

Article

On the Legality of Development of Nuclear Weapons

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ABSTRACT

The International Court of Justice in the Legality of the Threat or Use of Nuclear Weapons held that there is neither customary nor conventional international law provides general prohibition of nuclear weapon although threat or use of nuclear weapons is contrary to U.N. Chart and the Court cannot conclude whether the threat or use of nuclear weapons would be lawful or unlawful. However, the use of nuclear weapons violates the principles of humanity and dictates of public conscience because of its indiscriminate and disproportionate destruction. It should be also noted that the radioactive fallout renders nuclear weapons more than functionally equivalent to poison weapons; as a matter of law, they are by no means to be treated differently from other weapons of mass destruction.

Since St. Petersburg Declaration the principles of humanity have been asserted as a constraint upon military necessity; other principles and rules of laws of war have never changed and can never be ignored. This note analyzes principles and rules of the international conventional law and customary law criticizing proposals for the legitimization of nuclear weapons, proposing that nuclear weapons are illegal per se and cannot be employed in any lawful manner, and use of nuclear weapons is a crime against humanity.

Keywords: *Nuclear Weapons, Military Necessity, Unnecessary Suffering, Indiscriminate, Disproportionate*

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I. INTRODUCTION

The two bombs dropped on Hiroshima and Nagasaki speeded Japan's decision to accept the Potsdam terms and accelerated the end of the war against Japan.¹ It was the earliest nuclear bombing used as a means of warfare,² making the world witness a potential catastrophe that was unthinkable previously. Later studies show that neither of these two cities are "purely military" targets,³ and proposition that bombs are "life saving" weapons is also questioned.⁴ Bombings in two cities caused in excess of 120,000 immediate deaths.⁵ The destructive power unprecedented in human history astonished the world; it was the first harnessing of sun's power in a large scale.⁶ Technological development changes the methods of warfare, from cross-bow to gun to long-range artillery to aerial bombardment, from arrow to bullet to cannonry to nuclear warheads.

A soldier with a rifle is able to discriminate between civilians and combatants, but aerial bombardments or long range missiles are unable to make such distinctions. The more destructive a weapon is the farther its effects go beyond control and predict of scientists who invent it or soldiers who use it. Nuclear weapons exterminate population and result in extensive ecosystem destruction. In the eyes of nuclear weapons, military and civilian, combatant and noncombatant, neutral and belligerent may be direct or indirect objects; the distinguish among them thus no more exists.⁷ Accordingly, civilian population in the "nuclear age" suffers more than ever, because of indiscriminate nature of nuclear weapons.⁸

Nonetheless, the laws of war do not change, principles still sustains, and there should have been debates on the legality of nuclear weapons, however, the legal community has been silent on this issue for decades since 1945.⁹ At first, the Allies were jubilant at the victory of war against Japan, and ignored the necessity and legality of atomic attack. The use of atomic attack was widely accepted as a life-saving weapon.¹⁰ Ironically, it saved soldiers' lives for landing or invading Japan in the price of sacrificing civilians' lives

1. Hanson W. Baldwin, *America at War-Victory in the Pacific*, 24 FOREIGN AFF. 26, 36 (1945).

2. THE EFFECTS OF NUCLEAR WEAPONS 6 (Samuel Glasstone & Philip J. Dolan eds., 3d ed. 1977).

3. Barton F. Bernstein, *The Atomic Bombings Reconsidered*, 74 FOREIGN AFF. 135, 147 (1995).

4. *Id.* at 151.

5. Jill M. Sheldon, *Nuclear Weapons and the Laws of War: Does Customary International Law Prohibit the Use of Nuclear Weapons in All Circumstances?*, 20 FORDHAM INT'L L.J. 181, 187 (1996).

6. Baldwin, *supra* note 1, at 26.

7. Elliot L. Meyrowitz, *The Status of Nuclear Weapons Under International Law*, 38 GUILD PRAC. 65, 65 (1981).

8. Elliot L. Meyrowitz, *The Laws of War and Nuclear Weapons*, 9 BROOK. J. INT'L L. 227, 227 (1983).

9. *Id.* at 228.

10. Meyrowitz, *supra* note 7, at 66.

in two cities more than two times of soldiers' lives. During the Cold War, possession of nuclear deterrence and threatening to use it is the most important counterweight to the Soviet Union.¹¹ State security and military necessity supersedes human security. There are arguments that laws of war are obsolete because of innovation of modern weaponry and development of the doctrine of "total war", and thus notions of "mutual assured destruction"¹² and "flexible response"¹³ were developed.

Besides the silence of legal community, another legal silence is that use of nuclear weapons is not explicitly prohibited by any international convention, though "effects of all weapons are governed by numerous conventions and customary international law."¹⁴ The International Court of Justice finds that comprehensive and universal prohibition of the use of nuclear weapons does not appear in treaties relating to all weapons and that there is no treaty prohibiting use of nuclear weapons.¹⁵

In the world of Post Cold War, the risk of nuclear danger might be worse, because the balance between two super powers is destructed, but secret trade of nuclear weapons, technologies or materials still exists, "[t]he hands controlling the trigger may be even more risky."¹⁶

In the absence of explicit prohibition by any international treaty or convention regarding the legality, controlling or restriction of nuclear weapons, the employment of nuclear weapons is subject to general rules of the law of war.¹⁷ In view of the characteristics of nuclear weapons and the principles of humanity and dictates of the public conscience, this paper proposes that nuclear weapons are unlawful *per se*; analogous to other prohibited weapons, nuclear weapons are illegal in all circumstances, and even mere possession of them may be a commission of crime against humanity.

II. CHARACTER OF NUCLEAR WEAPONS

The explosion of nuclear weapons emits "thermal radiation" producing tens of millions of degree compared with a few thousands in a conventional

11. Meyrowitz, *supra* note 8, at 229.

12. Meyrowitz, *supra* note 7, at 67.

13. Elliot L. Meyrowitz, *The Opinions of Legal Scholars on the Legal Status of Nuclear Weapons*, 24 STAN. J. INT'L L. 111, 136 (1987).

14. David M. Corwin, *The Legality of Nuclear Arms Under International Law*, 5 DICK. J. INT'L L. 271, 271 (1987).

15. *See* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 226-27 (July 8).

16. C. G. Weeramantry, *Nuclear Weapons and International Law*, 9 MICH. ST. U.-DCL J. INT'L L. 255, 255 (2000).

17. LESLIE C. GREEN, *THE CONTEMPORARY LAW OF ARMED CONFLICT* 128 (2d ed. 2000).

explosion¹⁸ causing skin burns and starting fires at considerable distances; explosion is accompanied with “initial nuclear radiation” and “residual radioactivity” which are highly-penetrating and long-lasting harmful.¹⁹

The International Court of Justice (hereinafter I.C.J.) in the Legality of the Threat or Use of Nuclear Weapons (hereinafter Advisory Opinion)²⁰ has noted that damage caused by the immense quantities of heat and energy released from nuclear explosion are more powerful than the damage caused by other weapons, with the radiation which is peculiar to nuclear weapons, these characteristics render nuclear weapons potential catastrophic. With the danger to cause genetic defects and illness to future generations, to damage environment, food and marine ecosystem, they have the potential to destroy all civilization and the entire ecosystem of the planet.²¹

A. *Destructive Capabilities*

The nuclear weapons are incendiary explosive weapons and radiological weapons. The dominant casualty effects are those of blast, thermal radiation and ionizing radiation. The radioactive fallout may be an extended period of days, weeks or even years before symptoms of ill-health are displayed. Radioactive fallout may also delay the healing of other injuries, and affect the progress of certain diseases.²²

The destructive capabilities of nuclear weapons destroyed four square miles of Hiroshima causing 100,000 serious injuries and immediate deaths in excess of 80,000, which is one-quarter of its population; it also destroyed one-half square miles of Nagasaki causing 40,000 injuries and immediate deaths in excess of 40,000, which is one-sixth of its population.²³ The physical damage to living organisms caused long-term illness to the survivors of two cities including anemia, cataracts, and leukemia.²⁴

Marshall Islands has been the site of nuclear weapons test from 1946 to 1958. The nuclear weapons tests in the Marshall Islands caused extensive radiation-induced illnesses, deaths and birth defects; an epidemiological study shows that the exposed populations received additional doses of radiation over the years from the later bomb tests and residual radiation on the islands.²⁵ It is seen that human populations which are hundreds, or even

18. THE EFFECTS OF NUCLEAR WEAPONS, *supra* note 2.

19. *Id.*

20. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 226-27.

21. *Id.* at 243-44.

22. INT'L COMM. OF THE RED CROSS [ICRC], WEAPONS THAT MAY CAUSE UNNECESSARY SUFFERING OR HAVE INDISCRIMINATE EFFECTS 20 (1973).

23. Sheldon, *supra* note 5.

24. *Id.* at 189.

25. Public Sitting Held on Tuesday 14 Nov. 1995 (CR 1995/32), Legality of the Threat or Use of

thousands, of miles from a nuclear blast may be caused to suffer serious injury, death after prolonged illness and severe birth defects.²⁶

The 1986 Chernobyl nuclear reactor accident, though not a nuclear weapon explosion, provides not only evidence on health effects of nuclear weapons, more importantly, indicates that unintentional release of radiation may cause the same degree of ecological impact and international nuclear pollution problem as those caused by nuclear weapon explosion. The Chernobyl nuclear reactor accident was a slow nuclear explosion and emitted a cloud of lethal, radioactive contaminants. The hot debris of reactor covered an area of more than 5,000 square kilometers with twenty million radionuclides were considered heavily contaminated, making human life impossible, approximately 130,000 people had to be permanently resettled; serious radioactive contamination in Sweden, Germany, Italy, Poland, Austria, Greece and other countries. 400 hectares of pine forest died within days, leafy trees only survived the first year.²⁷ Since the accident, levels of thyroid cancer among children had risen to eighty times higher than the normal rate; and birth defects have increased from 3.87 per 1,000 live births to 6.97 per 1,000 live births; other illness and effects associated with radioactive exposure include leukemia, increased infant mortality rate, shorter life expectancy, higher infertility rate and genetic mutations.²⁸ In view of the risk of intentional release of radiation, storage, transporting, or mere possession of nuclear weapons should bear the same scrutiny and criminal culpability as intentional release of radiation by nuclear weapons exploration.

B. *Distinction*

The nuclear weapons are not like conventional weapons. Though both kill people by heat and blast; nuclear explosion produces millions times higher degree of heat and devastates much greater geographic impact than conventional, causing indiscriminate human destruction and unnecessary suffering; the radioactivity emitted threatens the reproductive ability of human and survivability of the environment resulting unpredictable future damage.²⁹ Nuclear weapons cannot be seen as just another improvement of conventional weapons.

Though nuclear weapons explosion do not produce bacterial, fungi,

Nuclear Weapons, 1996 I.C.J. Pleadings (Nov. 14 1995) (oral statements), available at <http://www.icj-cij.org/docket/files/95/5943.pdf>.

26. *Id.* at 20.

27. Ved P. Nanda & Jeffery C. Lowe, *Nuclear Weapons and the Ecology: Is International Law Helpless to Address the Problem*, 19 DENV. J. INT'L L. & POL'Y 87, 96-98 (1990).

28. Sheldon, *supra* note 5, at 190-91.

29. Meyrowitz, *supra* note 7, at 74.

viruses, or living organism that cause death or diseases in human or animals, the effects of radioactive fallout clearly injured human body by altering the chemical structure of humans, plants and animals with long-term genetic effects on them; they thus are not only more destructive than conventional incendiary weapons but the functional equivalent of the effects produced by poison weapons, bacterial weapons and gas weapons³⁰ with even more devastating effects.

III. LAWS OF WAR AND NUCLEAR WEAPONS

The laws of war distinguish between *jus ad bellum* and *jus in bello*. *Jus ad bellum* governs the states' initial resort to armed conflict; *jus in bello* monitors states' subsequent actual conduct during armed conflict.³¹ *Jus ad bellum* relates to the lawfulness of a belligerent's resort to armed conflict, while *jus in bello* refers to the rights and duties of belligerents during the course of armed conflict.³² For the purpose of this paper, the term "laws of war" taken in this paper referring to *jus in bello* and not to *jus bellum*. The reason is that *jus in bello* applies in cases of armed conflict whether or not the inception of the conflict is lawful under *jus ad bellum*.³³ The laws of war apply in situations of armed conflict whether or not such conflict has been formally declared or otherwise recognized as war.

In his *the Art of War*, Sun Tzu, Chinese military strategist and philosopher, stated that "[i]n the practical art of war, the best thing of all is to take the enemy's country whole and intact"³⁴ The purpose of war is to bring enemy under subjugate, not to exterminate enemy, neither to wipe out enemy's countryside.³⁵ The proper object of war is the bring about of conditions that are needed to establish a just and meaningful and lasting peace.³⁶ Therefore, means of warfare is not unlimited and methods of warfare must be restricted. It is an effort to reduce brutality in war, motivated by humanitarian considerations.³⁷ The 1907 Hague Convention IV Regulations Article 22 provides that: "the right of belligerents to adopt

30. *Id.* at 75.

31. DOCUMENTS ON THE LAWS OF WAR 1 (Adam Roberts & Richard Guelff eds., Oxford 3d ed. 2000).

32. Sheldon, *supra* note 5, at 210.

33. DOCUMENTS ON THE LAWS OF WAR, *supra* note 31.

34. Sun Tzu, *Sun Tzu on the Art of War*, in ROOTS OF STRATEGY: A COLLECTION OF MILITARY CLASSICS 21, 60 (Thomas R. Phillips ed., Lionel Giles trans., The Military Serv. 1941) (n.d.).

35. Weeramantry, *supra* note 16, at 268.

36. Burns H. Weston, *Nuclear Weapons and International Law: Prolegomenon to General Illegality*, 4 N.Y.L. SCH. J. INT'L & COMP. L. 227, 235 (1983).

37. JOZEF GOLDBLAT, ARMS CONTROL: THE NEW GUIDE TO NEGOTIATIONS AND AGREEMENTS 279 (2d ed. 2002).

means of injuring the enemy is not unlimited.”³⁸

Weapons of mass destruction are weapons that are “intended to kill human beings, without discriminating between combatants and noncombatants, on a massive scale.”³⁹ There is no conventional or treaty definition of weapons of mass destruction.⁴⁰ Generally, they include nuclear, bacterial, and chemical weapons, which may cause large number of casualties and destruction.⁴¹ Bacterial and chemical weapons are regulated by conventions and treaties; therefore, nuclear weapons, as a means of warfare, like all other weapons of mass destruction, should be inquired the legality of its use under scrutiny of appropriate body of law, which is the laws of war.

A. *Sources of Laws of War*

The conduct of warfare is governed by laws of war which are composed of two parts, unwritten and written, and recognized as binding by all civilized nations. Its unwritten part includes sentiments of humanity, dictates of honorable feeling, considerations of general convenience, custom preserved by military tradition, and the work of international jurists. Its written part includes state instruction to its armies, international agreements in the forms of treaties or conventions.⁴² According to the International Military Tribunal at Nuremberg, the laws of war consist of treaties, universally recognized state custom and practice, and general principles of justice applied by jurists and practiced by military courts.⁴³ To summarize, sources of laws of war include: international agreements, customary principles and rules, judicial decisions, writings of legal specialists, national manuals of military law and related texts, and resolutions of various international bodies.⁴⁴

International agreements include laws of war codified in multilateral treaties or bilateral treaties, such as St. Petersburg Declaration, Hague Conventions, and Geneva Conventions and their Additional Articles or Protocols.⁴⁵ Customary principles and rules are from the practices of states,

38. Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land art. 22, Oct. 18, 1907, 32 Stat. 1803 [hereinafter Hague Convention (IV)].

39. Black's Law Dictionary 1731 (9th ed. 2009).

40. David P. Fidler, *Weapons of Mass Destruction and International Law*, AM. SOC'Y INT'L L. (Feb. 2003), <http://www.asil.org/insigh97.cfm>.

41. *Id.* See also DEP'T OF DEF., DICTIONARY OF MILITARY ASSOCIATED TERMS 507 (2001), available at http://www.dtic.mil/doctrine/dod_dictionary/data/w/7970.html.

42. THOMAS ERSKINE HOLLAND, *THE LAWS OF WAR ON LAND* 1 (1908).

43. Sheldon, *supra* note 5, at 208.

44. DOCUMENTS ON THE LAWS OF WAR, *supra* note 31, at 4.

45. *Id.* at 5.

some of them are codified but much of them continue to exist in the form of unwritten customary principles.⁴⁶ They “result from the usages of established among civilized people, from the laws of humanity and the dictates of the public conscience.”⁴⁷

Judicial decisions play an important role in interpretation, implementation and development of international conventional laws or customary laws. Theoretically, they include decisions of international and national judicial bodies,⁴⁸ but national judicial decisions adjudicating international issues, at most may be a significant factor in fostering the creation of a climate of world opinion which may exert influence upon governmental policy-making and initiate a process of international consensus building international law in the future.⁴⁹ Holdings of International Court of Justice (I.C.J.) and other international courts are generally accorded a high degree of legitimacy. The I.C.J. has been asked to adjudicate the legality of nuclear weapons; the legality of the Security Wall; issues arising out of conflict of Bosnia-Herzegovina and the Democratic Republic of the Congo; the legality of the NATO action in Serbia in 1999. There have been criticism regarding particular judgments and opinions but I.C.J.’s popularity is evidenced by the continuing submission of cases to it, and there appears little evidence that international adjudication is rejected as illegitimate.⁵⁰

Writings of legal specialists, from their aspects, often provide insights, clarification and evidence of where the law stands.⁵¹ National manuals of military law and related texts provide what states consider to be basic rules of lawful conduct on the battlefield⁵² and lawful means of warfare. International bodies include inter-governmental, such as United Nations, and non-governmental, such as International Committee of Red Cross. Their Resolutions or Draft Rules provide international community consensus in implementation of certain provisions of treaties and proposition of laws of war.

B. *Binding on States*

Customary international law is a source of international law “where it is evidence of a general practice accepted as law”; it requires only widespread,

46. *Id.* at 8.

47. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 63, Aug. 12, 1949, 75 U.N.T.S. 31.

48. DOCUMENTS ON THE LAWS OF WAR, *supra* note 31, at 10.

49. RICHARD A. FALK ET AL., NUCLEAR WEAPONS AND INTERNATIONAL LAW 56-57 (1981).

50. ALAN BOYLE & CHRISTINE CHINKIN, THE MAKING OF INTERNATIONAL LAW 310 (2007).

51. DOCUMENTS ON THE LAWS OF WAR, *supra* note 31, at 12.

52. *Id.* at 14.

rather than unanimous, acquiescence is needed; it binds all states including those which have not recognizes the norm.⁵³ The proper role of state practice is to serve as evidence of *opinio juris* and is desired to adopt a broader definition of “practice”; “[s]tate practice covers any act or statement made by or on behalf of a state from which its view can be inferred about the existence or content of a rule of international law.”⁵⁴ The fact that states sometimes do not make their act or statement public suggests that they do not uphold either the universal applicability or inapplicability of the rule; however, a state’s publication of its views in favor of a rule among other members of the global community, such as ratifying a treaty, indicates its belief that this rule should be universally recognized.⁵⁵ Customary rules and principles embodied in the laws of war are customary international law, which are “the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience”⁵⁶, binding all states whether or not they have been codified in conventions or treaties and regardless whether states are parties to a convention or treaty.

Treaties as a source of laws of war impose legal obligation on states either by state formal action expressing intent, such as by signature, or consent, such as ratification, accession or succession, to be bound by treaties.⁵⁷ Reservations or declarations made by party states may only bind themselves but may not impair treaty obligations imposed on other states. If a treaty codifies customary international laws, to the extent that the provisions of embodied customary international law, it is binding on all international community whether they are state parties or not and regardless the provision of “general participation clause” in the treaty. Besides, treaties are applicable to non-party states if they accept and observe the provisions of treaty on the laws of war as a matter of policy, even if those provisions are not customary international law.⁵⁸

The development of international convention law can be contributed to the development of customary international law which lends great weight, if not binding, to the universality of treaties incorporating rules of general application which should be due observed because of their intrinsic utility, even from those states which have never expressly given their consent.⁵⁹

53. DAVID WEISSBRODT ET AL., INTERNATIONAL HUMAN RIGHTS: LAW, POLICY, AND PROCESS 13 (4th ed. 2009).

54. IAN SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 254 (2d ed. 1984).

55. BRIAN D. LEPARD, CUSTOMARY INTERNATIONAL LAW: A NEW THEORY WITH PRACTICAL APPLICATIONS 220 (2010).

56. Hague Convention (IV), *supra* note 38, pmb1.

57. DOCUMENTS ON THE LAWS OF WAR, *supra* note 31, at 17-18.

58. *Id.* at 18.

59. NAGENDRA SINGH & EDWARD MCWHINNEY, NUCLEAR WEAPONS AND CONTEMPORARY INTERNATIONAL LAW 41 (Martinus Nijhoff, Developments in International Law Vol. 11, 2d ed. 1989).

C. *The Silence of Treaties over the Legality of Nuclear Weapons*

Nuclear weapons as one of the mass destruction weapons are different from other prohibited weapons on the ground that the use, production, and stockpiling of other weapons of mass destruction, even gas weapons, have been rendered illegal by conventions⁶⁰ but “no convention has been concluded regarding the use or threat of use of nuclear weapons.”⁶¹ There are treaties regulating the use of particular weapons, but there is no black letter law regarding the use of nuclear weapons. In view of the uncontrollable effects of nuclear explosions and the long-term damages to environment and human health caused by radioactive fallout, nuclear weapons are functional equivalent to bacterial and chemical weapons. Because of the ban of other mass destruction weapons, nuclear weapons may well be expected to be unlawful *per se* and banned on the ground that it causes unnecessary suffering, adverse effects to environment and casualties which is disproportionate to military advantage.⁶² Though, there are treaties regulating nuclear testing,⁶³ there are treaties prohibiting nuclear weapons in certain area,⁶⁴ there is treaty on the non-proliferation of nuclear weapons,⁶⁵ however, there is no treaty rendering illegality or prohibition of nuclear weapons. There were assurances given by nuclear-weapon states not to use nuclear weapons against non-nuclear-weapon states parties to Treaty on the Non-proliferation of Nuclear Weapons (hereinafter NPT),⁶⁶ but there is no declaration by those four states that nuclear weapons are illegal.

The laws of war are a continually evolving body of law consisting of many sources within the larger body of customary international law;⁶⁷ they are not static, but follow the needs of a changing world.⁶⁸ As early as the 4th century B.C., states sought to regulate the means and methods of warfare to

60. Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571 [hereinafter Geneva Protocol]; Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological and Toxin Weapons and on Their Destruction, Apr. 10, 1972, 1015 U.N.T.S.164.

61. See Jerome B. Elkind, *Nuclear Weapons: The World Court's Decision*, 49 RHDI 401 (1996).

62. GREEN, *supra* note 17, at 129.

63. Treaty Banning Nuclear Weapons Tests in the Atmosphere, in Outer Space and Under Water, Aug. 5, 1963, 480 U.N.T.S. 43; Treaty Between the USA and the USSR on Limitation of Underground Nuclear Weapon Tests, July 3, 1974, 13 I.L.M. 906; Treaty Between the United States of America and the Union of Soviet Socialist Republics on Underground Nuclear Explosions for Peaceful Purposes, May 28, 1976, 15 I.L.M. 891.

64. Treaty for the Prohibition of Nuclear Weapons in Latin America and the Caribbean, Feb. 14, 1967, 634 U.N.T.S. 281; Treaty on the Southeast Asia Nuclear Weapon Free Zone, Dec. 15, 1995, 35 I.L.M. 635; African Nuclear Weapon Free Zone Treaty, Apr. 11, 1996, 35 I.L.M. 698.

65. Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161.

66. S.C. Res. 984, ¶ 1, U.N. Doc. S/RES/984 (Apr. 11, 1995).

67. Sheldon, *supra* note 5, at 208.

68. Meyrowitz, *supra* note 7, at 73.

limit the destructive effect of war. During the Middle Age, religious authorities tempted to reduce the savagery of armed conflict.⁶⁹ The 1868 St. Petersburg Declaration is the first codified international agreement applying humanitarian principle renouncing the use of particular weapon causing unnecessary suffering during warfare.⁷⁰ The 1899 and 1907 Hague Conferences sought to reconcile humanitarian concerns with interests of military; regulations to conferences, which are recognized as customary international law, provides that belligerents' right to injure enemy is limited and use of poisonous weapons is prohibited.⁷¹ The U.N. Charter contributes to the development of the laws of war through its prohibition in Article 2 (4)⁷² on the threat or use of force and its allowance for use of force in self-defense in Article 51.⁷³ The 1949 Geneva Conventions and their Protocols established protections for civilians and combatants either in the form of declared war or any kind of armed conflicts and mandated that indiscriminate attacks are prohibited.⁷⁴ Nonetheless, only very few writings assert that nuclear weapons are out of the ambit of laws of war; besides, the idea of legitimization of nuclear war on the price of abrogating laws of war has never been the international consensus.⁷⁵ The lack of explicit treaty provision or any hard black letter law does not warrant that nuclear weapons are out of the ambit of laws of war; on the contrary, the question of legality may be decided in accordance with customary principles and rules, particularly those concerning unnecessary suffering and proportionality.⁷⁶

International law is firmly rooted in laws of war and cannot be reduced to a set of black letter rules; there are a great number of general principles that lie behind international law out of which international law is constantly fertilized.⁷⁷ It is too early for anybody to venture the view that there is no international law outside of what stated in black letters;⁷⁸ argument that nuclear weapons uses are without legal constraint in the absence of an explicit treaty ban fails to heed the multifaceted nature of the international law-creating system.⁷⁹ The development of customary international law always lends great weight in application of conventional law, and the laws of humanity and public conscience are always binding.

69. Sheldon, *supra* note 5, at 210.

70. Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, Dec. 11, 1868, 18 Martens Nouveau Recueil (ser.1) 474.

71. Hague Convention (IV), *supra* note 38, arts. 23(a), 23(e).

72. U.N. Charter art. 2, para. 4.

73. U.N. Charter art. 51.

74. Geneva Protocol, *supra* note 60.

75. Weston, *supra* note 36, at 243.

76. GREEN, *supra* note 17.

77. Weeramantry, *supra* note 16, at 256.

78. *Id.*

79. Weston, *supra* note 36, at 243.

IV. STATE SOVEREIGNTY AND USE OF NUCLEAR WEAPONS

Proponents of legality of nuclear weapons avert the principles and rules that lie behind international law, though they do not deny the effects caused by nuclear weapons,⁸⁰ and they all recognize the principles and rules lie behind the laws of war, such as prohibition of disproportionate use of weapons and indiscriminate attacks.⁸¹ However, because of the lack of explicit prohibition of use of nuclear weapons, they find the loopholes arguing that use of nuclear weapons are legal,⁸² or at least not illegal under certain circumstances.⁸³ It is true as noted by Judge Shahabuddeen that states rely on Lotus principle proposing that they have a sovereign right to do whatever is not prohibited under international law.⁸⁴ However, state sovereignty right is not unlimited.

A. *Judicial Decisions on State Sovereignty*

The modern international relations require that sovereign states are “coequal and generally independent of constraints except to the degree they consent to limitations on their freedom of action.”⁸⁵ In the case of the S.S. “Lotus”, the Permanent Court of International Justice decides that:

[I]nternational law governs relations between independent states. The rule of law binding upon states therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.⁸⁶

In the case of *Military and Paramilitary Activities*, the I.C.J. reaffirmed Lotus doctrine and concludes that:

80. Meyrowitz, *supra* note 13, at 112.

81. CHARLES J. MOXLEY, JR., *NUCLEAR WEAPONS AND INTERNATIONAL LAW IN THE POST COLD WAR WORLD* 33 (2000).

82. Meyrowitz, *supra* note 13, at 113.

83. *Id.* at 119.

84. *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, 375 (July 8) (dissenting opinions of Judge Shabuddeen).

85. Robert F. Turner, *Nuclear Weapons and the World Court: The ICJ's Advisory Opinion and Its Significance for U.S. Strategic Doctrine*, 72 INT'L L. STUD. SER. US NAVAL WAR COL. 309, 312 (1998).

86. S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No.10, ¶ 44 (Sept. 7).

[I]n international law there are no rules, other than such rules as may be accepted by the States concerned, by treaty or otherwise, whereby the level of armaments of a sovereign State can be limited, and this principle is valid for all States without exception.⁸⁷

Furthermore, in the Advisory Opinion, I.C.J. held that in the absence of explicit authorizing and recognition of legality for threat or use of nuclear weapon depending upon specific authorization, state practice shows the “illegality of use of certain weapon as such does not result from an absence of authorization but, on the contrary, is formulated in terms of prohibition.”⁸⁸ It seems that international judicial decisions provide states strong rationale for legality of use of nuclear weapons.

However, the view that restrictions on international conduct requiring consent by the state in question is overly restricted and unrealistic, because application of laws of war is not limited to those few situations for which explicit treaty provisions have been drafted.⁸⁹ The “Martens Clause” embodied in the Preamble to the Hague Convention contains a general measure for those conditions where no explicit prohibition on particular weapons and laws of war still applies regardless of consent to restriction by state.⁹⁰ The International Military Tribunal at Nuremberg also stated that the laws of war are to be found in treaties, customs, universally recognized state practices, general principles of justice.⁹¹ States cannot shield their conduct from scrutiny by laws of war on the theory of state sovereignty by contenting that they do not submit themselves to scrutiny of laws of war. The sanctity of human life and the minimization of losses and suffering during armed conflicts is the core of laws of war. When advances in weapons technology have rendered past discussions of limiting the effects of war irrelevant, the modern weapons must surrender to the principles of law, not the reverse.⁹²

B. *Proposition Rests on Tolerance*

The traditional international legal view holds that a state can do whatever it wants, only if that is not strictly prohibited by treaties; and any prohibition on international conduct must be based on the express or implied

87. *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, 135 (June 27).

88. *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, 247 (July 8).

89. Daniel J. Arbess, *The International Law of Armed Conflict in Light of Contemporary Deterrence Strategies: Empty Promise or Meaningful Restraint?*, 30 MCGILL L.J. 89, 102 (1985).

90. *Hague Convention (IV)*, *supra* note 38, pmbl.

91. *United States v. Hermann Wilhelm Goring*, XXII Trials of the Major War Criminals Before the International Military Tribunal 441, 465 (1948).

92. Arbess, *supra* note 89, at 103.

consent of the state.⁹³ The proposition that what is not prohibited is permitted is untenable on the ground that any black letters cannot enumerate all the various kinds of conduct which are prohibited in this uncertain world.⁹⁴ Numerous core principles which hard black letter rules were based on will never fade away as time passed by, yet can be drawn out for the purpose of making clear decision on legality of nuclear weapons.

It is true that there is no positive law that prohibits the use of nuclear weapons, and it is also true that the use of nuclear weapons does not require any authorizing from any authority. But that does not mean nuclear weapons can be exempted from legal scrutiny of international customary rules and principles. Nonetheless, many international agreements have addressed the inevitable consequences and indiscriminate, disproportionate effects that would stem from any use of nuclear weapons.⁹⁵ Therefore, the foundation of claim for the legality of nuclear weapons rests not on the permission but “on the tolerance afforded by the international system for national claims that are not already the subject of an international prohibition.”⁹⁶

It is impossible to find prescription of nuclear weapons in conventions, treaties, judicial decisions, and customary principles and rules that antedate the advent of nuclear weapons. Therefore neither St. Petersburg Declaration, which declared the law of humanity and prohibition of unnecessary suffering,⁹⁷ nor Hague Convention, which codified the term “unnecessary suffering” in its Regulation Article 23(e)⁹⁸ could have embodied proscription of nuclear weapons. From the foregoing, it is evident that law of humanity, prohibition of unnecessary suffering, are embodied in the laws of war, and violation of prohibition of unnecessary suffering formulates the illegality, as Advisory Opinion’s holding, against the use of nuclear weapons.

Thus, when a state employs arms, projectiles, or material calculated to cause unnecessary suffering, it violates Hague Convention; its legal obligation was breached because unnecessary suffering is caused by its belligerent conduct, not because certain weapons were used. Unless there were a provision in Hague Convention exempting infringement by employment of nuclear weapons, such infringement will be no different were it made by employment of nuclear weapons or any other weapons. Again, nuclear-weapons states are not shielded under state sovereignty to use weapons inconsistent with laws of humanity. The use of the Lotus doctrine to establish the legality of nuclear weapons failed to recognize the dynamic

93. Meyrowitz, *supra* note 8, at 231.

94. Weeramantry, *supra* note 16, at 257.

95. Corwin, *supra* note 14, at 272-73.

96. FALK ET AL., *supra* note 49, at 21.

97. Corwin, *supra* note 14, at 274.

98. *Id.* See also Hague Convention (IV), *supra* note 38, art. 23(e).

nature of the laws of war as reflected in the Martens Clause.

V. APPLICABLE LAWS

If states cannot do whatever they want, then what are the applicable laws? Since the emergence of the nation-state system, the laws of war have occupied an important place in the development of international law.⁹⁹ Technological innovation in military weaponry not only made armed conflict more cruel and barbaric but also “rapidly outstripped the capability of the international legal system to respond, and belligerent states seemed disinclined during the course of hostilities to inhibit their freedom of action in any way.”¹⁰⁰ However, the laws of war impose legal obligation on all states monitoring and restraining conducts and means of warfare of belligerent states in armed conflict.

A. *Laws of Humanity and Dictates of Public Conscience*

1. *Martens Clause*

Traditional restraints in the laws of war are not limited to those giving explicit voice through treaties.¹⁰¹ The “Martens Clause” embodied in the Preamble to the Hague Convention (IV) of 1907 rendering a legal yardstick to those situations in which no specific international convention existed to prohibit a particular type of weapon or tactic,¹⁰² and providing a dynamic element to the interpretation of international law.¹⁰³ The drafters recognized that they had not addressed every possible war situation neither included proper provisions to provide protection to the inhabitants and the belligerents in cases not expressly provided for in the convention.¹⁰⁴ Martens Clause assures that, no matter what states may fail to agree upon, the conduct of war will always be governed by existing principles of international law.¹⁰⁵ The Preamble to the Hague Convention provides that:

[U]ntil a more complete code of the laws of war has been issued, the high contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the

99. FALK ET AL., *supra* note 49, at 23.

100. Meyrowitz, *supra* note 8, at 240.

101. FALK ET AL., *supra* note 49, at 21.

102. *Id.*

103. Elaina I. Kalivretakis, *Are Nuclear Weapons Above the Law? A Look at the International Criminal Court and the Prohibited Weapons Category*, 15 EMORY INT’L L. REV. 683, 718 (2001).

104. *Id.* at 717.

105. *Id.*

inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.¹⁰⁶

The Clause recognizes that there were already existing certain principles of international laws operating to provide protection, which were broader than any then existing treaty, and may apply in the event that protection was not available under conventional texts.¹⁰⁷ Principles of humanity and dictates of public conscience are to be ascertained in the light of changing conditions, inclusive of changes in the means and methods of warfare and the outlook and the tolerance levels of the international community.¹⁰⁸ It is also an authoritative reminder to proponents of the legality of nuclear weapons that customary international law is not static, that dynamic interpretation is required in reading and applying customary international law, and most importantly, that principles of humanity and dictates of the public conscience are preliminaries in determining whether a method of warfare not explicitly addressed by treaties is nevertheless illegal or regulated by customary international law.

While the principles of humanity and dictates of public conscience cannot alone delegitimize means of warfare on the ground of their arguable vagueness, the Martens Clause argues for interpreting international humanitarian law consistently with the principles of humanity and the dictates of public conscience; therefore, in situations where there already is some legal basis for adopting a more humanitarian position, the Clause enables the extra step to be taken in determining the legality of weapons.¹⁰⁹

2. *Law is not Static*

In the absence of prior definitions of crimes against humanity and crimes against peace, the Nuremberg Tribunal was confronted the problem that there lacked explicit prohibition or crimes expressed in positive international law.¹¹⁰ However, the Nuremberg judgment concludes that:

[T]he law of war is to be found not only in treaties, but in custom and practices of states, which gradually obtained universal

106. Hague Convention (IV), *supra* note 38, pmbll.

107. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 226, 406 (July 8) (dissenting opinions of Judge Shabuddeen).

108. *Id.*

109. Kalivretakis, *supra* note 103, at 720.

110. FALK ET AL., *supra* note 49, at 22.

recognition, and from the general principles of justice applied by jurists and practiced by military courts. The law is not static, but by continued adoption follows the needs of a changing world¹¹¹

Thus, the fact that there is no general treaty prohibition merely asserts that nuclear weapons are arguably “not illegal *per se*”, nonetheless, another fact that should be also noted and cannot be ignored is that absent conventional international laws, conduct of war is always subject to the scrutiny of customary international law.¹¹² It is evident that the legality of nuclear weapons must be judged in light of the generalized treaty prohibitions, custom and usage reflected in the practices and policies of states, general principles of law recognized by civilized nations, and the elementary and fundamental dictates of humanity.¹¹³

B. *Inquiries for the Legality of Nuclear Weapons*

If international law has anything to provide regarding the legality of nuclear weapons, it must be implied rather than explicit and through derivations from and analogies to the conventional and customary laws of war¹¹⁴ that limit the use of force in war. In determining whether a state conduct or means of warfare violates the laws of war, the action in question must be viewed against the literal terms of the international conventions and declarations regarding laws of war.¹¹⁵

A noted article summarized from said derivations and analogies proposing six core rules as relevant legal inquiries to legality of nuclear weapons; each of them involves a balancing of customary principle of humanity against that of military necessity.¹¹⁶ These six rules embody principles of prohibitions on unnecessary suffering, indiscriminate attacks, disproportionate reprisals, uncontrollable and unpredictable damages to natural, infringing neutrality, and use of poison weapons. They are: 1. prohibition to use weapons or tactics that cause unnecessary or aggravated devastation and suffering; 2. prohibition to use weapons or tactics that cause indiscriminate harm as between combatants and noncombatant, military and civilian personnel; 3. prohibition to effect reprisals that are disproportionate to their antecedent provocation or to legitimate military objectives, or disrespectful of persons, institutions and resources otherwise protected by

111. United States v. Hermann Wilhelm Goring, *supra* note 91, at 441, 455.

112. Burns H. Weston, *Nuclear Weapons and International Law: Illegality in Context*, 13 DENV. J. INT'L L. & POL'Y 1, 3 (1983).

113. FALK ET AL., *supra* note 49, at 22.

114. Weston, *supra* note 36, at 232.

115. Corwin, *supra* note 14, at 273.

116. Weston, *supra* note 36, at 232-42.

the law of war; 4. prohibition to use weapons or tactics that cause widespread, long-term and serve damage to the natural environment; 5. prohibition to use weapons or tactics that violate the neutral jurisdiction of non-participating states; 6. prohibition to use asphyxiating, poisonous, or other gases, and all analogous liquids, materials, or devices, including bacteriological methods of warfare.¹¹⁷

The laws of humanity have been historically among the more important sources of the laws of war that limit the means of warfare and asserted as constrains upon military necessity ever since the 1868 Declaration of St. Petersburg.¹¹⁸ In its advisory opinion, I.C.J. has unanimously concluded that “[a] threat or use of nuclear weapons should also be compatible with the requirements of . . . [T]he principles and rules of international humanitarian law”¹¹⁹ These six rules are from laws of humanity and the dictates of the public conscience which are the two core elements of Martens Clause. With these six rules, balanced with customary principle of humanity against military necessity, the legality of nuclear weapons may be examined objectively. Military necessity and laws of humanity are to be measured objectively rather than subjectively; measurement is not through eyes of victim, but indicates there should be no resort to measures which entail suffering beyond that necessary for achieving the purpose of the attack.¹²⁰

VI. LEGAL DEVELOPMENT OF LAWS OF WAR AS APPLIED WITH LEGALITY OF NUCLEAR WEAPONS

The horrors associated with technological developments in military weaponry inspired the codification and development of laws of war in the forms of conventions¹²¹ and declarations. The purpose is to reduce the horrors inherent to the greatest extent possible in view of the political purpose for which war is fought.¹²² These conventions stressed the prohibition of inhumane warfare and the protection of civilians and neutral states, and basic guidelines and restraints of the classical international laws of war are unanimously confirmed by governments.¹²³

117. *Id.* at 232-42.

118. ELLIOTT L. MEYROWITZ, PROHIBITION OF NUCLEAR WEAPONS: THE RELEVANCE OF INTERNATIONAL LAW 22 (1990).

119. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 226 (July 8).

120. GREEN, *supra* note 17, at 126.

121. FALK ET AL., *supra* note 49, at 23.

122. GREEN, *supra* note 17, at 15.

123. FALK ET AL., *supra* note 49, at 23.

A. *St. Petersburg Declaration*1. *Legal Norms*

There are two primary purpose underline the *jus in bello*. The first is a desire to ratchet down the level of violence that occurs in armed conflict, which is a goal to prohibit use of particular weapons or forbid the creation of unnecessary suffering; the second is to shield those who are not directly participating in the conflict from its effects.¹²⁴

The international concept of humanity requiring combatants to minimize the degree of suffering and destruction caused to opposing forces originated in the 1868 Declaration of St. Petersburg.¹²⁵ This Declaration was a result called for the restriction of the use of a new type of bullet which expands on entry into body and causes painful wounds that are difficult to treat medically, and it is the first document to recognize a limitation on the means available to accomplish military ends.¹²⁶ Since the Declaration of St. Petersburg Declaration, the principles of humanity have been asserted as a constraint upon military necessity.¹²⁷ Based on the laws of humanity, the Preamble to the Declaration of St. Petersburg specially enunciated the prohibition from using of weapons causing unnecessary suffering and indiscriminate attacks. It states:

[C]onsidering that the progress of civilization should have the effect of alleviating, as much as possible, the calamities of war:

[T]hat the only legitimate object which States should endeavor to accomplish during war is to weaken the military force of the enemy;

. . .

That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable;

That the employment of such arms would, therefore, be contrary to the laws of humanity¹²⁸

124. Michael N. Schmitt, *The Principle of Discrimination in 21st Century Warfare*, 2 YALE HUM. RTS. & DEV. L.J. ¶ 4, at 145 (1999).

125. Corwin, *supra* note 14, at 273.

126. FALK ET AL., *supra* note 49, at 23.

127. *Id.*

128. Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, *supra* note 70.

2. *Scrutiny*

Three principles were upheld by the Declaration of St. Petersburg;¹²⁹ this paper proposes three derivations from these three principles, and all of them should be applied in examine legality of use of nuclear weapons. First is the principle that the necessities of war cannot override the laws of war; therefore in view of balancing laws of humanity against military necessity, the permissible scope of devastation and suffering is not unqualified. Second is the principle that wartime sovereignty is not absolute; therefore states cannot do whatever they want on the ground that there is no explicit treaty prohibition. Third is the principle that warfare is governed by the laws of humanity which are valid even without the express consent of government; therefore, humanity security is higher than state security. In view of the destructive consequence and indiscriminate casualties among civilians and noncombatants, use of nuclear weapons clearly causes unnecessary suffering, overweighs military necessity against humanity, and supersedes state security over humanity security.

B. *Hague Conventions*

1. *Legal Norms*

Subsequent to the principle of prohibition of use weapons causing unnecessary suffering was first embodied in a multiple international agreement, St. Petersburg Declaration, the prohibition against unnecessary suffering has been adopted and reinforced in numbers of declarations and treaties,¹³⁰ such as the Hague Convention of 1899 and its Regulations of 1907; the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases and Bacteriological Methods of Warfare of 1925 (herein after the 1925 Geneva Protocol); the Nuremberg Charter of 1949; and the four Geneva Conventions.¹³¹

Following the spirit of the St Petersburg Declaration, the Hague Convention held in 1899 prohibited the use of dum dum bullet, which expand, flatten easily in the human body and cause more serious wounds than other bullets.¹³² The principles established in the Declaration of St. Petersburg were embodied in Article 22 of the Regulations annexed to the Hague Convention (IV) of 1907.¹³³ It sets forth that “The right of

129. FALK ET AL., *supra* note 49, at 24.

130. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 483 (July 8) (dissenting opinions of Judge Weeramantry).

131. Kalivretakis, *supra* note 103, at 714.

132. GOLDBLAT, *supra* note 37, at 280.

133. FALK ET AL., *supra* note 49, at 24.

belligerents to adopt means of injuring the enemy is not unlimited.”¹³⁴ Article 23(e) sets forth that “To employ arms, projectiles, or material calculated to cause unnecessary suffering” is forbidden.¹³⁵

2. *Scrutiny*

Literally apply these two articles, it is evident that nuclear weapons are illegal under Hague Convention because of its salient effects which cause unnecessary suffering to human body as noted above. Were nuclear weapons exist in nineteenth century, it would be surely another reason called for Hague Convention besides dum dum bullet. In light that dum dum bullet was prohibited because of the unnecessary suffering it caused, compared to the indiscriminate and disproportionate destruction caused by using nuclear weapons and the residual genetic effects of radioactive fallout, it is unreasonable to conclude that the use of nuclear weapons involves only the limited proportionate force required to weaken enemy.¹³⁶

Though the authoritative standard used to determine “unnecessary suffering” has never been set forth, the standard should balance “the harm caused by the weapon against the necessity of the military goals sought to be achieved.”¹³⁷ One formulation has been proposed that the standard is a “head-on meet of the principles of humanity and military necessity” which determines illegality of weapons by weighing more on disproportionate harm caused by that weapons but less on the unnecessary human suffering.¹³⁸

It is noted that the laws of humanity embodied in the preamble to the Hague Convention are also codified in its Regulations. Therefore, military necessity cannot be abused, and it is not the absolute leading, and can never be the superseding, guide in determining permissible weapons used in war; it must be balanced against by laws of humanity. Under this balance, nuclear weapons can never be permissible means of warfare because of its inhuman and cruel characteristics as noted.

C. *The 1925 Geneva Protocol*

1. *Legal Norms*

At the 1899 Hague Conference, delegates also passed declaration

134. Hague Convention (IV), *supra* note 38, art. 22.

135. *Id.* art. 23(e).

136. FALK ET AL., *supra* note 49, at 25.

137. Corwin, *supra* note 14, at 274.

138. Burns H. Weston, *Nuclear Weapons Versus International Law: A Contextual Reassessment*, 28 MCGILL L.J. 542, 554-55 (1983).

limiting the use of specific weapons, including dum-dum bullets and asphyxiating gases.¹³⁹ The codification of prohibition of unnecessary suffering in its Regulations addressed the development of the laws of humanity based on the sweeping St. Petersburg Declaration. The Article 23(a) of the Regulations annexed to the Hague Convention (IV) of 1907 sets forth that the employment of poison or poisoned weapons are especially forbidden.¹⁴⁰

During the World War I German and British employed poison gas as a means of warfare which was disapproved by members of international community. At the International Conference on the International Trade in Arms, Munitions, and Implements of War thirty-eight states signed the 1925 Geneva Protocol condemning “the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices” as a means of warfare.¹⁴¹ The Protocol and Hague Regulations universally recognize that the uses of poison and all analogous materials or devices are illegal under international law; and such recognition and adherence is considered binding upon the international community.¹⁴² The generality of these prohibitions clearly intended to cover the production, possession, threat, or use of any poisonous substances or emission.¹⁴³ The position in customary law relating to the prohibition of the use of poison in warfare is well known.¹⁴⁴ Because of the great degree of compliance with the Protocol and its comprehensive declaration, the Protocol has become the customary international law and is binding on even nonparticipating states.¹⁴⁵ This prohibition phrased in general terms is one of the time-honored rules of laws of war.¹⁴⁶

However, there is no official definition of “poison”.¹⁴⁷ One scholar proposed that poison is inevitably defined by “enumerating all possible poisonous substances recognized as such by the municipal law of civilized nations”, and it covers “any substance that when introduced into, or absorbed by, a living organism destroys life or injures health.”¹⁴⁸

139. Declaration on the Use of Bullets Which Expand or Flatten Easily in the Human Body, July 29, 1899, available at http://avalon.law.yale.edu/19th_century/dec99-03.asp, (“The contracting Parties agree to abstain from the use of bullets which expand or flatten easily in the human body.”); Declaration on the Use of Projectiles the Object of Which is the Diffusion of Asphyxiating or Deleterious Gases, July 29, 1899, available at http://avalon.law.yale.edu/19th_century/dec99-02.asp, (“The contracting Powers agree to abstain from the use of projectiles the sole object of which is the diffusion of asphyxiating or deleterious gases.”).

140. Hague Convention (IV), *supra* note 38, art. 23(a).

141. Geneva Protocol, *supra* note 60.

142. FALK ET AL., *supra* note 49, at 27.

143. *Id.*

144. SINGH & MCWHINNEY, *supra* note 59, at 121.

145. Corwin, *supra* note 14, at 276.

146. FALK ET AL., *supra* note 49, at 26.

147. SINGH & MCWHINNEY, *supra* note 59, at 121.

148. *Id.* at 122.

2. *Analogy to Poison*

Uranium, a basic raw material of all nuclear weapons,¹⁴⁹ is itself a highly toxic chemical; nuclear weapons in the course of explosions also release a variety of other toxic chemicals, including some whose toxicity endures for thousands years.¹⁵⁰ If the use of poison on an arrow made it a poisoned weapon, the use of uranium in nuclear weapons would appear to render the latter “poisoned” in the same sense.¹⁵¹ The use of nuclear weapons contaminates water, food, soil, plants and animals; it contaminates not only the areas covered by immediate nuclear radiation, but also a much larger unpredictable zone affected by the far-reaching radioactive fallout.¹⁵² The immediate nuclear radiation consisting neutrons and gamma rays, which are destructive of human life inasmuch as it gives rise to disease, aggravates suffering and proves lethal by bringing about chemical changes via exposure to radiation.¹⁵³

The manufacture of nuclear weapons utilizes poisonous substance, their explosions produce poisonous effects resulting from radioactive fallout which can be considered as the functional equivalent of the effects resulting from the use of poison gas and/or bacteriological weapons; it thus establishes a *prima facie* case that nuclear weapons are poisonous weapons.¹⁵⁴ Therefore, any argument that nuclear weapons are out these two conventional prohibitions on the ground that their advent did not exist at the time of these two conventions, or that the effects of nuclear weapons are different from those of poison weapons cannot be upheld in view of the nuclear weapons’ effects and Protocol’s language. Protocol’s plain language sets forth general prohibition of listed substances and clearly outlaws those substances by their poison nature rather than their harm.¹⁵⁵ Thus, even if the death caused by radioactive is arguably fewer than the death caused by nuclear explosion, such fact is not determinative of its legality under Protocol.

3. *Scrutiny*

The Geneva Protocol is so comprehensive that any weapon whose effects are similar to that of poison gas or bacteriological warfare would be

149. *Id.*

150. *Id.* at 27.

151. *Id.* at 122.

152. *Id.*

153. *Id.*

154. MEYROWITZ, *supra* note 118, at 23.

155. Corwin, *supra* note 14, at 278.

subject to its prohibition.¹⁵⁶ When a statute is phrased in general terms, it must be applied broadly, any narrow interpretation is not intended by the framers.¹⁵⁷ It is evident that all nuclear weapons now deployed or planned manifest radiation effects that for all intents and purposes are the same as those that result from poison gas and bacteriological means of warfare.¹⁵⁸ As long as nuclear weapons release neutrons, gamma rays and radioactive fallout contaminating air and earth, they run contrary to the recognized laws of war; regardless the radioactive fallout may be small and intended only to destroy military targets without affecting noncombatants, if poison as such is prohibited, nuclear weapons would appear to contravene the oldest and most generally admitted rules of warfare.¹⁵⁹

Although radiation cannot be categorized as gas, chemical or bacteriological warfare, by applying the definition of poison as noted above and the comprehensive text in the Protocol, "all analogous materials or devices",¹⁶⁰ it is obvious that, because of characteristics, regardless of whether radiation is treated as gas, liquid, or solid,¹⁶¹ nuclear weapons have the analogous effects of poison or poisoned weapons and need to be treated as prohibited and unequivocally illegal by Article 23(a) of the Regulations annexed to the Hague Convention (IV) of 1907 and 1925 Geneva Protocol. The characteristics of nuclear weapons are so horrible that its existence should not be tolerated in view of the risk of devastation of civilization; by the analogy noted above between the effects of poison and other prohibited weapons and the effects of nuclear weapons as a class, even mere possession of nuclear weapons is clearly illegal.

Furthermore, the possession of biological and chemical weapons in any circumstances has been prohibited by supplemented conventions. Biological weapons are subjected to the 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological and Toxin Weapons and on their Destruction; chemical weapons are subjected to the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons on their Destruction.¹⁶² Since nuclear weapons are analogous to other prohibited weapons, the possession of nuclear weapons in all circumstances for any reasons shall be illegal as violation of these said conventions.

156. MEYROWITZ, *supra* note 118, at 23.

157. Corwin, *supra* note 14, at 277.

158. Weston, *supra* note 36, at 241.

159. SINGH & MCWHINNEY, *supra* note 59, at 125.

160. Geneva Protocol, *supra* note 60.

161. Corwin, *supra* note 14, at 277.

162. DOCUMENTS ON THE LAWS OF WAR, *supra* note 31, at 157.

D. *The 1949 Geneva Conventions and 1977 Protocol I*1. *Legal Norms*

The center concern of all four 1949 Geneva Conventions is the protection of victims of war. In view of the large number of states parties to these four Conventions and the status which the Conventions have acquired in the international community, the Conventions are widely regarded as customary international law.¹⁶³ A report of the U.N. Secretary-General to the Security Council in 1993 concerning the establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY) affirmed that the law embodied in the four Geneva Conventions had become part of customary international law; besides, the statutes of the international criminal tribunals for Yugoslavia and Rwanda, and the Rome Statute of the International Criminal Court, all contain the definition of crimes which are based in the provisions of the four 1949 Geneva Conventions.¹⁶⁴

The four Geneva Conventions of 1949 offer a further yardstick by which to measure the legality of nuclear weapons under customary international law.¹⁶⁵ The first three conventions reaffirmed earlier humanitarian principles providing protections to wounded, sick, or shipwrecked combatants, and for prisoners of war; the fourth convention established protections for civilians, as well as combatants.¹⁶⁶ The protection of civilians and neutrals, and the distinction between combatant and noncombatant, are principles elemental to the laws of war.¹⁶⁷ The protection of civilians and civilian objects during armed conflict is the very heart of the laws of humanity and laws of war.¹⁶⁸ As noted above, the 1868 St. Petersburg Declaration first formally expressed that the “only legitimate object which states should endeavor to accomplish during war is to weaken the military forces of enemy” and that “this object would be exceeded by employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable.”¹⁶⁹ The

163. *Id.* at 196.

164. *Id.*

165. FALK ET AL., *supra* note 49, at 50.

166. *See* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, *supra* note 47, arts. 12, 19 (distinction between combatants and noncombatants); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea arts. 12, 22, Aug. 12, 1949, 75 U.N.T.S. 85 (distinction between combatants and noncombatants); Geneva Convention Relative to the Treatment of Prisoners of War arts. 12, 13, Aug. 12, 1949, 75 U.N.T.S. 135 (protections and treatments for prisoners of war); Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 13, Aug. 12, 1949, 75 U.N.T.S. 287 (protections for civilians on indiscriminate basis); *see also* Sheldon, *supra* note 5, at 224-25.

167. FALK ET AL., *supra* note 49, at 30.

168. Schmitt, *supra* note 124, ¶ 3.

169. Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400

principle of prohibition of unnecessary suffering was reaffirmed in the Regulations to Hague Convention, and has been labeled “Hague Law”;¹⁷⁰ the 1949 Geneva Conventions reaffirmed the principle of prohibition indiscriminate attacks on civilians and noncombatant, and has been labeled “Geneva Law”.¹⁷¹

The 1977 Protocol I to the Geneva Conventions (hereinafter Geneva Protocol I) codifies a humanitarian principle prohibiting indiscriminate attacks by stipulating that¹⁷²: (1) the use of means of warfare is not unlimited; (2) prohibition to employment of weapons causing superfluous or unnecessary suffering; (3) prohibition to employment of weapons causing widespread, long-term and severe damage to natural environment; (4) state obligation to determine whether employment of a new weapon or means of warfare would be prohibited by Protocol or any other rule of international law; (5) state obligation to distinguish between civilian population and combatants and between civilian objects and military objectives, and limit attacks only on military objects; (6) protection of civilians shall be observed in all circumstances and prohibition of indiscriminate attacks; (7) prohibition to attack objects indispensable to the survival of the civilian population, such as food, water, and agricultural areas; (8) prohibition of use of means of warfare which are intended or may be expected to cause widespread, long-term and serve damage to natural environment and thereby to prejudice the health or survival of population.

General international law embraces the principle that the object of war cannot be the complete and total destruction of an enemy, and such principle was codified in this Protocol.¹⁷³ As one scholar pointed out, destruction of a civilian population as an avowed or obvious object is forbidden because inherent in the prohibition is the last vestige of the claim that war can be legally regulated at all.¹⁷⁴ It is evident that customary international law protects civilians and noncombatants from being targets of military attacks regardless of the means used in warfare;¹⁷⁵ once this principle is embodied in Geneva Protocol I, its provisions are binding to all states, whether they are non-parties or signature parties with reservations or understanding.

Grammes Weight, *supra* note 70.

170. Schmitt, *supra* note 124, ¶ 4.

171. *Id.*

172. Protocol Additional to the Geneva Convention of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) arts. 35, 36, 48, 51, 54, 55, June 8, 1977, 1125 U.N.T.S. 6 [hereinafter 1977 Geneva Protocol I].

173. FALK ET AL., *supra* note 49, at 31.

174. *Id.*

175. *Id.* at 32.

2. *Scrutiny*

The only factual evidence to prove the culpability of discrimination of nuclear weapons is the two atomic bombs in Hiroshima and Nagasaki which proved that nuclear weapons are indiscriminate between civilians and military, combatants and noncombatants. Arguments might be made that theoretically it is possible to use nuclear weapons to avoid indiscriminate harm among casualties. Targeting military objects might be theoretically one hundred percent accurate, however, as noted above, radioactive fallout and radionuclides are indiscriminate, uncontrollable and unpredictable, in view of the radioactive fallout released by nuclear weapons explosions, the characteristics of nuclear weapons are indiscriminative and disproportionate; its effects cause widespread, long-term and serve damage to human beings and environment. Use of nuclear weapons violates either customary international law or Geneva Protocol I. Any logical reasoning will propose that nuclear weapons are illegal.

E. *Nuremberg Principles*

1. *Legal Norms*

The principle international agreements on the laws of war concluded before 1945 contain inadequate reference to punishment for violation.¹⁷⁶ After World War II, majority of war crimes against international law were tried by international military tribunal. In reaching verdict the Nuremberg Tribunal focused attention on issues to the application of the laws of war; the doctrines recognized are known as the Nuremberg Principles.¹⁷⁷ Nuremberg Tribunal also found that international law is contained not only in treaties and custom but also in the general principles of justice applied by jurists and practiced by military courts.¹⁷⁸ More importantly, “the law embodied in the 1945 Nuremberg Charter had become part of customary international law; [s]ome of the Nuremberg Principles were incorporated in the statutes of the international criminal tribunals for the former Yugoslavia and Rwanda, and in the Rome Statute of the International Criminal Court.”¹⁷⁹

Article 6 of the Nuremberg Charter defines three crimes¹⁸⁰: (1) crimes against peace namely, planning, preparation, initiation, or waging of a war of

176. DOCUMENTS ON THE LAWS OF WAR, *supra* note 31, at 175.

177. *Id.* at 176.

178. Charles J. Moxley, Jr., *The Unlawfulness of the Use or Threat of Use of Nuclear Weapons*, 8 ILSA J. INT'L & COMP. L. 447, 462 (2002).

179. DOCUMENTS ON THE LAWS OF WAR, *supra* note 31, at 176.

180. Charter of the International Military Tribunal art. 6, Aug. 8, 1945, 59 Stat. 1546, 82 U.N.T.S. 279.

aggression, or a war in violation of international law; (2) war crimes namely, violation of the laws or customs of war, such violation shall include, but not be limited to murder of civilian population, wanton destruction of cities, or devastation not justified by military necessity; (3) crimes against humanity namely, murder, extermination and other inhumane acts committed against any civilian population, before or during the war.

The protection of civilians and the distinction between combatants and noncombatants is the vital principle of the modern of laws of war.¹⁸¹ In a total war era, the civilian participation in the war effort and technological development in weaponry render the application of this rule impossible in many instances; however, the more vital the target militarily, the more the law will condone incidental civilian damage. Therefore, direct attacks on civilians and noncombatants or terror bombardment purely for the purpose of destroy enemy moral are not only a violation of the principle of discrimination in the laws of war but also a crime against humanity under Article 6(c) of the Nuremberg Charter, because such belligerent actions exterminates a civilian population in whole or in part.¹⁸²

2. *Scrutiny*

In the case of nuclear weapons, the geographic pervasiveness and permanency of radioactive contamination resulting from nuclear explosion, coupled with the vast breadth of immediate destruction erase the distinction between combatants and noncombatants, civilians and military.¹⁸³ Therefore, even if they are not employed for direct attacks on civilians and noncombatants, the uncontrollable and unpredictable effects generated by explosions inevitably cause civilians and noncombatants casualties even outside of military targets. Besides, it is evident that the purpose to employ nuclear weapons is to destroy adversary state's morale and will to fight by the devastating power in annihilation and destruction resulting from radiation and fallout. Thus, use of nuclear weapons, whether or not direct attacks on civilians or noncombatants, regardless of incidental or calculated civilians casualties, is a crime against humanity under Nuremberg Charter.

The military practice of "total war" is to destroy a state's morale and willpower by attacking its industrial war-making base and civilian population; and the deterrence doctrine in the nuclear era extended the concept of "total war".¹⁸⁴ Strategic deterrence threatens everyone in the world, the whole human beings is indeed "held hostage by military strategy

181. Weston, *supra* note 36.

182. *Id.* at 236.

183. Meyrowitz, *supra* note 7, at 76.

184. Meyrowitz, *supra* note 8, at 245.

whose inevitable consequence can only be the decimation of the world's population."¹⁸⁵ Obviously, the use or threat to use of nuclear weapons under the doctrine of deterrence violates Article 6(c) of the Nuremberg Principles which defines crimes against humanity as the "extermination of a civilian population, before or during war."¹⁸⁶

Furthermore, nuclear weapons explosions release uncontrollable radioactivity which threatens the very survival of human species and its environment; such effects, causing genetic mutations and long-term contamination of earth, inevitably result in genocide and ecocide which is indeed the military goal of nuclear weapons.¹⁸⁷ The Convention on the Prevention and Punishment of the Crime of Genocide (herein after Genocide Convention) provides that genocide includes killing, causing serious bodily harm to members of group, and "[d]eliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part"; and that both genocide and attempt to commit genocide shall be punished.¹⁸⁸ Thus, in light of the military goal and genocidal effects by its destructive power, it is an inescapable conclusion that nuclear weapons will result in war of extermination, and that their destructive power and potential for far-reaching effects on the global environment transform them into instruments of genocide.

3. *War Crime Culpability*

States can only act through individuals. It is individuals acting on behalf of states, in the first instance, commit war crimes.¹⁸⁹ By Nuremberg Charter, the use or threat to use of nuclear weapons is arguably a crime against peace and a crime against humanity for which individual military and political leaders should be held accountable.¹⁹⁰ Ultimately, it is individuals, not states, who are imprisoned or excused. "[S]trict intentionality is not required for criminal culpability for violation of the law of armed conflict; [w]illfulness, recklessness, gross negligence, and even mere negligence are potential bases for culpability."¹⁹¹ The *mens rea* inquiry for war crimes is the notice of risk of nuclear weapons not the intention of unlawful consequences.¹⁹² Because Article 51(5) of Geneva Protocol I imposes war crimes culpability for

185. *Id.*

186. *Id.*

187. Meyrowitz, *supra* note 7, at 79.

188. Convention on the Prevention and Punishment of the Crime of Genocide arts. 2, 3, Dec. 9, 1948, 78 U.N.T.S. 277.

189. MOXLEY, *supra* note 81, at 313.

190. Meyrowitz, *supra* note 8, at 244.

191. Moxley, *supra* note 178, at 457.

192. *Id.* at 458.

indiscriminate attacks not only for the acts that are “intended” but also for that “may be expected to cause” certain impermissible effects;¹⁹³ Article 35(3) also provides that means of warfare which are “intended” or “may be expected” to cause widespread long-term and severe damage to the natural is prohibited.¹⁹⁴ The necessary consequence of nuclear weapons is so much part of common universal knowledge today that no disclaimer of such knowledge would be credible.¹⁹⁵ Nuclear weapons are indeed deployed in part with a view of utilizing the destructive effects of radiation and fallout.¹⁹⁶ The potential effects of nuclear weapons is so widely known, the actor causing the consequences cannot avoid legal responsibility for causing them; it is just like driving a car at high speed through a crowded market street cannot avoid responsibility for the resulting death on the ground of claiming of no intention to kill particular person who died.¹⁹⁷ Since damages to neutrals, civilians, noncombatants are a natural, foreseeable and, indeed, inevitable consequence,¹⁹⁸ it is clear that any kinds of use of nuclear weapons are war crimes under Nuremberg Charter, Genocide Convention and Geneva Protocol I.

Furthermore, use of nuclear weapons also commits a war crime under the 1998 Rome Statute of the International Criminal Court (herein after the Rome Statute). Article 5 of the Rome Statute provides that the crimes of genocide, against humanity, war crimes and aggression are under its jurisdiction.¹⁹⁹ The use of nuclear weapons is fundamentally incompatible with general provisions of the Statute as well as the kind of international order envisioned by the Statute;²⁰⁰ although the Rome Statute does not expressly stipulate use of nuclear weapons as a crime, as noted in Article 8 2(b)(xx), the use of weapons “of a nature to cause superfluous injury or unnecessary suffering” or “inherently indiscriminate in violation of the international law of armed conflict” is a war crime.²⁰¹

193. 1977 Geneva Protocol I, *supra* note 172, art. 51(5).

194. *Id.* art. 35(3).

195. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 901 (July 8) (dissenting opinions of Judge Weeramantry).

196. *Id.* at 904.

197. *Id.* at 901.

198. *Id.* at 905.

199. Rome Statute of the International Criminal Court art. 5, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

200. John Burroughs, *The International Criminal Court, Weapons of Mass Destruction, NGOs, and Other Issues: A Report on the Negotiations and the Statute*, LAW. COMM. ON NUCLEAR POL'Y (Apr. 1999), <http://lcnp.org/global/icc.htm>.

201. Rome Statute, *supra* note 199, art. 8.

F. *I.C.J.'s Advisory Opinion*1. *Decisions*

In response to a request by U.N. General Assembly, in 1996, the I.C.J. issued an advisory opinion which is the first time an international judicial decision addressed the question of the legality of the threat or use of nuclear weapons.²⁰² The court found that there is no expressed prohibition or authorization of use of nuclear weapons by international law, but use of nuclear weapons is contrary to U.N. Charter and the rules of humanitarian law.

The court decided:²⁰³ (1) there is in neither customary nor conventional international law any specific authorization or comprehensive and universal prohibition of the threat or use of nuclear weapons; (2) a threat or use of force by means of nuclear weapons that is contrary to Article 2(4) of the United Nations Charter and that fails to meet all the requirements of Article 51, is unlawful; (3) a threat or use of nuclear weapons should be compatible with the requirements of the international law applicable in armed conflict, particularly those of the principles and rules of international humanitarian law; (4) the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law. However, by eleven votes to three, the court acknowledged that there is neither customary nor conventional international law that prohibiting the threat or use of nuclear weapons; by seven votes to seven, the court acknowledged that though the threat or use of nuclear weapons would be contrary to laws of war and humanitarian law, the court cannot conclude whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defense.

2. *Summary of Arguments Made by Proponent and Opponent States*

In 1961, more than three decades before I.C.J. issued its advisory opinion on the legality of nuclear weapons, the Declaration on the Prohibition of the Use of Nuclear and Thermo-Nuclear Weapons already provided that:

- (a) The use of nuclear and thermo-nuclear weapons is contrary to the spirit, letter and aims of the United Nations and, as such, a

202. DOCUMENTS ON THE LAWS OF WAR, *supra* note 31, at 639.

203. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinions, 1996 I.C.J. 226, 266 (July 8).

- direct violation of the Charter of the United Nations;
- (b) The use of nuclear and thermo-nuclear weapons would exceed even the scope of war and cause indiscriminate suffering and destruction to mankind and civilization and, as such, is contrary to the rules of international law and to the laws of humanity;
 - (c) The use of nuclear and thermo-nuclear weapons is a war directed not against an enemy or enemies alone but also against mankind in general, since the peoples of the world not involved in such a war will be subjected to all the evils generated by the use of such weapons;
 - (d) Any State using nuclear and thermo-nuclear weapons is to be considered as violating the Charter of United Nations, as acting contrary to the laws and humanity and as committing a crime against mankind and civilization²⁰⁴

In this case, arguments proposed by states opposing the legality of the use and threat of use of nuclear weapons may be analyzed as followed:²⁰⁵

(1) the use or threat of use of nuclear weapons is unlawful because U.N. Charter Article 2(4) provides that all members shall refrain from the threat or use of force in any manner inconsistent with the purpose, maintenance of international peace and security, of the United Nations; (2) use of nuclear weapons can be seen to be inconsistent with the idea of developing friendly relations among nations as provided in U.N. Charter Article 1; (3) nuclear war is inconsistent with the purpose to achieve international co-operation in solving international problem as provided in U.N. Charter Article 1, instead, it is a violation of human rights and fundamental freedom; (4) U.N. Charter requires members to seek solution via peaceful means of settlement of dispute, and use or threat use of nuclear weapons is not a peaceful means; (5) pursuant to U.N. General Assembly Resolution 1653, Declaration on the

204. GA. Res. 1653 (XVI), U.N. Doc. A/RES/1653(XVI) (Nov. 28, 1961).

205. See Written Statement of the Government of Egypt, Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. Pleadings 8-9, 11-20 (June 20, 1995); Written Statement of the Government of India, Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. Pleadings 1-3, 5 (June 20, 1995); Written Statement of the Government of the Islamic Republic of Iran, Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. Pleadings 1, 4-5 (June 19, 1995); Written Statement of the Government of Malaysia, Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. Pleadings 2-6, 9-14 (June 19, 1995); Written Statement of the Government of Mexico, Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. Pleadings 6-10, 12 (June 19, 1995); Written Statement of the Government of Nauru, Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. Pleadings 3-7, 12-15, 20-23, 48-51, 61-63 (June 15, 1995); Written Statement of New Zealand, Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. Pleadings 12-13, 16-21 (June 20, 1995); Written Comments of the Government of Solomon Islands, Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. Pleadings 9, 25, 36-41, 46-47, 53-54, 59-63, 69-70, 76-99, 100-02 (June 20, 1995); Written Statement of the Government of Sweden, Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. Pleadings 3, 5 (June 20, 1995).

Prohibition of the Use of Nuclear and Thermo-Nuclear Weapons, use of nuclear is a crime against humanity and a violation of the U.N. Charter; (6) use of nuclear weapons violates the principles listed in the Universal Declaration of Human Rights.²⁰⁶

The main arguments by proponent state of the legality of use of nuclear weapons relied on the fact that there was no treaty that explicitly prohibits the use of nuclear weapons, and the theory that the use of nuclear weapons is lawful in specific instances such as self-defense, deterrence and reprisals.²⁰⁷ I.C.J. acknowledged that fact but pointed out that:

[T]he Court notes that the nuclear-weapon States appearing before it either accepted, or did not dispute, that their independence to act was indeed restricted by the principles and rules of international law, more particularly humanitarian law, as did the other States which took part in the proceedings.²⁰⁸

3. *Characteristics of Nuclear Weapons*

Regarding to the characteristics of nuclear weapons, the court found that “nuclear weapons are explosive devices whose energy results from the fusion or fission of the atom”, and that nuclear explosion releases “not only immediate quantities of heat and energy, but also powerful and prolong radiation” which causes damage vastly more powerful than the damages caused by other weapons.²⁰⁹ Accordingly, the court held that:²¹⁰ (1) characteristics render nuclear weapons “potential catastrophic”; (2) the destructive power of nuclear weapons cannot be contained in either space or time; (3) nuclear weapons have the potential to destroy all civilization and the entire ecosystem of the planet; (4) the radiation released by a nuclear weapon would affect health, agriculture, natural resources and demography

206. G.A. Res. 217 (III), A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

207. See Written Statement of the Government of the Federal Republic of Germany, Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. Pleadings 3-4, 6 (June 20, 1995); Written Statement of the Government of Italy, Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. Pleadings 1-4 (June 19, 1995); Written Statement of the Government of the Netherlands, Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. Pleadings 11-13 (June 16, 1995); Written Statement of the Government of Russian Federation, Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. Pleadings 5-11, 14-15, 18 (June 19, 1995); Written Comments of the United Kingdom, Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. Pleadings 17, 22, 24-35, 36-39, 55, 58-60, 62-64, 73-76, 78-81, 92-94 (June 16, 1995); Written Statement of the Government of the United States of America, Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. Pleadings 1-23, 30-31 (June 20, 1995).

208. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 239 (July 8).

209. *Id.* at 243.

210. *Id.*

over a very wide area; (5) the use of nuclear weapons would be a serious danger to future generations, future environment, food and marine ecosystem, and to cause genetic defects and illness in future generations.

While pointing out the characteristics of nuclear weapons are such, the court refrained from declaring nuclear weapons are illegal in all circumstances. Moreover, the court let open the question regarding the legality of use of nuclear weapons in an extreme situation of self-defense which a state's survival is in stake. Nonetheless, the inclusion of nuclear weapons in the list of prohibited weapons is supported, if not mandated, by this Advisory Opinion.

4. *Binding*

The opinion is advisory, which is not directly binding on the United Nations or its member states. However, the court authoritatively interprets law that "relating to the use of force enshrined in the United Nations Charter and the law applicable in armed conflict which regulates the conduct of hostilities," and states must follow this interpretation in complying with those underlying laws. Therefore, though this advisory opinion may be arguably not binding on the legality of nuclear weapons, it can be still cited as an authoritative statement of the law.²¹¹

VII. REBUTTALS ON THEORIES FOR LEGALITY OF USE OF NUCLEAR WEAPONS

As stated above, theories for the legality of use or threat to use of nuclear weapons include self-defense, reprisals and deterrence. These theories may be arguable on their face, but they are substantively insufficient to support the legality of use of nuclear weapons.

A. *Self-defense and Reprisal*

The U.N. Charter contributes to the development of laws of war. U.N. Charter obligates states members refrain from the use of force in international relations, and use of force is prohibited except in self-defense and authorization by U.N.²¹² Article 2(4) is the core of the strict prohibition of the use of force in the U.N. Charter.²¹³ It provides that: "[a]ll Members shall refrain in their international relations from the threat or use of force

211. Kalivretakis, *supra* note 103, at 708-09.

212. Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1620 (1984).

213. *Id.* at 1624.

against the territorial integrity or political independence of any state, or in any manner inconsistent with the Purposes of the United Nations.”²¹⁴ According to Article 51, a state cannot invoke right to self-defense unless the Security Council fails to take measures to maintain international peace and security; nonetheless, rules of customary international law further limit the right to self-defense through requirements of necessity and proportionality providing that the use of force must be proportionate and necessary to an armed attack.²¹⁵

Since state members are obligated to refrain from the threat or use of force against the territorial integrity or political independence of any other state, the first use or threat to use nuclear weapons to attack another state is clearly a violation of U.N. Charter. It appears that resorts to force which does not involve such first use of nuclear weapons such as self-defense or reprisal might not constitute an infringement of Charter obligations. However, if the weapons are contrary to international law, not even the reasons of repelling aggression nor exercising the right of self-defense in U.N. Charter Article 51 would appear normally to justify their initial or first use.²¹⁶ Such conclusion would be warranted, even if the war were waged against an aggressor who had violated Charter itself; both belligerents are required to observe and are entitled to insist as among themselves on the observance of laws of war particularly in the sphere of prohibited weapons and practices.²¹⁷

1. *Self-defense*

Self-defense is an absolute right in law and has been accepted by international law both in its customary and conventional aspects but it is not unlimited and must be governed by the general principles of law.²¹⁸ In the customary aspect, the *Caroline* case provides widely recognized standard that a state is entitled to take forcible measures in self-defense, where it can demonstrate a necessity, instant, overwhelming, leaving no choice of means and no moment for deliberation; and the act justified by necessity of self-defense, must be limited by that necessity and kept clearly within it.²¹⁹ In the conventional aspect, the U.N. Charter Article 51 provides: “nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain

214. U.N. Charter art. 2, para. 4.

215. Sheldon, *supra* note 5, at 223.

216. SINGH & MCWHINNEY, *supra* note 59, at 166.

217. *Id.*

218. *Id.* at 86.

219. See MICHAEL W. DOYLE, STRIKING FIRST: PREEMPTION AND PREVENTION IN INTERNATIONAL CONFLICT 11-13 (Stephen Macedo ed., 2008).

international peace and security”²²⁰

In regard to the nature of the weapons used in self-defense, the quantum of force has to be strictly proportionate to the necessity of repelling the attack.²²¹ The I.C.J. in the case of *Military and Paramilitary Activities* found that “self-defense” in the text of Charter Article 51 is a natural or inherent right which can be inferred from customary law, although “Article 51 does not contain any specific rule whereby self-defense would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law”, self-defense cannot “subsume and supervene customary international law”, and that “customary international law continues to exist alongside treaty law.”²²² Besides, in any case, there is no express conventional international or customary international law would justify a departure from the laws of war merely on the ground that a state had committed an act of aggression.²²³ Therefore, even in the cases of self-defense the means of warfare is not unlimited; under Marten Clause, states cannot do whatever they want in the name of state sovereignty, here, states cannot do whatever they want in the name of self-defense under U.N. Charter Article 51. Besides being restricted to response to an armed attack only, the inherent self-defense right of state is still under the scrutiny of military necessity and proportionality. Since self-defense is restrict to “if an armed attack occurs”²²⁴, the right of self-defense cannot be exercised in the case of mere threat even though that threat may be with nuclear weapons.²²⁵

(a) Scenarios

There might be two possible scenarios for using nuclear weapons in the name of self-defense. The first scenario would occur when a state was attacked by conventional weapons, and respond in using nuclear weapons as self-defense.

In the *Advisory Opinion*, Great Britain and France made their statements before the I.C.J. arguing that self-defense trumps the restrictions and principles of laws of war.²²⁶ President Bedjaoui rejected these overbroad self-defense arguments in his declaration:

[A] State’s right to survival is also a fundamental law, similar in

220. U.N. Charter art. 51.

221. SINGH & MCWHINNEY, *supra* note 59, at 100.

222. *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U. S.)*, 1986 I.C.J. 14, 94 (June 27).

223. SINGH & MCWHINNEY, *supra* note 59, at 167.

224. U.N. Charter art. 51.

225. SINGH & MCWHINNEY, *supra* note 59, at 87.

226. *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinions*, 1996 I.C.J. 226, 226 (July 8).

many respects to a ‘natural’ law. However, self-defense — if exercised in extreme circumstances in which the very survival of a State is in question—cannot produce a situation in which a State would exonerate itself from compliance with the ‘intransgressible’ norms of international humanitarian law. In certain circumstances, therefore, a relentless opposition can arise, a head-on collision of fundamental principles, neither one of which can be reduced to the other. The fact remains that the use of nuclear weapons by a State in circumstances in which its survival is at stake risks in its turn endangering the survival of all mankind, precisely because of the inextricable link between terror and escalation in the use of such weapons. It would thus be quite foolhardy unhesitatingly to set the survival of a State above all other considerations, in particular above the survival of mankind itself.²²⁷

The principle of proportionality mandates the force used for self-defense must be proportionate to the force used by the aggressor’s armed attack. Because nuclear weapons explosions release not only the heat and energy as those can be released by conventional weapons but also powerful and prolong radiation, and “[t]he destructive power of nuclear weapons cannot be contained in either space or time”, characteristics of nuclear weapons render them “potentially catastrophic”; accordingly, nuclear weapons “have the potential to destroy all civilization and the entire ecosystem of the planet.”²²⁸ In view of such a vast disparity in magnitude between nuclear weapons and any conventional weapons, argument is unpersuasive that using nuclear weapons is a proportionate self-defense to conventional weapons armed attack.

The second scenario would occur when a state was attacked by nuclear weapons, and responds by nuclear weapons for self-defense.

The doctrine of self-defense is applicable only to prevent further damage to citizens and territories; the right to self-defense does not give the rise of the right to retaliate.²²⁹ Nuclear self-defense against nuclear aggression seems to be counterforce. Besides, as noted above, protection of civilians and attacks only on military targets are the principles of laws of war and codified in the Geneva Protocol I. The I.C.J. in Advisory Opinion also held that it “cannot lose the sight of the fundamental right of every state to survival, and thus its right to resort to self-defense, in accordance with Article 51 of the Charter, when its survival is at stake.”²³⁰ From the

227. *Id.* at 268 (declaration of President Bedjaoui).

228. *Id.* at 243 (advisory opinions).

229. Corwin, *supra* note 14, at 284.

230. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinions, 1996 I.C.J. 226, 243

foregoing, it appears that in the case of self-defense against armed attacks by nuclear weapons, self-defense response may be legitimate by using nuclear weapons if targeting only on adversary military objects as a counterforce strike.

Nonetheless, in view of the destructive power and the devastating effects of nuclear weapons as revealed above, massive injuries to civilians and damages to environment are inevitable; “the degree of force needed to effectively defend against future attacks is inherently disproportionate to the destruction that it would necessarily cause, particularly given the fact that there is no guarantee that the aggressor would launch additional weapons.”²³¹ The I.C.J. in *Advisory Opinion* also noted that a state’s exercise of self-defense must comply with the principle of proportionality, and that the “use of force that is proportionate under the law of self-defense, must in order to be lawful, also meet the requirements of the law applicable in armed conflict which comprise in particular the principles and rules of humanitarian law.”²³² Even the Great Britain, the proponent state of legality of use of nuclear weapons, stated that:

[A]ssuming that a State’s use of nuclear weapons meets the requirements of self-defense, it must then be considered whether it conforms to the fundamental principles of the law of armed conflict regulating the conduct of hostilities.

.....

The legality of the use of nuclear weapons must therefore be assessed in the light of the applicable principles of international law regarding the use of force and the conduct of hostilities, as is the case with other methods and means of warfare²³³

Therefore, even in the scenario of nuclear weapons self-defense against nuclear weapons attacks, using of nuclear weapons might arguably meet the principle of military necessity; however, it cannot meet the scrutiny of principle of proportionality. Still it is illegal to use nuclear weapons in such scenario.

(b) Summary

The characteristics of indiscrimination and disproportionality make illegal to use nuclear weapons in self-defense scenarios; either in the first use

(July 8).

231. Corwin, *supra* note 14, at 285.

232. *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinions, 1996 I.C.J. 226, 245 (July 8).

233. Written Comments of the United Kingdom, *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. Pleadings 40 (June 16, 1995).

scenario or second use scenario, the fact that military necessity outweighs against the laws of humanity makes nuclear weapons illegal as a means of self-defense under both U.N. Charter and customary international law.

However, Judge Singh proposes that as long as further force is ceased when the attack is permanently repelled, “[i]t would be legitimate to repel a nuclear attack with nuclear weapons if self-defense is to be effective . . . irrespective of the legality of nuclear weapons.”²³⁴ Because “[b]ased on the general principles of law . . . the force used in self-defense must be proportionate to and commensurate with the quality and character of the attack it is intended to meet and what is done in excess is not protected.”²³⁵ This argument ignores that it is the characteristics of nuclear weapons as noted in this paper make them illegal in all circumstances. Once nuclear weapons are employed, the uncontrollable, unpredictable effects and far-reaching, long-term damages to global environment resulting from radioactive fallout manifest a fact that nuclear weapons can never be proportionate to and commensurate with the quality and character of the attack. It is a question of the characteristics of nuclear weapons, not a question of the manner or scenario for employment of nuclear weapons. If first use of nuclear weapons is in violation of laws of war and U.N. Charter, there is no reason to establish that second use of nuclear weapons is legal. The characteristics and effects of nuclear weapons, which render them instruments of genocide, do not change for second use; the reasons to prohibit employment of nuclear weapons remain the same. If Judge Singh’s proposition is acceptable, it seems mean that genocide against genocide is permissible.

2. *Reprisal*

Reprisals are actions which are in themselves unlawful, but which become lawful when taken in response to unlawful actions by the other side; lawful reprisals are limited to actions that are proportionate to their antecedent provocation, and the harm caused by retaliatory attack must be in proportion to the original attack.²³⁶ Reprisals must be taken with intent to cause the enemy to cease violations of law of war and after all other means have been exhausted, and that they must be proportionate to the violations.²³⁷

(a) Scenarios

Like self-defense, there are two scenarios for possible reprisal by using nuclear weapons. The first scenario is nuclear weapons reprisals in response

234. SINGH & MCWHINNEY, *supra* note 59, at 102.

235. *Id.*

236. Corwin, *supra* note 14, at 283.

237. MOXLEY, *supra* note 81, at 150.

to conventional weapons attacks. In view of the factual evidence of nuclear weapons revealed as above, the effects of nuclear weapons are uncontrollable, since the effects are uncontrollable, the use of nuclear weapons for reprisal cannot meet the principle of proportionality. There is no definite standard by which the qualitative and quantitative limits can be judged, but it is quite clear from the effects of nuclear weapons that their use as a reprisal for any normal violation of the laws of war would be clearly excessive.²³⁸ It would seem that lawful reprisal would not be possible by using nuclear weapons in response to conventional attack.²³⁹

In the case of nuclear weapons reprisals to nuclear weapons attacks, it seems that such reprisals are proportionate in scope to original attack. Some noted scholars proposed that possible use of nuclear weapons in contingencies does not amount to the breach of international law and that nuclear weapons are permissible as reprisals to nuclear weapons attacks.²⁴⁰ However, in view of the uncontrollability and indiscrimination characteristics of radioactive fallout by nuclear weapons explosions, it is still inconceivable to propose that nuclear weapons would be proportionate to nuclear weapons attack. Besides, the probabilities are overwhelming that the second use of nuclear weapons would be designed to punish the enemy, and to use one's own nuclear assets to strike adversary's nuclear assets before they are preemptively struck by the adversary. Therefore, the targets decided must be within short time and based on existing war plan, the legitimate objectives of reprisal seems oxymoronic,²⁴¹ because there is no time for calculation of proportionality, and indiscriminate casualties resulting from nuclear weapons reprisals is a necessary and inevitable consequence. Furthermore, the U.N. Charter 2(4) and 51 condemn forcible reprisals; use of force is limited to self-defense. Since the purpose of reprisal is not to defend but to retaliate,²⁴² reprisal by nuclear weapons violates U.N. Charter.

(b) Summary

Again, it is not a question of indiscriminate use of weapon, it is a question of using an indiscriminate weapons. The nuclear weapons are weapons of surprise and yield maximum results when used suddenly; they will mark the commencement of hostilities in which event they would always appear to be illegal.²⁴³ Therefore, either the first or the second resort to nuclear weapons would appear to contravene both customary and conventional law, since their use could only be justified as retaliation in

238. SINGH & MCWHINNEY, *supra* note 59, at 172.

239. Moxley, *supra* note 178, at 470.

240. SINGH & MCWHINNEY, *supra* note 59, at 172.

241. Moxley, *supra* note 178, at 471.

242. Corwin, *supra* note 14, at 283.

243. SINGH & MCWHINNEY, *supra* note 59, at 168.

kind.²⁴⁴ And such employment of nuclear weapons may result in indiscriminate reprisals against civilians and noncombatants. Therefore, employment of nuclear weapons is illegal for the purpose of reprisal.

B. *Deterrence*

1. *Illusion of Peace*

Deterrence is a political justification rather than a legal justification. As noted by Judge Weeramantry's dissenting opinion in Advisory Opinion, deterrence is not even a plausible argument:

[I]t was argued by some States contending for legality that such weapons have played a vital role in support of international security over the last fifty years, and have helped to preserve global peace. Even if this contention were correct, it makes little impact upon the legal considerations before the Court. The threat of use of a weapon which contravenes the humanitarian laws of war does not cease to contravene those laws of war merely because the overwhelming terror it inspires has the psychological effect of deterring opponents. This Court cannot endorse a pattern of security that rests upon terror.²⁴⁵

Since the advent of nuclear weapons in 1945, wars of a various sizes, types and duration have flourished continuously in the Third World,²⁴⁶ and tens of millions deaths resulting from those armed conflicts. The nuclear weapons might arguably have prevented the world war or a nuclear war, but as to the extent of preserving global peace by nuclear weapons deterrence, such an alleged role is an illusion.

2. *Terrorizing and Hostage*

The purpose of deterrence is to hold the population of adversary hostage, under the threat of annihilation to prevent nuclear war.²⁴⁷ Thus, nuclear weapons deterrence is the mutual assured destruction based on an argument that total devastation would deter the use or even threat of

244. *Id.*

245. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinions, 1996 I.C.J. 226, 551 (July 8) (dissenting opinion of Judge Weeramantry).

246. Meyrowitz, *supra* note 8, at 245.

247. FALK ET AL., *supra* note 49, at 32.

weapons of mass destruction.²⁴⁸ Indeed, nuclear weapons deterrence results the balance of terror that maintains the disconcerting and tenuous global peace. Nuclear weapons constitute a major source of people's insecurity and a main threat to state security.²⁴⁹ In view of the laws of war, the legality of using nuclear weapons under the deterrence doctrine is unpersuasive, because nuclear weapons terrorize and hold hostage the whole human beings, which is a crime against humanity under Nuremberg Charter.²⁵⁰ The use of strategic nuclear weapons in populated areas would result in the discriminate and massive destruction of the civilian population, even if it is directed exclusively against military targets as counterforce rather than countervalue.²⁵¹ In view of the capacity of nuclear weapons to terrorize and destroy a civilian population, recognition of the legality of nuclear weapons would virtually eliminate the entire effort to constrain the mode of combat by means of laws of war.²⁵²

3. *Illegality of Possession*

The military necessity cannot overweigh humanity; the only legitimate object of warfare is to overcome the resistance of the military force of enemy, and the right to adopt means of injuring an enemy is not unlimited.²⁵³ The use or threat to use nuclear weapons under the deterrence doctrine is absolutely inconsistent with Nuremberg Charter's prohibition, "extermination of a civilian population, before or during the war."²⁵⁴ Therefore, so long as the laws of war exist, "the prohibition of a weapon of terror not incidental to lawful operations must be regarded as an absolute rule of law";²⁵⁵ nuclear weapons used for the purpose of deterrence by terrorizing and destroying civilian population should be prohibited as weapons of terror.

A noted scholar dismissed the deterrence justification by contending that, like previous weapons which were supposed to deter war, the nuclear weapons would not stop war by its mere existence.²⁵⁶ Judge Weeramantry also pointed out that "deterrence needs to carry the conviction to other parties that there is a real intention to use those weapons, it leaves the world

248. Meyrowitz, *supra* note 7, at 67.

249. Ved P. Nanda, *Nuclear Weapons, Human Security, and International Law*, 37 DENV. J. INT'L L. & POL'Y 331, 336 (2009).

250. Charter of the International Military Tribunal, *supra* note 180, art. 6(c).

251. Meyrowitz, *supra* note 8, at 240.

252. *Id.* at 241.

253. Alexander N. Sack, *ABC-Atomic, Biological, Chemical Warfare in International Law*, 10 LAW GUILD REV. 161 (1950).

254. Charter of the International Military Tribunal, *supra* note 180, art. 6(c).

255. Meyrowitz, *supra* note 8, at 241.

256. Meyrowitz, *supra* note 13, at 115.

of make-believe and enters the field of seriously-intended military threats.²⁵⁷ Deterrence is therefore a further step than mere possession of nuclear weapons; “[i]t means the possession of weapons in a state of readiness for actual use.”²⁵⁸ “The intention to cause damage or devastation which results in total destruction of one’s enemy or which might indeed wipe it out completely clearly goes beyond the purposes of war.”²⁵⁹ Once the intention to use nuclear weapons is communicated, expressly or impliedly, such a communication constitutes threat to use.

Either in domestic law or international law, if an act, such as killing, is wrongful, the threat to commit it must also be wrongful.²⁶⁰ As I.C.J. stated, “If an envisaged use of weapons would not meet the requirements of humanitarian law, a threat to engage in such use would also be contrary to that law.”²⁶¹ Since use of nuclear weapons is illegal under laws of war and U.N. Charter Article 2(4), threat to use of nuclear weapons must be also illegal. Furthermore, as already observed, analogous to possession of other prohibited weapons, mere possession of nuclear weapons is illegal; possession of nuclear weapons with the intention to use is the same illegal under conventional international law.

4. *Risk by Threat*

According to the deterrence doctrine, either use or threat of nuclear weapons aims at “mutually assured destruction”. Besides, deterrence policy is inherently provocative; once the nuclear threshold is crossed, an escalatory spiral is likely to be initiated.²⁶² Risk of countervalue use and large scale exchange of nuclear weapons tends to escalate once the threat is received by the adversary. Command, control and communication systems are likely to breakdown after the nuclear exchange starts, ordered scenarios used in military maneuver cannot be enacted during war time. Once nuclear war has begun, first priority of each side is to destroy the other side’s nuclear weapons before they are used. Because the pressure to prevail, or at least to avoid defeat, will be such that rational constraints are likely to evaporate,²⁶³ large scale mobilization of nuclear weapons is absolutely foreseeable. Nuclear weapons lead to the reciprocal implementation of escalating military threat both in response to and in the initiation of attacks. Threat of nuclear

257. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinions, 1996 I.C.J. 226, 540 (July 8) (dissenting opinion of Judge Weeramantry).

258. *Id.*

259. *Id.*

260. *Id.* at 541.

261. *Id.* at 257 (advisory opinion).

262. MEYROWITZ, *supra* note 118, at 202.

263. *Id.*

weapons for the purpose of deterrence with intent to large scale discriminate and disproportionate nuclear exchange is far inconsistent with the laws of humanity as solemnly accepted at St. Petersburg Declaration and repeatedly endorsed by the world community.

5. *Military Utility*

Doctrine of deterrence provides a balance of terror, a tenuous global peace; during cold war, it cannot stop wars among 3rd world; after cold war, it cannot deter terrorism attacks on September 11, 2000 and terrorists' attacks with conventional weapons in other states possessing nuclear weapons. By deterrence, the military utility of nuclear weapons is ostensible;²⁶⁴ the continuing possession of nuclear weapons has a negative effect on the maintenance of regional and global security.²⁶⁵ Serious and unacceptable risk of nuclear war cannot be avoided until the fact that nuclear weapons serve no military purpose whatsoever is recognized. The Cuba missiles crisis proves that unacceptable risk of accidental or inadvertent use of nuclear weapons is the result of misjudgment or miscalculation; as long as nuclear weapons exist, such risk can never be erased but only escalated.²⁶⁶

The nature and effects of nuclear weapons are such that they are inherently incapable of being discriminate, limited with any degree of certainty to a specific military target.²⁶⁷ Mutual assured destruction is the intent behind the doctrine of deterrence, therefore, even by the smallest nuclear warheads, it is clear that the effects of use of nuclear weapons under deterrence doctrine cannot be limited to be military targets sought to be destroyed. Since military objects as well as civilian population of both belligerents will surely be destroyed, the use of nuclear weapons would be military and rational suicide.²⁶⁸ Therefore, nuclear weapons are not military decisive, and this is why there are international agreements setting forth goal of achieving nuclear disarmament.²⁶⁹ For the reasons noted above, nuclear weapons have no military utility.²⁷⁰

264. Nanda, *supra* note 249, at 333.

265. *Id.*

266. *Id.* at 334.

267. MEYROWITZ, *supra* note 118, at 201.

268. *Id.* at 207.

269. *Id.*

270. *Id.*

C. Accuracy

1. Possibilities

The I.C.J. President Bedjaoui indicates in his declaration in the Advisory Opinion that:

[N]uclear weapons can be expected—in the present state of scientific development at least—to cause indiscriminate victims among combatants and non-combatants alike, as well as unnecessary suffering among both categories. The very nature of this blind weapon therefore has a destabilizing effect on humanitarian law which regulates discernment in the type of weapon used Until scientists are able to develop a ‘clean’ nuclear weapon which would distinguish between combatants and non-combatants, nuclear weapons will clearly have indiscriminate effects an constitute an absolute challenge to humanitarian law.²⁷¹

It is true that with the technological development in nuclear weaponry, a more accurate targeting system is theoretically possible. Advocates of the legality of nuclear weapons thus claim the possibility of limited nuclear war, hitting military targets precisely and discriminately, without the mass destruction attendant to mutual assured destruction.²⁷² They also claim that indiscriminate effects on the civilian population, non-combatants and neutral states which the older literature assumed to be inevitable can be avoided²⁷³ by using Global Position System satellites for guidance.²⁷⁴

Such claims naively attempt to ignore the characteristics and destructive consequence of nuclear weapons and contribute two dangerous illusions, that nuclear weapons are just another weapons and that nuclear war can be fought as if it were conventional war.²⁷⁵ Even though it is one hundred percent accuracy to deliver nuclear weapons to military targets by technological improvement in weaponry, it does not necessarily follow that nuclear weapons are more discriminate and proportionate. The effects of radiation, which cannot result from any conventional weapons, make nuclear weapons inherently indiscriminate and disproportionate; precise targeting does not change these inherent characteristics, nor prevent catastrophic

271. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinions, 1996 I.C.J. 226, 272 (July 8) (declaration of President Bedjaoui).

272. MEYROWITZ, *supra* note 118, at 200.

273. Turner, *supra* note 85, at 342.

274. *Id.* at 342-45.

275. MEYROWITZ, *supra* note 118, at 201.

damage to human beings and the earth. In fact, there are numerous governmental and private studies showing that “minimum collateral damage to civilian populations would occur even if nuclear weapons were restricted to military targets.”²⁷⁶

An argument may be made that nuclear attacks military targets or troops in the remote area, such as desert, underground or deep sea, will not indiscriminately damage civilians and noncombatants nor infringe neutral states sovereignty. Another argument may be made that clean nuclear weapons,²⁷⁷ free of or low yield radiation, will be made possible with technological advance. Therefore, employment of nuclear weapons may be legitimate.²⁷⁸

It is not the targeting that should be decisive in determining the legality of nuclear weapons, but rather the enormous destructive potential of these weapons and the uncontrollable effects of their use.²⁷⁹ This said argument is implausible because it misses the point as to the risks of employment of nuclear weapons and as to nature of the challenge to the laws of war that nuclear weapons present.²⁸⁰ As noted above, nuclear weapons are analogous to poison weapons because the radiation released from explosions, and such unique effect is what makes nuclear weapons are not just improved conventional weapons. Were it is in laboratory, the effects of nuclear explosions may be under control without other factors. But in the real world, “given the potential destructiveness of nuclear weapons, the inherent uncontrollability of radiation, and overall potential for escalation, misperception, and loss of command and control,”²⁸¹ “there are no assurances that a conflict involving WMD would be controllable or of short duration”,²⁸² nuclear exchange is very likely to happen, and such risk negates the possibility that employment of nuclear weapons could be ever proportionate in any conditions. The explosions of nuclear weapons are just like opening Pandora’s Box; you will never know how far the effects of radiation would be. The effects of radiation would not be limited to the targeted desert, deep sea or underground, because radiation is unpredictable and unpredictable. The land, atmosphere, and sea will suffer long-term contamination by far-reaching radiation; thus, such employment can never be limited or clean.

Furthermore, as observed above, the purpose of use nuclear weapons is

276. *Id.*

277. Alfred P. Rubin, *Nuclear Weapons and International Law*, 8 FLETCHER F. 45, 54 (1984).

278. Moxley, *supra* note 178, at 451, 468.

279. GOLDBLAT, *supra* note 37, at 294.

280. Moxley, *supra* note 178, at 451.

281. *Id.* at 467.

282. JOINT CHIEFS OF STAFF, JOINT PUBLICATIONS 3-12, DOCTRINE FOR JOINT NUCLEAR OPERATIONS I-14 (2005).

mass destruction; if the sole use contemplated for nuclear weapons is to destroy military targets, there would be no need to maintain them at all, since they would fail to possess any greater military utility than conventional weapons.²⁸³ Therefore, the proposition of “clean nuclear weapons” and “limited nuclear war” are all implausible.

2. Summary

There is no evidence proving the accuracy of delivering nuclear weapons, but there is evidence proving their indiscrimination and proportionality. Since no nuclear weapons were used in war after Hiroshima and Nagasaki, predicting the accuracy with which the nuclear weapons can hit designed targets, and the likely destructiveness of such hits, is based upon calculations and assumptions and, to a lesser extent, upon actual testing.²⁸⁴ Because of political factors, dangers inherent in nuclear testing, and test ban treaties limiting the testing of nuclear weapons, data from actual nuclear testing is limited²⁸⁵ and always kept secret. The ability to hit specific targets with precision is only statistical.²⁸⁶ Not only the warhead itself but also the weather and the physical condition of targets and various factors will affect the accuracy and effects of nuclear weapons. There are lots of known and unknown factors affecting the accuracy with which nuclear weapons can be delivered to their targets, such as errors in specifying initial conditions, caused by inertial guidance, or due to gravitational anomalies, and atmosphere/weather condition.²⁸⁷

In view of these possible errors, short of data from actual testing, it is hard to be a persuasive argument that technological improvement makes nuclear weapons never miss any target;²⁸⁸ the confidence in actual use of nuclear weapons in hitting targets accurately should be decreased, because actual use would not accord with the test result.²⁸⁹ Even if the warhead were delivered to a particular target with startlingly high probability, where any particular warhead will end up is far from certain, because the radiation effects are uncontrollable.²⁹⁰

283. Arbess, *supra* note 89, at 114.

284. MOXLEY, *supra* note 81, at 521.

285. *Id.*

286. Moxley, *supra* note 178, at 451.

287. MOXLEY, *supra* note 81, at 523-25.

288. *Id.* at 526-28, 674-77.

289. *Id.* at 523.

290. Moxley, *supra* note 178, at 451.

VIII. CONCLUSION

The stockpile of warheads around the world is more than twenty thousand, among which five thousand more warheads are considered operational, of which more than three thousand U.S. and Russian warheads are on high alert, ready for use on short notice.²⁹¹ The world is not meant to be a prison in which man awaits his execution; the weapons of war must be abolished before they abolish us.²⁹²

Nuclear weapons are not just another bigger bomb. The inherently indiscriminate characteristics and the massive injury to human beings and environment, which can hardly be rendered as necessity, make nuclear weapons fail to comply with any scrutiny of laws of war. Although there is no specific treaty bans the use of nuclear weapons, there are laws of war embodying mandates of laws of humanity, dictates of public conscience, and general principles of justice indicating that nuclear weapons are unlawful *per se*. There are treaties addressing the nuclear weapons issue, banning possession and testing in certain areas, agreement on non-proliferation. Furthermore, the 1956 International Committee of Red Cross Draft Rules for the Limitation of the Dangers incurred by the Civilian Population in Time of War Article 14 expanded prohibited weapons listed in the 1925 Geneva Protocol including weapons disseminating radioactive.²⁹³ These treaties represent international community's dedication to abolish nuclear weapons; they constitute evidence of state practice opposing nuclear weapons use.²⁹⁴ The cumulative effect of these treaties clearly establishes a customary rule prohibiting any kind of use of nuclear weapons.

In Resolution 1653, the General Assembly declared that the use of nuclear weapons is "a direct violation of the Charter of United Nations" and exceeds "the scope of war and cause indiscriminate suffering and destruction to mankind and civilization and, as such, is contrary to the rules of international law and to the laws of humanity"; and that any state using nuclear weapons is to be considered "as committing a crime against mankind and civilization."²⁹⁵ Besides this resolution, the General Assembly has adopted numerous resolutions directly relating to the use of nuclear weapons, suspension of nuclear weapons testing and total nuclear weapons disarmament.²⁹⁶ Although these resolutions are not legally binding, they are

291. Hans M. Kristensen, *Status of World Nuclear Forces*, FED' N AM. SCIENTISTS (June 7, 2011), <http://www.fas.org/programs/ssp/nukes/nuclearweapons/nukestatus.html>.

292. Nanda, *supra* note 249, at 343.

293. ICRO, Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War art. 14 (1956), *available at* <http://www.icrc.org/ihl.nsf/FULL/420?OpenDocument>.

294. Sheldon, *supra* note 5, at 246.

295. G.A. Res. 1653 (XVI), *supra* note 204.

296. *See* G.A. Res. 49/75, K, U.N. Doc. A/RES/49/75 (Jan. 9, 1995).

evidence of consensus considering the use of nuclear weapons as a violation of rules of humanity and recognizing that global “survivability” is so element that a prohibition on the use or threat of nuclear weapons can be reasonably inferred from the existing laws of war.²⁹⁷

A study on nuclear exchange effects on the populations and economies of the United States and the Soviet Union shows that: the effects of nuclear war cannot be calculated; even the limited or small nuclear attacks would bring enormous impact; even the sheltering or evacuation cannot be effective to save live when food and water are contaminated by radioactive fallout; form the economic, political, and social point of view, conditions after an attack would get worse before they started to get better.²⁹⁸

If the German invasion of Belgium was condemned as a violation law and declared a war crime, it is submitted that when employment of nuclear weapons is bound to injure neutral states, such employment must be considered as a violation of international law and, if it involves killing of innocent neutrals, a clear war crime.²⁹⁹ If dum dum bullet was illegal on the ground that it explodes in entering the body of single individual, the same legal system cannot uphold the legality of nuclear weapons, which burn to death tens of thousands of people at one stroke.³⁰⁰ If killing a single civilian or noncombatant is illegal, wantonly destroying entire cities, regions or countries by nuclear weapons can never be legal.³⁰¹

Protection of civilians and prohibition of indiscriminate and disproportionate means of warfare are core principles of laws of war. They are absolute and conjunctive and cannot be selectively applied for particular purposes. Sates recognizing these principles can hardly find any legitimate excuse to deny their application on nuclear weapons and claiming that they are legal methods of warfare. Furthermore, they are customary international laws codified in conventional international laws, binding all states even those who do not recognize these norms. Based on the foregoing, it is clear that nuclear weapons are unlawful *per se* because of the special characteristics, regardless of whether there is a treaty or custom establishing such unlawfulness, and whether or not they are employed in a lawful war or unlawful war. Nuclear weapons are unlawful weapons and cannot be employed in any lawful manner.

It should be noted that states who are not signatories to treaties or agreements on the issue of nuclear weapons are still bound by the principles

297. Meyrowitz, *supra* note 8, at 255.

298. OFFICE OF TECH. ASSESSMENT, THE EFFECTS OF NUCLEAR WAR 3-5 (1979), available at <http://www.fas.org/nuke/intro/nuke/7906/>.

299. NAGENDRA SINGH, NUCLEAR WEAPONS AND INTERNATIONAL LAW 106 (1959).

300. Weeramantry, *supra* note 16, at 262.

301. John. H. E. Fried, *First Use of Nuclear Weapons: Existing Prohibitions in International Law*, 12 BULL. PEACE PROPOSALS 21, 28 (1981).

and rules of laws of war. As stated above, international customary laws bind all members in the global community, even non-signatories to treaties are bound by the international customary laws restrictions and requirements forfeited in international conventional laws. Since there is no explicit prohibition of nuclear weapons by existing treaties, restrictions and requirements mandated by laws of war is the only proper argument against the legality of use or threat of use of nuclear weapons. This note would also like to briefly explore Taiwan's position facing nuclear weapons adversary state. As a founding member of the United Nations and a signatory to the Treaty on the Non-Proliferation of Nuclear Weapons,³⁰² the Republic of China has the obligation to conduct its act to meet the requirements and restrictions of customary and conventional international law. Though facing the threat of a nuclear weapons country, China, Taiwan has announced "five noes" policy regarding nuclear weapons, namely no development, no production, no acquisition, no stockpiling, and no use; and assures that this policy remains unchanged. In order to effectively deter China, Taiwan's military must develop the ability to effectively respond. This does not mean a balance of terror, but rather the ability to reliably mount a counterattack following an initial strike by China, in order to make China think twice before undertaking an assault of Taiwan.³⁰³ Even in the case of being assaulted by nuclear weapons, Taiwan still can assert protection under the rules and principles of laws of war.

302. Treaty on the Non-Proliferation of Nuclear Weapons, *supra* note 65 (ratified by Republic of China May 25, 1970).

303. *GIO Minister Lin Chia-lung Presides over a Second Meet the Foreign Press Event at Which Three High-ranking Government Officials Discuss Defense Procurement and National Security with the International Media*, GOV'T INFO. OFF., REPUBLIC OF CHINA (TAIWAN) (Oct. 18, 2004), <http://www.gio.gov.tw/ct.asp?xItem=31585&ctNode=2462&mp=807>.

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由核子武器本質論其發展之適法性

田 力 品

摘 要

國際法院「國際法是否允許在任何情況下威脅和使用核子武器」一案之諮詢意見認定國際法上雖無明文禁止，亦無明文允許使用核子武器，雖使用核子武器與聯合國憲章精神相違，國際法院仍無法對使用核子武器是否違法作出結論。

然觀諸核子武器對攻擊客體不加區別及造成損害比例失衡以及對生態環境的損害，明顯可見使用核子武器違反戰爭法及人道法。吾人尤應注意，核子武器爆炸所生之落塵，對生態及人員之殺傷，實與毒武器無異，甚至更有過之。自法律之角度以觀，同列大規模毀滅性武器，生化、毒及瓦斯武器均被國際公約禁止使用，唯獨核子武器之適法與否仍因國際公約緘默而使核武國家得以繼續持有，不受制裁。

自聖彼得堡宣言，各項公約均揭示人道考量高於軍事需求，本文據此檢驗核子武器適法性，並主張，核子武器本質違法，不論持有及運用均屬違法。

關鍵詞：核子武器、軍事必要、不必要痛苦、不加區別、比例失衡