Accountability after Nuclear War: Why Not Plan Ahead?

George Perkovich

Vice President for Studies, Nuclear Policy Program, Carnegie Endowment for International Peace, Washington, DC, USA

ABSTRACT
If nuclear war occurs, non-belligerents want the conductors to take responsibility for providing assistance to deal with harm imposed on them. This harm could take the form of radioactive fallout, climatic change that causes global food shortages and refugee crises. But states and experts preoccupied with winning (or at least not losing) wars that could go nuclear have largely ignored questions of post facto accountability. Nuclear-armed states claim to be responsible, defensive actors; therefore, they should not object if others demand processes to adjudicate the conduct of nuclear war after the fact and provide reparations and remedies to victims in non-belligerent nations. Indeed, international efforts to establish such accountability could strengthen deterrence against aggression and use of nuclear weapons.

Background
Because nuclear war could cause humanitarian and environmental catastrophe, many governments and civil society organizations demand accountability from those who would conduct such war. Non-nuclear weapon states want clearer, more legally binding guarantees that they will not be threatened or attacked by nuclear weapons. If nuclear war does occur, non-belligerents want the conductors to take responsibility for providing material and financial assistance to deal with harm imposed on them. This harm could take the form of radioactive fallout, climatic change that causes global food shortages and refugee crises emanating from destroyed states.

States and experts preoccupied with winning (or at least not losing) wars that could go nuclear have largely ignored questions of post facto accountability. They focus instead on convincing their adversaries that they (the adversaries) will lose if they start a war or use nuclear weapons first. While this focus on deterrence may be understandable, it ignores commitments nuclear-weapon states made in 1995 when non-nuclear-weapon states had leverage over them.1

The Nuclear Nonproliferation Treaty entered into force in 1970 and had a 25-year term, with the provision that parties would conference in 1995 to review and decide whether to extend it. At the conference that spring, nuclear-weapon states adamantly

1The NPT’s original term was from 1970 to 1995, with a provision to meet in 1995 to decide upon extending it.
wanted the treaty to be extended indefinitely. Key non-nuclear-weapon states along with civil society organizations preferred to limit extension, say, to 10–15 years. Then, parties could assess whether sufficient progress had been made toward nuclear disarmament to extend the treaty further\(^2\).

To help win indefinite extension, the nuclear-weapon states agreed to UN Security Council Resolution 984 (Reaching Critical Will n.d.). This resolution provides a “positive security assurance” that “the Security Council, and above all its nuclear-weapon State permanent members, will act immediately in accordance with the relevant provisions of the Charter of the United Nations, in the event that such States are the victim of an act, or object of a threat of, aggression in which nuclear weapons are used” (para 2). Resolution 984 also expresses the Security Council’s “intention to recommend appropriate procedures … regarding compensation under international law” from an aggressor state(s) “for loss, damage or injury sustained as a result of the aggression” (para 6). This helped garner the decision in May 1995 to extend the Nuclear Non-Proliferation Treaty (NPT) indefinitely.

Since the passage of Resolution 984, little effort has been made to develop contingency plans or other demonstrations of commitments to uphold its letter and spirit. Official records and the security studies literature show scant evidence that any nuclear-armed states have planned and developed capabilities to conduct such preventive interventions in conflicts to which they are not otherwise a party. Nor have nuclear-armed states said anything about compensation for loss, damage or injury that belligerent and/or non-belligerent nations might suffer from nuclear war. Many of the roughly 150 states that do not rely on nuclear deterrence – directly or through extension from allies – find this deeply unjust\(^3\).

Unsurprisingly, then, proponents of the 2017 Treaty on the Prohibition of Nuclear Weapons sought to fill the accountability void. Because their primary objective was to prohibit nuclear weapons, supporters of this treaty did not focus on strengthening security guarantees from nuclear-weapon states. (Doing so could directly or indirectly affirm the value of deterrent threats to use nuclear weapons.) Instead, they concentrated on questions of legal accountability for past and possible future detonations of these weapons.

Article 6 of the Treaty on the Prohibition of Nuclear Weapons (TPNW) calls on all parties to “take necessary and appropriate measures towards the environmental remediation of areas” contaminated by “testing or use of nuclear weapons and other nuclear explosive devices”. Article 7 calls on each State Party to “provide technical, material and financial assistance to States Parties affected by nuclear-weapon use or testing” and to “provide assistance for the victims of the use or testing of nuclear weapons or other nuclear explosive devices”. Article 7, further, establishes “a responsibility” for any State Party that “has used or tested nuclear weapons … to provide adequate assistance to affected States Parties, for the purpose of victim assistance and environmental remediation” (para 6).

\(^2\)David Krieger recounts these debates vividly in Krieger (2019).

\(^3\)Clearly, practical problems abound in the provision of effective security guarantees and legal accountability and redress. Each of the five primary security guarantors in the UN Security Council can veto calls for action by the Council. They also possess nuclear weapons and comparatively strong conventional military forces. If one or more of these nuclear powers were involved in the given crisis or conflict, they likely would veto proposals to use force or impose sanctions to compel them to de-escalate and avert nuclear use. Other states could take pre-emptive military or political-economic measures such as sanctions, but it is difficult to imagine this except in coalition with at least some of the permanent members.
The TPNW is not in effect and will not bind nuclear-armed states that do not sign it. Yet, this does not negate the political-moral issue of accountability. There is value in shifting the frame of analysis and debate.

**From Prospective Theorizing to Post Facto Accountability**

Debates on the legality of nuclear weapons usually focus theoretically on prospective decisions to threaten and use nuclear weapons. But what if deterrence fails and nuclear weapons are used? Should conductors of nuclear war be held accountable after the fact for the legitimacy of their conduct and the consequences it imposes on others, including non-belligerent nations? Remarkably, little consideration has been given to post facto accountability.

(In the discussion here I am looking beyond the legal argumentation and process that would determine guilt or accountability: who was the aggressor that wrongfully started the conflict? Who initiated use of nuclear weapons, and was this first use was legal? If escalation occurred, then did one or both sides violate International Humanitarian Law in their ensuing conduct? My focus is more on the idea of holding conductors of nuclear war accountable and the value of pursuing it).

One response to all this could be that nuclear war would kill the people responsible for it, so there is no value – from the standpoint of deterrence or justice – in planning tribunals or other mechanisms of accountability. But that argument undermines the claim of those nuclear-weapon states and strategists that say nuclear use and escalation would or could probably be limited. Both Russia and the United States make this claim as they introduce new weapons into their large arsenals and speak of initiating limited nuclear strikes to de-escalate war or re-establish deterrence. Pakistani military leaders have similar plans on a much smaller scale. If nuclear-armed states seriously believe that they are responsible, defensive actors and that nuclear use would be limited, then they should not object if others demand processes to adjudicate the conduct of nuclear war after the fact. Indeed, such a mechanism could politically and morally strengthen deterrence against wrongful aggression and use of nuclear weapons.

Legal accountability could be established within or outside of the Treaty on the Prohibition of Nuclear Weapons (Mian 2011). The fact that no nuclear-armed state is likely to join the TPNW does not preclude treaty parties from developing a model for a legal tribunal that could adjudicate accountability for the consequences of nuclear-weapon use (Colangelo and Hayes 2019; Lewis and Sagan 2016). The more such an effort was informed by recognized international legal experts, including from nuclear-armed states, the more persuasive its recommendations could be in broader international politics.

Alternatively, or in parallel, interested states and experts could explore how the International Criminal Court’s mandate could be amended to encompass adjudication of the lawfulness of states’ conduct of nuclear war. Again, it is highly unlikely that any nuclear-armed state would submit to such jurisdiction. Such resistance could then

---

4“Legality of the Threat or Use of Nuclear Weapons,” advisory opinion of the International Court of Justice, 1996; see also Nystuen, Casey-Maslen, and Bersagel (2014) and Drummond (2019).
heighten international attention to the underlying issues in ways that could raise political costs for states and leaders whose words and deeds raise the prospect of nuclear conflict.

Of course, assigning legal accountability for the use of nuclear weapons would encounter major practical challenges. Contrary to the categorical claim made in the TPNW, some uses of nuclear weapons may be legal, for example, if one or a few weapons with relatively low yield were targeted against ships at sea or military forces or installations away from population centres. If an initial use did not transgress legal limits, but the adversary escalated the war, sorting out the relative culpability of individuals and states for the subsequent stages and consequences of the conflict would be extremely daunting.

In such legal debate, the contentious doctrine of belligerent reprisal likely would arise. Reprisal is “an act illegal in itself but permissible in reasonable proportion and with proper safeguards as a response to illegal acts already committed by the enemy and as a deterrent to their recurrence”, according to Geoffrey Best (1994, 192). The United States, France and the United Kingdom have invoked this legal concept, and others conceivably could too (Richard, Lt. Col. T.T. 2016, 867). However, without a tribunal or other agreed means of adjudicating post facto legal accountability, the legal validity of “belligerent reprisal” is an academic matter.

What Good It Could Do

Emphasizing the value of legal accountability is admittedly a normative or political exercise: if the risks of massive nuclear or conventional retaliation did not deter leaders from using nuclear weapons, it is difficult to see how the threat of a tribunal would deter them. Still, a serious and sustained international campaign to establish legal accountability would serve at least three important purposes.

First, such a campaign could compel officials in nuclear-armed states and their allies to clarify the conditions under which they would conceivably order the use of nuclear weapons. They would be asked a simple question: does your government intend to apply the Law of Armed Conflict (also known as International Humanitarian Law) to its conduct of nuclear war? The United States and the United Kingdom have made such declarations. The Trump Administration’s 2018 Nuclear Posture Review, for example, states that the United States will “adhere to the law of armed conflict” in any “initiation and conduct of nuclear operations”. If leaders of other nuclear-armed states opposed such calls for clarity and legal accountability, they would invite challenge from some of their own populations – in states where this is tolerated – and from the broader international community.

Second, heightened attention to accountability could stimulate and inform debates over the liabilities of varying types of nuclear arsenals, doctrines and targeting plans. Would higher thresholds for nuclear use, smaller arsenals, lower-yield weapons and more

---

5US Field Manual 27-10, paragraph 497 states that “Reprisals are conduct which otherwise would be unlawful, resorted to by one belligerent against enemy personnel or property for acts of warfare committed by the other belligerent in violation of the Law of War for the sole purpose of enforcing future compliance with the Law of War”.

6The doctrine of belligerent reprisals remains “an important part of nuclear weapon policy and deterrence theory” for the United States. The United States, France and the United Kingdom have taken pains in debates over relevant international treaties such as the 1977 Additional Protocol I to the Geneva Conventions to insist that “the rules established by this Protocol were not intended to have any effect on and do not regulate or prohibit the use of nuclear weapons”, quoted in Casey-Maslen (2014a).
restrictive targeting significantly reduce legal (and financial) liabilities? If so, this could help balance arguments that advocates of large arsenals and escalation dominance strategies make on the basis of game theory and military logic. In some states, military officers could become more aware of the potential liability that could attend uses of nuclear weapons whose legal validity is unclear.

Third, international address of these issues would give voice to states and civil society actors that have felt unjustly neglected by the nuclear-armed states’ narrow framing of debates. Nuclear-armed states reject the TPNW, but acknowledging concerns about accountability that are reflected in the treaty could signal respect for the interests of populations whose welfare is hostage to the actions of those who wield nuclear weapons.

Reparations and Remedies?

Legal accountability could open the way for other international actions in support of non-belligerents harmed by nuclear weapon use: reparations and remedies. Historically, defeated states pay reparations to victors. The idea in relation to nuclear weapons is that any party that causes significant damage to non-belligerent nations should help repair the damage. (Survivors in the combatant nations could also contest each other for reparations, but that is a different matter.) Nuclear-armed states may dismiss this issue categorically, but the potential material dislocations and costs of nuclear war to non-belligerent nations are too grave to justly ignore. Even if the feasibility of determining legal liability and extracting reparations and remedies would prove low, the validity of much of the world’s concerns deserves to be addressed seriously.

Payments of reparations for violation of international law are rare and are usually made to governments rather than individual victims (Casey-Maslen 2014b, 462). The number of people that would be damaged by widely harmful nuclear use could also make anything more than symbolic financial reparations impractical. This is especially likely if the state deemed responsible was itself devastated. In any case, serious exploration of a possible right to remedy and reparation would acknowledge that many non-nuclear-weapon states see the threat or use of nuclear weapons as an injustice against them.

One long-serving senior U.S. diplomat suggested that accountability for nuclear winter (or autumn) could be treated similarly to climate change. The analogy is logical, given the common denominator of climatic effects, whether in the form of global warming or nuclear winter. Indeed, attributing responsibility for causing climatic harm from nuclear war would be much more straightforward than it is regarding emissions that have produced the climate emergency now alarming most of the world.

With climate change, after 25 years of fraught negotiations, a general understanding was reached in the 2015 Paris Agreement on Climate Change that the wealthiest, most technologically advanced states should provide subsidized technical assistance to developing countries that are being asked to eschew lower-cost greenhouse gas-emitting

---

7Along these lines, Harald Muller has proposed as a thought experiment that nuclear-armed states be required to “insure themselves against liability for the damages their weapons could cause in the case of nuclear war”, much as states and nuclear power plant operators insure against nuclear accidents. If states were unwilling or unable to do so, this would seem to affirm the arguments that many non-nuclear-weapon states about the undue risks posed by nuclear weapons. Debate on this issue at least would give voice and agency to those states and concerned civil societies (Muller 2013, 550).

8William Burns, email correspondence with the author, 2 July 2018.
technologies. Many of these developing countries also will face some of the severest environmental harm from rising sea levels, changes in weather patterns and other related climatic effects. The demands for assistance to developing countries reflect the fact that the wealthiest countries produced most of the emissions causing climate change.

Of course, the “Loss and Damage” elements of the Paris Agreement remain contentious. The December 2018 meeting in Katowice, Poland, to advance its implementation highlighted developing countries’ frustration that the United States and other rich countries are ignoring provisions requiring financial support and technical assistance to developing countries. Thus, the principle of equity in redressing the effects of climate change could be a precedent for assistance to non-belligerent victims of nuclear war. On the other hand, the recalcitrance of the richest and most powerful nations in implementing the principle may affirm, for many, the inadequacy of any course other than prohibiting nuclear weapons.

Treatment of refugees from nuclear war is another concern of non-belligerent states and reflects a logic similar to the question of reparations. The possible scale of refugee flows is alarming, especially if nuclear use not only devastated belligerent nations but also – through nuclear winter – caused severe agricultural harm to the populations of non-belligerent states. The latter would be as entitled to assistance as would be the direct victims of aggression and nuclear use. They would, most likely, seek to migrate to countries that were not devastated by nuclear detonations. Thus, the burden of admitting and caring for them, or blocking them, would fall most immediately on non-belligerent states. What rights of migration could these refugees expect, and what assistance would be provided to their hosts? Who could or would enforce such rights and provide such assistance?

All of these issues raise portentous questions of law and politics and enormous problems of practicality. That is precisely the point. If the states that benefit from nuclear deterrence will not accept responsibility for rectifying the consequences that would be imposed on others if nuclear weapons are detonated, then why should others tolerate the continued existence of these weapons? Refusal even to treat such concerns seriously and explore ways to mitigate them intensifies the frustration and animus that disarmers feel toward the most avid deterrers. The favored deterrer response – nuclear deterrence should work if the right number and type of weapons are funded and deployed – may be more sensible than disarmers judge. However, it is insufficient. If those who derive no clear benefit from nuclear deterrence but would suffer from its failure, continue to feel disrespected and unlikely to have their needs met, the fracturing of the global nuclear order will intensify.

**How to Proceed**

The analysis and debate recommended here could be initiated several ways. Parties to the NPT could call for the conduct of a series of international conferences on accountability. Willing states could organize such conferences, perhaps in cooperation with civil society organizations. If, as is likely, some nuclear-weapon-states would prevent the consensus necessary for an NPT Review Conference to authorize such work, parties to the TPNW could undertake it. The TPNW’s inclusion of accountability provisions would seem to make this an obvious further line of work for its champions. Nothing need preclude
interested parties from inviting officials or legal experts from nuclear-armed states to join
dialogue on these issues. If such dialogue produced compelling analyses and recommenda-
tions, international political pressure could be mounted on nuclear-armed states to
address these issues. Their refusal would possibly heighten international awareness of the
problem of accountability, itself a worthwhile objective.

In the late 1980s, two young U.S. Defense Department officials, Franklin Miller and
Gil Klinger spent months examining military plans for nuclear war. They realized that
these plans called (potentially) for detonating thousands more nuclear weapons than any
president would conceivably authorize. Many of the targets were unimportant and/or the
number of weapons planned to hit them was excessive. Even after their review, the
United States would retain more than 20,000 nuclear weapons. As Fred Kaplan recounts
in his excellent recent book, The Bomb, Klinger quipped to Miller: “If (God forbid) there’s
a nuclear war, and if (God forbid) you and I survive it, and if (God forbid) the Russians
win, we’re going to be put on trial at Nuremburg”.

As things stand today, there is no plan or prospect to establish anything like the
Nuremburg tribunal. The legality of states’ conduct of nuclear war should not depend on
who wins the war. Who starts it is more important and how each adversary fights it. Even
“winners” should be accountable. If law is to influence (deter) decisions to use nuclear
weapons, actors need to know in advance that they and their nations will be held
accountable.

Disclosure Statement

No potential conflict of interest was reported by the author.

Notes on Contributor

George Perkovich is the Olivier and Nomellini Chair, and vice president for studies, at the Carnegie
Endowment for International Peace, in Washington, DC. He is the co-editor of Abolishing Nuclear
Weapons: A Debate (2009, downloadable at https://carnegieendowment.org/files/abolishing_-
nuclear_weapons_debate.pdf) and most recently of Toward Accountable Nuclear Deterrents:
How Much is Too Much? (https://carnegieendowment.org/2020/02/11/toward-accountable-
nuclear-deterrents-how-much-is-too-much-pub-80987).

References

Best, G. 1994. Law and War since 1945. Oxford: Clarendon Press.
Casey-Maslen, S. 2014a. “The Use of Nuclear Weapons as a Reprisal under International
Humanitarian Law.” In Nuclear Weapons Under International Law, edited by G. Nystuen,
S. Casey-Maslen, and A. G. Bersagel, 171–190. Cambridge: Cambridge University Press.
Casey-Maslen, S. 2014b. “The Right to a Remedy and Reparations for the Use of Nuclear
Weapons.” In Nuclear Weapons Under International Law, edited by G. Nystuen, S. Casey-
Maslen, and A. G. Bersagel, 461–480. Cambridge: Cambridge University Press.
Colangelo, A. J., and P. Hayes. 2019. “An International Tribunal for the Use of Nuclear Weapons.”
Journal for Peace and Nuclear Disarmament 2 (1): 219–252. doi:10.1080/25751654.2019.1624248.
Drummond, B. 2019. “UK Nuclear Deterrence Policy: An Unlawful Threat of Force.” Journal on
the Use of Force and International Law 6 (2): 193–241. doi:10.1080/20531702.2019.1669323.
Krieger, D. 2019. “Participation in the 1995 NPT Review and Extension Conference.” Nuclear Age Peace Foundation. https://www.wagingpeace.org/participation-in-the-1995-npt-review-and-extension-conference/

Lewis, J. G., and S. D. Sagan. 2016. “The Nuclear Necessity Principle: Making U.S. Targeting Policy Conform with Ethics and Laws of War.” Daedalus 145 (4): 62–74. doi:10.1162/DAED_a_00412.

Mian, Z. 2011. “Processes, Conditions and Stages for a Humanitarian Approach to Achieve and Maintain a World Free of Nuclear Weapons.” Paper presented to Acronym Institute Workshop, Glion, Switzerland, June 23–24.

Muller, H. 2013. “Icons off the Mark.” The Nonproliferation Review 20 (3): 540–555. doi:10.1080/10736700.2013.849911.

Nystuen, G., S. Casey-Maslen, and A. G. Bersagel, eds. 2014. Nuclear Weapons Under International Law. Cambridge: Cambridge University Press.

Reaching Critical Will. n.d. “History of the NPT 1975-1995.” Women’s International League for Peace and Freedom. http://www.reachingcriticalwill.org/disarmament-fora/npt/history-of-the-npt-1975-1995

Richard, Lt. Col. T.T. 2016. “Nuclear Weapons Targeting: The Evolution of Law and U.S. Policy.” Military Law Review 224 (4): 862–978.