and have so far been used only by, states (and not non-state actors). Therefore, their applicability under International Law would be culled out of laws governing the inter-state use of force and also laws applicable to armed conflict<sup>28</sup>, besides existing instruments that limit types of weapons/agents in warfare<sup>29</sup>.

#### *Existing Instruments*

The existing instruments on limiting the types of weapons/agents in warfare do not specifically refer to nuclear weapons. However, inferences of the same can be drawn from them, as these instruments/declarations contain prohibitory provisions against the use of arms that cause aggravated suffering and are considered 'inhumane'—a categorisation that applies to nuclear weapons. This includes the Declaration of St. Petersburg 1868, which underlined that the use of arms that "aggravate" the suffering of disabled men or render their death inevitable is "contrary to humanity," and also banned projectiles under the weight of 400 g<sup>30</sup>. In addition, the Hague Declaration of 1899 and the Hague Convention of 1907 (IV) provided for prohibition of "asphyxiating and deleterious gases" and "poison or poisoned weapons"<sup>31</sup>. This was further reiterated by the Geneva Protocol

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28. International Law and Policy Group, "Nuclear Weapons Under International Law: An Overview", 2014, p. 5.

29. Verma, n. 8, p. 580.

30. Ibid.

31. Ibid., p. 581.

of 1925, which added the analogous (liquids, materials and devices) as well as bacteriological warfare to this list<sup>32</sup>.

On the other hand, international agreements such as the Biological Weapons Convention 1972 (BWC) and the Chemical Weapons Convention 1992 (CWC) codified the prohibition on the use of biological agents/toxins or chemical weapons. Here, the BWC prohibited the use of biological agents/toxins as well as their development, production, stockpiling or acquisition/retention of biological weapons (Article 1)<sup>33</sup>. The CWC prohibited the use and development of chemical weapons, “any military preparations to use chemical weapons”, as well any efforts by states-parties to “assist, encourage or induce, in any way, anyone to engage in any activity prohibited” under the CWC (Article 1)<sup>34</sup>. Both these conventions referred to the Geneva Protocol 1925 in their respective Preambles to place limitations on the use of weapons “condemned by the civilised world”<sup>35</sup>

A reading of these instruments/declarations highlights that the prohibition of specific kinds of weapons/agents is dependent on whether their use is considered contrary to humanity and unjustifiable. Nuclear weapons not only fall in this category but limitations on their applicability can be gauged from instruments banning the use of WMDs in warfare—even though there is a lack of a treaty law banning the use of nuclear weapons in warfare.

### *Laws of ‘Armed Conflicts’*

International Humanitarian Law (IHL), which encompasses the Geneva Conventions of 1949 (I-IV) and their two Additional Protocols (1977), regulates the conduct of parties in armed conflict in order to limit their

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32. Ibid.

33. *Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction* (1972).

34. *Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction* (1992).

35. *Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare (Geneva Protocol)* (1925).

effects (*jus in bello*<sup>36</sup>). The common Article 3 of the Geneva Conventions of 1949 states the following<sup>37</sup>:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions: (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat' by sickness, wounds, detention, or any other cause, shall, in all circumstances, be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are, and shall remain; prohibited at any time and in any place whatsoever, with respect to the above-mentioned persons:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
- (d) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilised peoples.

In context of the above-mentioned Article, hostilities and use of force during armed conflict (of international and non-international nature) can only be directed against the military objectives of adversaries and not civilian

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36. ICRC, "What is International Humanitarian Law?", 2022, available at <https://www.icrc.org/en/document/what-international-humanitarian-law>. Accessed on June 3, 2023.

37. *Geneva Conventions (1-IV)*, 1949, Common Article 3.

targets<sup>38</sup> as is encompassed in the Geneva Convention (IV) of 1949<sup>39</sup>. The use of nuclear weapons (either strategic or tactical) cannot fulfil this obligation under the IHL and is expected to lead to widescale collateral damage as there would be no distinction between combatants and non-combatants<sup>40</sup>.

### *Nuclear Weapons and the Legality of 'Use of Force'*

The UN Charter regulates whether a state may lawfully resort to armed force against another state (*jus ad bellum*<sup>41</sup>). Herein, Article 2 (4) states:<sup>42</sup>

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.

In addition, under the UN Charter, the use of force is allowed either as a measure for collective security if so decided by the UN Security Council in order to maintain or restore international peace and security (Article 39); or a measure of collective or individual self-defence until the UN Security Council has taken measures necessary to maintain international peace and security (Article 51)<sup>43</sup>.

Hence, the circumstance under which a state is lawfully allowed to use force is outlined in the UN Charter. In addition to circumstances, of equal importance is the principle of “necessity” and “proportionality” as was laid down in the ‘Caroline Case of 1837 between Great Britain (using the Canadian militia) against the US<sup>44</sup>—and which thereafter became a part of Customary International Law. As per this, nuclear weapons are inherently violative to the

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38. Verma, n. 8, p. 29.

39. *Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War* (1949).

40. Verma, n. 8, p. 581.

41. n. 37.

42. UN, *Charter of the United Nations*, October 24, 1945, 1 UNTS XVI, available at <https://www.refworld.org/docid/3ae6b3930.html>—last accessed on 23 June 2023.

43. *Ibid.*

44. Verma, n. 8, p. 537.

**In 2017, a United Nations conference was organised in New York to negotiate an international instrument that would place legally binding obligations on its parties to prohibit nuclear weapons and move towards their total elimination and disarmament. This led to the adoption of the Treaty on the Prohibition of Nuclear Weapons 2017 (TPNW).**

“necessity” and “proportionality” principle under Customary International Law and, therefore, their use cannot be justified under circumstances outlined in the UN Charter.

#### **THE NPT, THE QUESTION OF DISARMAMENT AND INTERNATIONAL CUSTOM**

The third pillar of the NPT rested on pursuing “negotiations in good faith” to limit the nuclear arms race and also for formulating a treaty for “general and complete nuclear disarmament”<sup>45</sup>. However, the role of the NPT regime in implementing or operationalising this aspect remained poor on account of global politics.

In 2016, the UN General Assembly (UNGA) adopted Resolution 71/258 to engage in multilateral nuclear disarmament negotiations directed at concluding an international agreement to ban nuclear weapons<sup>46</sup>. Following this, in 2017, a United Nations conference was organised in New York to negotiate an international instrument that would place legally binding obligations on its parties to prohibit nuclear weapons and move towards their total elimination and disarmament. This led to the adoption of the Treaty on the Prohibition of Nuclear Weapons 2017 (TPNW).

The TPNW sought to place binding obligations on parties, prohibiting them from developing, testing, producing, acquiring, possessing, stockpiling, using or threatening to use nuclear weapon, while also prohibiting the deployment of nuclear weapons on national territory and providing of assistance to any state that could enable conduct of prohibited activities<sup>47</sup>.

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45. n. 1.

46. UNGA Resolution 71/258, *Taking Forward Multilateral Nuclear Disarmament Negotiations*, December 23, 2016.

47. UNGA, *Treaty on the Prohibition of Nuclear Weapons*, A/CONF.229/2017/8, July 7, 2017.

The TPNW currently has 68 parties and it entered into force in 2021. Pertinently, the P-5 countries as well as others that possess nuclear weapons are not a party to the treaty.

Hence, the third pillar of the NPT—the question of disarmament—has continued to remain outside the ambit of Customary International Law despite the adoption of a treaty (TPNW)—especially as none of the countries that possess nuclear weapons are signatories to it.

**Norms do not imply mere intervening variables that privilege a few great players but rather require a deeper consensus and values of legitimacy, certainty, and effectiveness of sanctions barring which, the norm stands contested.**

## CONCLUSION

This research paper sought to analyse the NPT—which is considered as the very basis of the international nuclear regime—through the lenses of IR and International Law, in order to understand the correlation between the formation of international norms related to the NPT (the ‘three pillars’) and state behaviour. The purpose of the same was to analyse whether both these aspects—NPT norms and state behaviour—informed one another and whether any elements of customary international law could be drawn from them—considering the existence of the NPT regime for over 50 years. To this end, it was seen that the norms related to nuclear non-proliferation as contained in the NPT, as well as nuclear energy cooperation, had informed the state practice (of signatories and non-signatories), but that of ‘disarmament’ (the third most important pillar of the NPT) had been left out of the ambit in IR practice as well as most of the International Law debates and procedures.

The research, both theoretical and that pertaining to the observations of state practice, indicates that norms do not imply mere intervening variables that privilege a few great players but rather require a deeper consensus and values of legitimacy, certainty, and effectiveness of sanctions barring which, the norm stands contested. Moreover, in such a case, the ability of a regime

(which supports this norm) to aid or restrict state behaviour is reduced. This is evident in the NPT regime, which created benchmarks of state behaviour related to nuclear non-proliferation and nuclear energy cooperation, but did not translate them into a normative value for 'disarmament'—even after the conclusion of a new treaty in 2017.

Thus, to circle back to the central question of the research: has the NPT crossed the 'customary' threshold since its entry into force 55 years ago? If we go by the text of the treaty and state practice, the answer is 'partially'—especially in relation to nuclear non-proliferation and nuclear energy cooperation. But beyond the text and state practice, the normative influence over disarmament is left wanting.