CHAPTER 5

CONTRADICTING ASPECT OF ITS LEGALITY AND THE QUESTION OF ITS ILLEGALITY UNDER LAW
CONTENTS

CHAPTER 5: CONTRADICTING ASPECT OF ITS LEGALITY AND
THE QUESTION OF ITS ILLEGALITY UNDER LAW

5.1 Introduction

5.2. Alleged Justification of its Legality and their inadequacy
   5.2.1 Justification 1: Abrogation of international law by contrary practices
   5.2.2 Justification 2: The necessity of war
   5.2.3. Justification 3: Practical military strategy
   5.2.4. Justification 4: The concept of just war
   5.2.5. Justification 5: Self-defense under Article 51 of UN Charter
   5.2.6. Justification 6: The preservation of one’s way of life.
   5.2.7. Justification 7: Preventing destabilization of areas of influence

5.3 Theory Based Justification
   5.3.1 The concept of deterrence
   5.3.2 Proportionality
   5.3.3 Reciprocity
   5.3.4 Coercive Credibility

5.4 The Rationale Deterrence Theory
   5.4.1 The Military Balance
   5.4.2 Signaling and Bargaining Power
   5.4.3 Reputations for Resolve
   5.4.4 Interests at Stake

5.5 Nuclear Power and Deterrence
   a. Minimal deterrence - a "limited" form of deterrence
   b. Massive retaliation - deterrence based on retaliating with greater
      force than originally used
   c. Mutual assured destruction - an "unlimited" form of deterrence

5.5.1 The mutually assured destruction theory or the game theory
   a. History
   b. Early cold war
   c. Second strike capacity
   d. Late cold war
   e. Post cold war
   f. Official Policy
   g. Criticism

5.5.2 Second strike capacity
   a. Perfect detection
b. Perfect rationality

c. Inability to defend

5.5.3 Schlesinger Doctrine of Nuclear Strike Policy

a. History

b. Flexible response

c. MAD

d. Schlesinger’s Reform

e. Criticism

5.6 Legal Dimension to the Illegality of Nuclear Weapon Use

5.6.1. International Law, Human Right Law, International Humanitarian Law and its Interdependence to Each Other

A. Extraterritorial Application of International Human Right Law

B. The Relationship between International Law, International Humanitarian Law and Human Right Law

a) The lex specialis approach

b) The Complementary and Harmonious approach

c) Towards an interpretive approach?

5.6.2 The Theory of Nuclear Weapon Use; Needs a Balance Approach From Necessity to Demand

a) The theory based argument

b) The rationalism of the theory

c) The concept of necessity to demand

d) States perspective

e) Humanistic perspective

5.6.2.1 The Applicability of Humanitarian Law to Nuclear Weapon and Arguments in the Atomic Bomb Decision

5.6.2.2 Transforming the Debate on the Legal Nature of Nuclear Weapon and Redefining Customary Law

5.6.2.3 Humanitarian Law Based Argument and Self-Defense Based Argument in the Charter Theoretical Independence and Actual Interaction toward the Status of nuclear weapon

5.6.2.4 The Changing Relationship between military necessities And humanitarian principles

a) The Expansion of Military Necessity and Military Objective

b) Expansion of Humanitarian Principles

c) Balance between Military Necessity and Humanitarian Principles
d) Analysis and Evaluation of the Tokyo District Court Decision in the Atomic Bomb Suit

5.6.2.5 The Exercise of Force Specified in the United Nations Charter and the Self-Defense based Argument

a) Is the Use of Nuclear Weapon Permitted within the Enforcement Measure of the Collective Security System and the Right of the Self-Defense?

b) ICJ Observation on Legality of Threat or the Use of Nuclear Weapon.

1. Legality of the use by a State of Nuclear Weapon in Armed Conflict-General list No-93
   A. Request of The World Health Organisation

2. Legality of the Threat or the Use of Nuclear Weapons-General List No 95
   B. REQUEST OF THE UNITED NATIONS

3. Court's analysis of illegality of nuclear weapons
   a. Deterrence and threat
   b. Decision
   c. Split decision

4. International reaction
   a. United Kingdom
   b. Scots law

5.6.2.6. Regulating Nuclear Weapon Use within the Right of Self-defense

1. Regulating the use of nuclear weapon in view of the principles of Necessity and proportionality

2. Regulating the use of nuclear weapons in view of the principle and rules of humanitarian law

5.6.2.7. Analysis and Evaluation of the ICJ Advisory Opinion

a. Circular arguments created by interaction between the differing arguments

b. Can the logic between jus ad bellum and jus in bellow resolve the circular and endless argument

c. Alternative frame: the relationship between the substantive and procedural law

d. Interpreting the issues
e. Argument regarding the use of nuclear weapons in the UN Charter’s right of self-defense should be considered independently

f. Nuclear deterrence, its relationship to Art 2(4) of UN Charter
   i. Meaning of deterrence
   ii. Degree of deterrence
   iii. Problem of credibility
   iv. Deterrence distinguished from possession
   v. Legal problems of intentions
   vi. The temptation to use the weapon maintained for deterrence

5.6.2.8. Principle of International Law and Nuclear Weapon

Reason 1. Causation of indiscriminate harm to the combatants and noncombatants
Reason 2. Aggravation of pain and suffering
Reason 4. Contradiction of the Principle of Proportionality
Reason 5. Nullification of return to peace
Reason 6. Destruction of the ecosystem
Reason 7. The Extermination of Population and the decimation of mankind
Reason 8. The possibility of extinction of the human race
Reason 9. Intergenerational damage
Reason 10. The express prohibition of asphyxiating gases and analogous materials
Reason 11. Destruction and Damage to neutral states.

5.7. Human Right Dimension to the Illegality of Nuclear Weapon

5.8. Analytical Summary

5.9. Conclusion
CHAPTER 5

“In view of the fact that in any future war, nuclear weapons will certainly be employed, and such weapon threaten the continued existence of mankind, we urge government of the world to realize and to acknowledge publicly that their purpose cannot be furthered by world war, and we urge them consequently, to find peaceful means for the settlement of all matters of dispute among them”

[Albert Enstine and Bertrand Russell, big four summit meeting Geneva]

Preliminary

Several centuries ago Erasmus, the great Dutch thinker, observed that war are made by few whose well being depend on human suffering. In the fifty five centuries of human history these few have been responsible for 14,500 wars which have taken a toll of 4 billion lives. Today the death of 4 billion can be a matter of hours and even minutes. Yet lethal nuclear arsenal is been replenished with ever more sophisticated weaponry. Thus the atomic age ushered in revolutionizing the destructive power at the command of man. With this also began the mad race for the acquisition of this destructive power, and the nuclear bomb was developed by all the five big powers namely USA (1945) USSR (1949), Britain (1952), France (1962), and China (1964). It is indicative that 250,000 times as much money are spent on the development and production of armaments as on research in combating infraction from which four persons in our planet die every minute. Presently nuclear weapon technology has developed to an advanced stage and consists of all atomic, hydrogen and thermo nuclear bombs. The destructive potentiality of each of these weapons is increased more than 1000 times as compared to the bomb dropped at Hiroshima and Nagasaki. But frantic completion continues unabated between the super powers pleading that its adversary had overtaken it in achieving first strike potential. The US, for example, argues that “the soviet potentiality threatens the survivability of each component of strategic forces “and the soviets plead that the agreed schedule of the pentagon plans for building up strategic offensive system is timed to complete the development of so called first strike potential in the 1980s. It is interesting to note that the peace of manufacturing nuclear weapon has got accelerated after the signing of the PTBT in May 1963. Every step in the direction of the nuclear armament has pushed up the stockpiling of the nuclear weapon. Their rivalry has got setup in ever expending spiral
and thus threatens the engulfment of the entire world into the nuclear terror by the stockpiling of these weapons. The increasing stockpiling would shudder one and the all. The U.S, USSR rivalry in stockpiling these weapons, combined with the ambitions of other power, has pushed upward the expenditure of military research and development and thus the spread of modern weapons around the world continues unchecked. There is little impetus at the movement behind any moves for arms control, let alone disarmament. The pressure against few arms control barriers which have been set up in the post war period in setting stronger. It is a sign of time that some people are beginning to talk of the present as a pre-war rather than post-war period. All this resulted in conclusion of several treaties and conventions not only prohibiting nuclear proliferation but also its use in war time. But literally speaking there seems to be no consensuses’ among the member of world community on nuclear proliferation. The states party to the convention has involved in proliferation of nuclear weapon making it the major defense strategy of nation’s military arsenal. In regard to nuclear proliferation and arms control, the fundamental problem is clear: Either we begin finding creative outside-the-box solutions or the international nuclear safeguards regime will become obsolete. Today a wide analysis of the problem is required especially when the matter is not limited to the state defense strategy but has fall into the hands of nongovernmental organization and terrorist’s network. The whole fact has to be reanalyzed to understand the truth. Interestingly the event of Second World War is taken as a pride by those involved in executing the Manhattan project. With a dramatic revolution of nuclear weapon the countries ventured into the nuclear age. Not Until then it was the matter of countries defense strategy. Soon the weapon became the pride of the many countries military arsenal, until they realized that subsequent proliferation would result into the ultimate question of existence. The determinant was on the sovereign right of the state that no country would make use of nuclear weapon against each other and if used it would give a subsequent right of reprisal. This was the climax of nuclear politics were in theories erupted to justify the use of nuclear weapon in the light of deterrence challenging the ethics, law and humanity.

Having seen in chapter 4th the consequential effect of nuclear weapon and deliberate implication of suffering on mankind, it can be argued beyond doubt that even in absence of any specific law on nuclear weapon, the weapon can be held illegal
per se. However the core principal factor of nuclear politics to legitimize the nuclear weapon has to be discarded within law. Chapter 5th undertakes to enquire the contradicting aspect of nuclear weapon use; the major controversial issues of possession and the use of nuclear weapon which is justified by most nuclear surmount as vehement from the practical perspective of international politics, since it works out as the best strategy to maintain balance of power. However the purpose of LOIAC has to be looked into as major criteria before justify the use of nuclear weapon, thus the chapter attempts to bring the ideological principle of nuclear weapon use within the limits of law and challenges its use as violation of impregnable principles of law of war.
5.1 Introduction

The nuclear factor has tangibly affected international relations. This has occurred before our very eyes so to speak. By ours I mean the generation born a few years before World War II. For a time however we had no inkling of what was happening, when fire flared upon Hiroshima and Nagasaki “brighter than thousand suns”. Scarcely had mankind heaved a sigh of relief after a devastating war than the dawn of the cold war lit up by the lurid glare of the atomic flame rose over the world. This time it was based upon the theory of strategic stability. In the early aftermath of World War II when nuclear weapons had just emerged on the consciousness of mankind, due to the American use of atomic bombs on the Japanese cities of Hiroshima and Nagasaki as a means of bringing World War II to a rapid conclusion, two alternative approach to the problem of preventing any future use of nuclear weapon competed in academic discussion on the organization of the post war World. On one side, most of the American scientists who were involved in the “atomic bomb project” convinced that nothing short of worldwide imposition of strict international control over all future atomic energy development would succeed in keeping out the genie of nuclear weapon use from perverting future national peaceful nuclear power programme into dangerous nuclear programme, on the other side there were those who felt that the appropriate approach was to seek a political consensus among all nuclear capable nations that the future production of nuclear weapon was not an acceptable mode of behavior; this viewpoint was expressed in the ban the bomb movement, which had a considerable following in the immediate post war period in England and on the European continent but was not especially widespread in the United States. The ban the movement never gained much following among the American scientist and scholars for two reasons. The first stemmed from the convictions that, the genie being put of the bottle, there would be no physical possibility of preventing other nations from following in our footsteps, short of actual physical control of the material needed to construct weapons. This was admittedly an entirely technological approach but it must be born in mind that United States atomic

4 Ibid
scientist had entirely technological origins, with its leaders having had very little if any experience in strictly political arena. But the second reason for unpopularity of the ban the bomb movement in U.S atomic scientist circles stemmed from the widespread and unforgettable and plausible convictions that the main imputes for and intellectual underpinning of the movement came from groups that were then commonly referred to as communist front i.e., controlled from the Soviet Union. Nowadays it is fashionable to ascribe such ideas as representing a rather shameful collapse of US intellectuals under the intimidating pressure of the late unlamented Senator Joseph McCarthy and his follower. While there is some real justification for this analysis, it should not be forgotten that all this occurred under the influence of real excess, both in and outside of the Soviet Union of the Stalinist regime. All in all the failure of post war international movement among the scientists, scholars and masses to eliminate the threat of nuclear weapon can be said to have collapsed.

Today military megalomaniacs shaping global strategic talk of “limited nuclear war” but the United States has stockpiled 28,500 megatons of explosive power, two million times the kind which destroyed Hiroshima. There is enough to kill every man, woman and child three times over. And nobody can explain what will be achieved by such overkill, since in such an event, neither the attacker nor the attacked will survive to tell it. Deterrence is rapidly deteriorating from what it used to be namely maintaining strategic stability due to rapid breakthrough in nuclear weapons technology. The arms control approach as an instrument of crisis stability has been eroded by the problems of strategic superiority, uncertainty and vulnerability and increasing economic cost of new strategic systems. Hence question like can nuclear deterrence last out the century, have become more relevant today. Strategic doctrine like flexible response counterforce strategy, Schlesinger doctrine and countervailing strategy are the necessary concomitants of new and more powerful fighting capacity to push the world to the brink of a nuclear war.

It is shocking to note that since the convening of the first special session of the UN on Disarmament (1978), world military spending has increased by 3 percent.
despite deterioration in the world economy. It is difficult to arrive at an accurate figure of global military spending but it was estimated between $600-650 billion in 1991. The increasing armament not only generate tension between the two contending powers but also put heavy pressure on other countries USA, for example, is pressuring its allies to share the responsibility for defending the surrounding airspace and sea lanes.\textsuperscript{9} Neighboring neutral countries are forced to go shopping for arms to counter the emerging danger generated by the new armaments. It is because of this reason that while world trade increased from 100 points to around 350 points during the 1970’s exports of weapons to the third countries went up from 100 to around 700 points during the decade. The seriousness of the issue is that the countries still hold up the trade business of nuclear weapon, under the vague pretence of balance of power. But then the question is, does this terminology hold well on practical application of the policy of balance of power. If so then there need to be a substantial positive result of no death in case of nuclear weapon strike.\textsuperscript{10}

Let me put it in these words “The doctrine on which the balance of power residue are subtle and is not an answer within it, these are just object-oriented method adopted by those few, willing to justify their act. Unfortunately the approach was adopted in later stage by those others as a policy of no exception”.

However there are several reason based approaches of states to indulge in nuclear warfare, right from the development of nuclear weapon till the strategic military approach of today, there is far unexplainable reasons which are traced down in this chapter as a major resource to contend the illegality of nuclear weapon use. There are several issues parallel to the inquiry and investigation, conflicting with the ethic and morality of international law on one hand and challenging the disarmament policy on the other.

\textbf{5.2. Alleged Justification of its Legality and their Inadequacy}

There are several justifications alleged to the act of atrocity as a necessary practice of state policy.\textsuperscript{11} The primary justification seems to be the state practice which hardly has any reference under international law even if it has any reference

\begin{itemize}
  \item \textsuperscript{9} Ibid, at p.90
  \item \textsuperscript{10} United Nations. Group of Experts on a Comprehensive Study on Nuclear Weapons, ‘Nuclear weapons: report of the Secretary-General of the United Nations’, (Frances Pinter, 1981), pp.98-112
  \item \textsuperscript{11} Bhabani Sen Gupta, ‘Nuclear weapons?: policy options for India’, (Sage Publications, 1983), p.78
\end{itemize}
those justifications is not applicable to the current state of nuclear war. Also none of these reasons satisfy their standpoint within the ambit of humanitarian law or LOIAC. The following are the justifications laid down by the state parties to the nuclear weapon.

5.2.1. **Justification #1.** Abrogation of international law by contrary practices.

It is true that principle prohibiting the indiscriminate slaughter of civilians and non combatant have often been violated when large centers of population were destroyed from the air during the great wars waged in this century. For example, they were violated through firebombing and the aerial bombardment during World War II, ‘not to speak of the devastation of Hiroshima and Nagasaki’. For this reason some might argue that the international law on the matter has been abrogated by contrary practice.\(^\text{12}\)

In response to this, it should be pointed out that even if there have been consistent violations through the manufacture and use of weapons that flatten cities and indiscriminately destroy civilian populations, those violations have been carried out by a very small group of powerful nations. This small group can be counted on one’s figure while the word community of nations exceeds the level of some one hundred and fifty states. Once it is accepted by the world community, customary international law cannot be abrogated these days and the age by the wishes or the conduct of less than 10 percent of the world’s nations. We are long past the stage when small body of powerful nations could dominate international law and dictate its rules. If these rules are an established part of international law and if they still command the unqualified support of the vast majority of the world’s nations then these rules certainly cannot be abrogated by the wishes or conduct of a small minority. In any event this specific point has received consideration in the Nuremberg judgment on *The Hostages Cases*\(^\text{13}\) in the following terms:

“It has also been stated in the evidence and argued to the tribunal that the rules of war have changed and that war has assumed totalitarian aspect. It is argued that the atom bombing of Hiroshima and Nagasaki in Japan and the aerial raids upon Dresden, Germany in the final stage of the conflict afford a pattern for the conduct of modern

\(^{12}\) Istvan S. Pogany, 'Nuclear weapons and international law', (Avebury, 1987), p.180

\(^{13}\) Ibid ,p.117
war and possible justification for the criminal act of these defendants. We do not think the argument is sound”.

It may also be argued that there is more general acceptance of the principles of indiscriminate slaughter in the dozens of smaller war that have plagued mankind in this century. Yet while it is generally accepted that the pursuit of a military objective may incidentally involved civilian deaths and therefore, aerial bombardment per se is not intrinsically illegal, there has never been any general acceptance in principle or in practice of the proposition that one is entitled to wipe out entire cities merely for the military advantage. Moreover, as we have seen, the relevant principles have been reaffirmed time and again both by the international community and by eminent international jurists. Even power which have in practice violated these principles has reaffirmed them in the Nuremberg Charter and by their acceptance of the principles set out in the Nuremberg judgment.¹⁴

5.2.2 Justification # 2. The necessity of war

In the view of some jurists, necessities of war constitute a ground on which the rule of international law can be overridden. According to this argument, there are certain dire and immediate urgencies in the life of a nation in which a statesman or general is compelled to protect his country form destruction by whatever means available.¹⁵ An example sometime cited is the position of Britain when Hitler stood poised for the attack in 1940. As the Bomber Command argued, carrying death and destruction indiscriminately to the enemy population seemed the best means of halting the attack.

If this argument is to carry any weight at all, however, it must be proved that the danger is both imminent and supreme. Was this the case with Britain? When by 1942 the bombing camping, following Lord Cherwell’s minute of 1942, made working class residential area of Germany the prime targets, the two factors of imminence and supreme danger no longer co-existed. Even it had been at any stage legitimate to direct attack as the civilian targets or at cities as such, the enormous injuries inflicted on Germany and its army and the presence at Britain’s side of the United States, with all its resources, had certainly removed the immense of danger.

¹⁴ Haralambos Athanasopulos, ‘Nuclear disarmament in international law’, (McFarland, 2000), p.113
¹⁵ Id.
Legal Regime on the Use of Nuclear Weapon and its Impact on Humanity

In fact a group of scientist objected to the calculations on which the Cherwell minute was based. Their objected was apparently not formulated in moral terms but there were moral objections from professional soldiers. The raid on German cities continued nonetheless and this was certainly a situation for which supreme emergency” no longer provided an arguable justification. Bombs were dropped on the city of Dresden, killing 100,000 people, as late as 1945. Even less justification was available under the doctrine of “supreme emergency” when the bombs were dropped on Hiroshima and Nagasaki.\(^{16}\)

Is the situation in which the nuclear bombs are used for a first strike one of “supreme emergency”? Do imminence and supreme danger come together? Even if they do, can one then proceed in such a manner as to annihilate civilians by the million far in excess of the Dresden or Hiroshima attack with certain death of millions of one’s own people as well? It is submitted that the supreme emergency is insufficient reason for the deliberate act of killing millions of innocent people. The argument of “necessities of war” is not a generally accepted rule, for if it were to be accepted without limitation, most of the other rules of the international law relating to war would be reduced to a cipher.

The government participating in 1868 Declaration of St. Petersburg foresaw that new technologies could heighten the conflict between the necessities of war and law of humanity. Such weapon tend to promote the idea that if one could terminate a war merely by using them, hundred and thousand of live could be saved. As we have seen, this argument was used in regard to Hiroshima and Nagasaki.\(^{17}\) The condition, in every case, is that the laws of humanity are temporarily overlooked. In case were new technology was leading toward new developments in armaments, the participants in the St. Petersburg declaration reserved the right “to come to an understanding in orders to maintain the principles which they have established and to conciliate the necessities of war with the law of humanity. This decision was approved by legal expert advising their government at the 1973 International Committee of Red Cross (ICRC) Conference of Government Experts. They recommended restraint or prohibition in respect of new weapons that may be inhumane or indiscriminate, such

\(^{16}\) Supra 5, p. 89
as incendiary and fragmentation weapon. The rule that every military necessity does not override international law was upheld in the judgment of the U.S. tribunal which tried Field Marshall List. It declares, “The rules of international law must be followed even if it results in the loss of a battle or even a war”.

5.2.3 Justification # 3. Practical military strategy

Since the first use of the bomb, great deals of strategic theory were constructed concerning its possible uses. In the 41 years during which these theories have been evolved and elaborated, moral consideration relating to the slaughter of hundreds of millions of people have been pushed aside in the name of a relentless “logic of strategic needs. The philosophy has been that practical tactical planning should not be clouded over by moral considerations which are an obstruction to clarity of military thinking. As is pre-nuclear days, when commanders calmly calculated their military losses in a given operation in term of tens of thousands of men, so also in the nuclear age it is thought that generals must coldly calculate strategy without being unduly moved by loss of human life.

This attitude is a supreme example of the dominance of traditional thinking and the failure to realize that the entire set of assumption underpinning such thinking has fallen away. One may operate freely within the framework only so long as the terms of the operation do not exceed the scale of the framework itself. For example one could discharge waste from the ship to the ocean indefinitely if the discharge were on the scale of the eighteen century, for the ocean had relatively infinite capacity to absorb such waste; or one could discharge pollutant into the air indefinitely before industrial revolution, for the atmosphere had a relatively infinite capacity to absorb them. Since neither ocean nor air has infinite capacity in today’s context, an entirely new strategy needs to be devised for discharging waste and pollutants. So it is with war. When conflict was a matter of sacrificing tens or hundreds of thousands of men, or even a few millions as in World War II, the reservoir of mankind was still large enough to take the blow and survive. But when the magnitude of the sacrifice would be hundreds of millions or billions of people, the operation would exceed the scale of the framework within which military strategy has traditionally been devised.

18 Id at, p.77
19 Id at, p.89
When that happens, the practical strategy really has no relation to practicalities at all. In the planning for nuclear war, this attempted divorce of practical planning from morality has reached this limit situation and its unreality stands starkly exposed. As with pollution, an entirely new framework of reasoning must be devised, in which some of the most basic assumption of past military reasoning must be discarded.  

5.2.4 Justification # 4. The concept of just war

The origin and the history of the just war concept were dealt in the previous chapter. Let me just add here if nuclear weapons are illegal, they are illegal whether the war in which they are used is legal or illegal, just or unjust. Even their use in a war of self defense would be illegal by this criterion.

Reference should be made in this context to General Assembly Resolution 1653 (XVI) of November 24, 1961. This Resolution condemned the use of nuclear weapons in any situation as being a crime against mankind and civilization. That the general principles relating to violation of the laws and customs of war are not limited to illegal wars appears clearly from Protocol 1 Additional to the Geneva Conventions of August 12, 1949. Article 35 of that Protocol contains the following provisions:

1. In any armed conflict, the right of the parties to the conflict to choose methods or means of warfare is not unlimited.
2. It is prohibited to employ weapons, projectiles and material and method of warfare of nature to cause superfluous injury or unnecessary suffering.
3. It is prohibited to employ methods or means of warfare which are intended or may be expected, to cause widespread, long term and serve damage the natural environment.

5.2.5 Justification # 5. Self-defense under Article 51 of UN Charter

Self-defense is seriously a justification taken by most states to retaliate against the nuclear weapon attack, should not a nation be entitled therefore to use nuclear weapon in retaliation if it is attacked with nuclear weapon?

---

20 Id.
22 Id.
Retaliation needs to have a logical justification, and it is hard to see what logical justification there could be in such a case. The nuclear attack from the enemy would be delivered by weapons several times the firepower of the Hiroshima bomb and it would in all probability be multiple attacks, causing many towns and cities to be blasted out of existence. Should that be the case, national security considerations could not be a logical justification. The society of the country attacked would be destroyed; its survivors would be either too severely injured or dazed to constitute anything like a civic society.\textsuperscript{23} If therefore retaliators button were pushed, it would not be for victory, or for a balance of power. All such pre-nuclear concept would be meaningless. Whether the retaliation were to come as a result of feelings of revenge or from panic, hysteria, or terror, the result would be the same the probable annihilation of the human race and its life support system. In a word, the attempt at retaliation would be irrational. In a recent issue of Time Magazine, the president of the United States is reported as discussing just a scenario. He said “the word comes that they are on their way. And as you sit there, knowing that there is no way, at present, of stopping them. So they are going to blow up how much of this country we can only guess here so that even though you’re all going to die, they are going to die too.” The president went on to observe: “there is something so immoral about it”. Here the word “illegal” should be added to “immoral”, since it would attract to itself the illegalities of destruction of the environment and annihilation of non-combatants we have already discussed.\textsuperscript{24} The elevation of self-defense to a high level of recognition in international law is not to be wondered at. It has represented the highest moral justification of a soldiers calling going deep into the roots of the human desire to cherish and protect one’s territory, traditions and national integrity.\textsuperscript{25} People of the highest moral stature have often experienced no qualms about taking up arms and inflicting death upon those who threatens these values. Indeed it was a noble thing to do. \textit{Dulce et decorum est pro patria mori} (it is sweet and seemly to die for one’s country) was classical expression of this view. As with so many other concept of war however these concept has been outmoded by the advent of nuclear weapons. When the nuclear powers fight a nuclear war, they will not be fighting for defense of their country, which in any case will be destroyed by the conflict. What they will be

\footnotesize
\textsuperscript{23} Richard J. Regan, Regan Richard J,'Just war: principles and cases', (CUA Press, 1996),p.123
\textsuperscript{24} Id
\textsuperscript{25} Supra, 21
seeking to achieve will be the destruction of their enemy’s country rather than the defense of their own.\textsuperscript{26}

From the standpoint of international law such retaliatory or revengeful slaughter of the enemy population would not be covered by the justification of self-defense. Indeed, it is a concept totally different from self-defense in content, quality and objective. It takes much brashness to assert that it is sweet and seemly to slaughter one’s enemies by the millions for the sake of revenge and retaliation. There are other ways as well in which nuclear weapons have radically altered concepts of defense, rendering the traditional legal principles outmoded. Traditionally, a cardinal method of ensuring national security has been the strengthening of one’s defense capabilities. In the nuclear age, nothing one can do internally is sufficient to protect one’s country, despite the claims made for a Star War type defense. The only way for a nation to increase its military strength is to enhance its ability to penetrate into the territory of the adversary. The old concept of weapons for defense no longer holds. The nuclear weapons being created are therefore aggressive rather than defensive, a fact which needs to be remembered when it is a matter of assessing culpability in their creation. This consideration leads naturally to the distinction between “offensive defensive and “defensive” defense.\textsuperscript{27}

In 1980 the concept of offensive defensive has given rise to a developing field of strategic research. This strategic research has special relevance to the nuclear situation and must considerably influence international law concept relating to self-defense. An offensive defense would be an attempt to prepare one’s defense by reading the means of waging an offensive within the attack territory. This is what the U.S and the U.S.S.R seems to be doing rather than preparing for defense by fortifying their internal defense. The adoption of an offensive strategy, however necessarily heightens the risk of nuclear war. For instance that the nation A adopts this strategy, the requirement of which are identical to those of war of aggression. In an international atmosphere of lack of trust the strategic observers of the adversary nation B would naturally view such activity as preparation for aggressive war and must make their plan as “worst case” of scenario. Even if nation B’s intention had been to plan a defensive defense, its countermove would be to achieve an offensive

\textsuperscript{26} Id
\textsuperscript{27} Linda A. Malone, ’International Law,’ (Aspen Publishers Online, 2008), pp.15-43
defense capability. Nothing this, A’s strategic observer would infer aggressive intent and step up A’s offensive defensive preparations. But seeing the escalation of A’s preparations, B would escalate accordingly. Once this type of arms spiral has began, it appears that very little short of war can break it. The irony of the situation is that both nations, A and B, initially may have had purely defensive intentions. But in a world of distrust, both assume enormously aggressive postures, and there is no means know for reading the true intent behind the overt preparations.  

Nor does the danger end there. As the arms building occurs on both sides, the possibility of the survival after an attack by even a fraction of the opponent’s nuclear arsenal become more attractive to military strategists. Each side whatever is protestation to the contrary, is ready with the apparatus for this purpose. Even those whose public posture is one of pure defensiveness prepare and enhance their first strike capabilities. The United States, for example, is doing so in the European theatre.

In short the self-defense argument is a self serving justification masking the inherent illegality of nuclear weapons. International law and international lawyers themselves have to shoulder a substantial part of the blame for permitting such an argument to assume its current credibility. In the word of an eminent American international lawyer:

International lawyer have not upheld the fundamental mission of their profession. The fundamental mission of international lawyer is to study the means whereby the power of modern nation state may be restrained by the rule of law. Although often, lawyers have allowed themselves to become ‘co-opted geopoliticians’... with respect to nuclear weapons, the failure of the international law has been most pronounced. After 1945 the United States possessed the nuclear advantages yet did little to control it. As the Cold War intensified, we simply came to accept these weapons with little effort expended to subject these weapons to the restraint of law. As time went on, we came to accept the premise that the main threat to peace was the
aggressive nature of our major adversary. We engaged in self-serving declarations that our weapons were merely defensive.  

5.2.6 Justification # 6. The preservation of one’s way of life.

Democracy, free enterprise, communism, or the socialist ways of life are objective which may be sincerely and deeply cherished by those desiring their preservation. How much may legitimately be sacrificed for the preservation of such cherished ways of life? Clearly a great deal, the use of nuclear weapons would not contribute to their preservation, but only to their sheer destruction. As Professor John Kenneth Galbraith once said, it will be difficult to distinguish the ashes of capitalism from those of communism after the global incinerations that will characterize nuclear war.

5.2.7 Justification # 7. Preventing destabilization of areas of influence

The prevention destabilization of areas of influence is another pillar of traditional strategic planning which may seem realistic in the context of conventional warfare but is completely unrealistic in the context of nuclear warfare. The nuclear winter would see postwar survivors struggling for survival amidst freezing conditions and bear lethal doses of radiation. As mentioned earlier, the threshold for majors’ climatic consequence may be very low. Only 100 megatons detonated over major urban center cloud create sub-freezing land temperatures for months. A 5,000 megaton war would spread dust clouds and radioactivity from the Northern to the Southern Hemisphere, constituting a serious threat to the survival of all living beings. It is hard to see how this chain of events is “perverting the destabilization of one’s area of influence”.

5.3 Theory Based Justification

Not until then the drop of nuclear weapon on Hiroshima and Nagasaki the ideal critic around the word pronounced the act as guilty to humanity. The justification then there given, were extremely contradicting and in view with the international politics, the nuclear surmount considered the act as necessary to the

30 Id.
situation prevailing and justifying that the bomb dropped have further saved thousands of life’s of the people of U.S and Japan, this is perhaps the most ridiculous way to escape from the liability of inhuman act, since the purpose behind the Manhattan project was to prepare a defense strategy to defeat Germany, then why was the bomb dropped on Japan. The whole scenario takes a twist when U.S President Roosevelt took up the decision to drop the bomb on Japan in spite of it surrender. The following are among the most commonly advanced argument.

1. There were only three bombs available not a vast arsenal. These have been produced at the cost of billions. The Americans could not afford the luxury of wasting a bomb.

2. If there were an advertised demonstration and the bomb did not work, the blow to American prestige would have been too great. It would have been worse in the result then if the demonstration had not been made.

3. The Japanese High Command in Tokyo may not necessarily have been impressed by a remote demonstration of the power of the bomb. Japanese tenacity was so great that a more immediate demonstration was required of its power.

4. The advantage of surprise would have been lost.

5. The war needed to be ended as early as possible, for every month of delay meant that soviet influenced in the Eastern theatre would increase. Without dropping the bomb, there was a great likelihood of soviet occupation of large areas of Asia and even of Japan itself.

The strategical military approach of nuclear weapon use by U.SA did not stand up to mark of rationalism. Today the strategical military use of nuclear weapon rely more on deterrence theory, and this theory has got its own pros and cons, which developed with the cold war and further nuclear proliferation among the nations. Deterrence theory gained increased prominence as a military strategy during the Cold War with regard to the use of nuclear weapons, and figures prominently in current United States foreign policy regarding the development of nuclear technology in

---

32 A. I. Nikitin, Morten Bremer Maarli, Tuning priorities in nuclear arms control and non-proliferation: comparing approaches of Russia and the West, (IOS Press, 2008), p.45
34 Id.
North Korea and Iran. Many commentators point to the Cold War and the use of nuclear weapons as the event that resulted in the development of deterrence theory in military strategy. In reality however deterrence theory was identified as a military strategy long before this time. In Schelling’s classic works of 1966 the concept that military strategy can no longer be defined as the science of military victory is presented. Instead, it is argued that military strategy is now equally, if not more, the art of coercion, of intimidation and deterrence.\textsuperscript{35}

Schelling goes on to explain the foundations of deterrence theory based on diplomacy. Diplomacy between states is defined as a form of bargaining that seeks outcomes for each state that though not ideal for either party, are better for both than other alternatives. In order for diplomacy to succeed, there must be some common interest, if only in the avoidance of mutual damage. Traditionally in military strategy, \textit{mutual sufferent} (i.e. pain and suffering) is among the results of warfare; however they have also been incidental and not the purpose. In the development of military strategy however, the capacity to hurt another state is now used as a motivating factor for other states to avoid it and influence another state’s behavior. In order to be coercive or deter another state, violence has to be anticipated and avoidable by accommodation. The power to hurt as bargaining power is the foundation of deterrence theory, and is most successful when it is held in reserve.\textsuperscript{36}

\subsection*{5.3.1 The Concept of Deterrence}

The use of military threats as a means to deter international crises and war has been a central topic of international security research for decades. Research has predominantly focused on the theory of rational deterrence to analyze the conditions under which conventional deterrence is likely to succeed or fail. Alternative theories however have challenged the rational deterrence theory and have focused on organizational theory and cognitive psychology.\textsuperscript{37} The concept of deterrence can be defined as the use of threats by one party to convince another party to refrain from initiating some course of action. A threat serves as a deterrent to the extent that it convinces its target not to carry out the intended action because of the costs and losses that target would incur. In international security, a policy of deterrence generally

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{35} Supra 33 at.p.105
\item \textsuperscript{36} Id.
\item \textsuperscript{37} Wade L. Huntley, ‘Nuclear Disarmament in the Twenty-first Century’ (Lulu.com, 2005), p.115
\end{itemize}
\end{footnotesize}
 Legal Regime on the Use of Nuclear Weapon and its Impact on Humanity

refers to threats of military retaliation directed by the leaders of one state to the leaders of another in an attempt to prevent the other state from resorting to the threat of use of military force in pursuit of its foreign policy goals.

As outlined by Huth (1999), a policy of deterrence can fit into two broad categories being (i) preventing an armed attack against a country’s own territory (known as direct deterrence); or (ii) preventing an armed attack against another state (known as extended deterrence). Situations of direct deterrence often occur when there is a territorial dispute between neighboring states in which major powers (e.g. the United States) do not directly intervene. On the other hand, situations of extended deterrence often occur when a major power becomes involved. It is the latter than has generated the majority of interest in academic literature. Building on these two broad categories, deterrence policies may be implemented in response to a pressing short-term threat (known as immediate deterrence) or as strategy to prevent a military conflict or short term threat from arising (known as general deterrence).

A successful deterrence policy must be considered in not only military terms, but also in political terms. In military terms, deterrence success refers to preventing state leaders from issuing military threats and actions that escalate peacetime diplomatic and military cooperation into a crisis or militarized confrontation which threatens armed conflict and possibly war. The prevention of crises of wars however is not the only aim of deterrence. In addition, defending states must be able to resist the political and military demands of a potential attacking nation. If armed conflict is avoided at the price of diplomatic concessions to the maximum demands of the potential attacking nation under the threat of war, then it cannot be claimed that deterrence has succeeded.

Furthermore, as Jentleson et al (2005) argue, two key sets of factors for successful deterrence are important being (i) a defending state strategy that balances credible coercion and deft diplomacy consistent with the three criteria of proportionality, reciprocity and coercive credibility, and that minimizes international and domestic constraints; and (ii) the extent of an attacking state’s vulnerability as shaped by its domestic political and economic conditions. In broad terms, a state

---

38 Id.
39 Id at, p. 134
wishing to implement a strategy of deterrence is most likely to succeed if the costs of non-compliance it can impose on, and the benefits of compliance it can offer to, another state are greater than the benefits of noncompliance and the costs of compliance.

The other important consideration to take into account is the domestic political and economic conditions within the attacking state affecting its vulnerability to deterrence policies, and the attacking state’s ability to compensate unfavorable power balances. The first factor is whether internal political support and regime security are better served by defiance, or if there are domestic political gains to be made from improving relations with the defending state. The second factor is an economic calculation of the costs that military force, sanctions, and other coercive instruments can be imposed, and the benefits that trade and other economic incentives may carry.\textsuperscript{40} This in part is a function of the strength and flexibility of the attacking state’s domestic economy and its capacity to absorb or counter the costs being imposed. The third factor is the role of elites and other key domestic political figures within the attacking state. To the extent these actors’ interests are threatened with the defending state’s demands, they will act to prevent or block the defending state’s demands.

\textbf{5.3.2 Proportionality}

Jentleson George et al (2005) provide further detail in relation to these factors. Firstly, proportionality refers to the relationship between the defending state’s scope and nature of the objectives being pursued, and the instruments available for use to pursue this.\textsuperscript{41} The more the defending state demands of another state, the higher that state’s costs of compliance and the greater need for the defending state’s strategy to increase the costs of noncompliance and the benefits of compliance. This is a challenge, as deterrence is, by definition, a strategy of limited means. George goes on to explain that deterrence may, but is not required to, go beyond threats to the actual use of military force; but if force is actually used, it must be limited and fall short of full scale use or war otherwise it fails. The main source of dis-proportionality is an objective that goes beyond policy change to regime change. This has been seen in the cases of Libya, Iraq and North Korea where defending states have sought to

\textsuperscript{40} Id.
\textsuperscript{41}Pictet, Jean, 'Humanitarian law and the protection of war victims,' (Leyden: Sijthoff,1975), pp.16-17
change the leadership of a state in addition to policy changes relating primarily to their nuclear weapons programs.\textsuperscript{42}

5.3.3 Reciprocity

Secondly, Jentleson et al (2005) outline that reciprocity involves an explicit understanding of linkage between the defending state’s carrots and the attacking state’s concessions. The balance lies neither in offering too little too late or for too much in return, not offering too much too soon or for too little return.\textsuperscript{43}

5.3.4 Coercive Credibility

Finally, coercive credibility requires that, in addition to calculations about costs and benefits of cooperation, the defending state convincingly conveys to the attacking state that non-cooperation has consequences. Threats, uses of force, and other coercive instruments (such as economic sanctions) must be sufficiently credible in order to raise the attacking state’s perceived costs of noncompliance.\textsuperscript{44} A defending state having a superior military capability or economic strength in itself is not enough to ensure credibility. Indeed, all three elements of a balanced deterrence strategy are more likely to be achieved if other major international actors (for example the United Nations or NATO) are supportive and if opposition within the defending state’s domestic politics is limited.

5.4 The Rational Deterrence Theory

The predominant approach to theorizing about deterrence has entailed the use of rational choice and game-theoretic models of decision making.\textsuperscript{45} Deterrence theorists have consistently argued that deterrence success is more likely if a defending state's deterrent threat is credible to an attacking state. Huth (1999) outlines that a threat is considered credible if the defending state possesses both the military capabilities to inflict substantial costs on an attacking state in an armed conflict, and if the attacking state believes that the defending state is resolved to use its available

\textsuperscript{43} Supra Pictet, Jean at, p89
\textsuperscript{45} Supra, 40
military forces. Huth (1999) goes on to explain the four key factors for consideration under rational deterrence theory being (i) the military balance; (ii) signaling and bargaining power; (iii) reputations for resolve; and (iv) interest at stake.\footnote{Id at p.70}

5.4.1 The Military Balance.

Deterrence is often directed against state leaders who have specific territorial goals that they seek to attain either by seizing disputed territory in a limited military attack or by occupying disputed territory after the decisive defeat of the adversary’s armed forces. In either case, the strategic orientation of potential attacking states is generally short term and driven by concerns about military cost and effectiveness. For successful deterrence, defending states need the military capacity to respond quickly and in strength to a range of contingencies. Where deterrence often fails is when either a defending state or an attacking state under or overestimate the others’ ability to undertake a particular course of action.

5.4.2 Signaling and Bargaining Power

The central problem for a state that seeks to communicate a credible deterrent threat through diplomatic or military actions is that all defending states have an incentive to act as if they are determined to resist an attack, in the hope that the attacking state will back away from military conflict with a seemingly resolved adversary. If all defending states have such incentives, then potential attacking states may discount statements made by defending states along with any movement of military forces as merely bluffs. In this regards, rational deterrence theorists have argued that costly signals are required to communicate the credibility of a defending state’s resolve.\footnote{Supra 37,Id} Costly signals are those actions and statements that clearly increase the risk of a military conflict and also increase the costs of backing down from a deterrent threat. States that are bluffing will be unwilling to cross a certain threshold of threat and military action for fear of committing themselves to an armed conflict.

5.4.3 Reputations for Resolve

There are three different arguments that have been developed in relation to the role of reputations in influencing deterrence outcomes. The first argument focuses on
a defending states’ past behavior in international disputes and crises, which creates strong beliefs in a potential attacking state about the defending states expected behavior in future conflicts. The credibility’s of a defending state’s policies are arguably linked over time, and reputations for resolve have a powerful causal impact on an attacking state’s decision whether to challenge either general or immediate deterrence.\(^48\) The second approach argues that reputations have a limited impact on deterrence outcomes because the credibility of deterrence is heavily determined by the specific configuration of military capabilities, interests at stake, and political constraints faced by a defending state in a given situation of attempted deterrence. The argument of this school of thought is that potential attacking states are not likely to draw strong inferences about a defending states resolve from prior conflicts because potential attacking states do not believe that a defending state’s past behavior is a reliable predictor of future behavior. The third approach is a middle ground between the first two approaches. It argues that potential attacking states are likely to draw reputational inferences about resolve from the past behavior of defending states only under certain conditions. The insight is the expectation that decision makers will use only certain types of information when drawing inferences about reputations, and an attacking state updates and revises its beliefs when the unanticipated behavior of a defending state cannot be explained by case-specific variables.\(^49\)

5.4.4 Interests at Stake

Although costly signaling and bargaining power are more well established arguments in rational deterrence theory, the interests of defending states are not as well known, and attacking states may look beyond the short term bargaining tactics of a defending state and seek to determine what interests are at stake for the defending state that would justify the risks of a military conflict. The argument here is that defending states that have greater interests at stake in a dispute will be more resolved to use force and be more willing to endure military losses in order to secure those interests. Even less well established arguments are the specific interests that are more salient to state leaders such as military interests versus economic interests.\(^50\)

\(^48\) Krishnan, N.K. Imperialist Onslaught Real issue before Non aligned Summit. (New Age 1979), p.90
Furthermore, Huth (2009) argues that both supporters and critics of rational deterrence theory agree that an unfavorable assessment of the domestic and international status quo by state leaders can undermine or severely test the success of deterrence. In a rational choice approach, if the expected utility of not using force is reduced by a declining status quo position, then deterrence failure is more likely, since the alternative option of using force becomes relatively more attractive.\footnote{Id}

5.5. Nuclear Power and Deterrence

Schelling (1966) is prescriptive in outlining the impact of the development of nuclear power in the analysis of military power and deterrence. For the first time in history, man has the power to eliminate his species from earth, and have developed weapons against which there is no conceivable defense. The key difference in the development of nuclear weapons however is not the level of damage they can cause, but the speed with which it can be done. This allows a state to inflict extreme damage to an opposing state without first achieving victory.\footnote{Alperovitz, Gar and Kai Bird. 'The centrality of the bomb.' Foreign Policy. V94, Spring 1994, p3-20} This element is a key contributor to the increased prominence of deterrence theory in the post Cold War period. Extreme pain and damage through nuclear weapons are now the primary instruments of coercive warfare which can be applied to intimidate or deter another state. These instruments allow deterrence policies to become increasingly powerful to the extent that the threat of use of nuclear power by a state is credible.\footnote{Booth: Ken, 'The Evolution of Strategic Thinking.' J. Baylis (et.al), Contemporary Strategy: Theories and Concepts, (New York: Holmes and Meier, 1987), pp109-178}

Nuclear deterrence is the application of deterrence theory to nuclear weapons, and can refer to a number of nuclear strategies such as:

- d. Minimal deterrence - a "limited" form of deterrence.
- e. Massive retaliation - deterrence based on retaliating with greater force than originally used.
- f. Mutual assured destruction - an "unlimited" form of deterrence.

- a. Minimal deterrence - a "limited" form of deterrence.

In nuclear strategy, minimal deterrence (also called \textit{minimum deterrence}) is an application of deterrence theory in which a state possesses no more nuclear...
Legal Regime on the Use of Nuclear Weapon and its Impact on Humanity

weapons than is necessary to deter an adversary from attacking.\footnote{Id.} Pure minimal deterrence is a doctrine of no first use, holding that the only mission of nuclear weapons is to deter a nuclear adversary by making the cost of a first strike unacceptably high. To present a credible deterrent, there must be the assurance that any attack would trigger a retaliatory strike. In other words, minimal deterrence requires rejecting a counterforce strategy in favor of pursuing survivable force that can be used in a counter value second strike. While the United States and the Soviet Union each developed robust first and second strike capabilities during the Cold War, the People's Republic of China pursued a doctrine of minimal nuclear deterrence. “Assuming that decision-makers make cost-benefit analyses when deciding to use force, China's doctrine calls for acquiring a nuclear arsenal only large enough to destroy an adversary’s "strategic points" in such a way that the expected costs of a first strike outweigh the anticipated benefits. Both India and Pakistan have also adopted this strategy, which they term Minimum Credible Deterrence.\footnote{Ibid at, p 181}

Minimal deterrence represents one way of solving the security dilemma and avoiding an arms race. Decision-makers often feel pressured to expand their arsenals when they perceive them to be vulnerable to an adversary’s first strike, especially when both sides seek to achieve the advantage. Eliminating this perceived vulnerability reduces the incentive to produce more and advanced weapons. For example, the United States’ nuclear force exceeds the requirements of minimal deterrence, and is structured to strike numerous targets in multiple countries and to have the ability to conduct successful counterforce strikes with high confidence. In response to this, China continues to modernize its nuclear forces because its leaders are concerned about the survivability of their arsenal in the face of the United States’ advances in strategic reconnaissance, precision strike, and missile defense.\footnote{Bracken, Paul. The Command and Control of Nuclear Forces. Yale University Press: New Haven and London, 1983. P.90} One disadvantage of minimal deterrence is that it requires an accurate understanding of the level of damage an adversary finds unacceptable, especially if that understanding changes over time so that a previously credible deterrent is no longer credible. A minimal deterrence strategy must also account for the nuclear firepower that would be "lost" or "neutralized" during an adversary’s counterforce strike. Additionally, a
minimal deterrence capability may embolden a state when it confronts a superior nuclear power, as has been observed in the relationship between China and the United States. Finally, while pursuing minimal deterrence during arms negotiations allows states to make reductions without becoming vulnerable, further reductions may be undesirable once minimal deterrence is reached because they will increase a state’s vulnerability and provide an incentive for an adversary to secretly expand its nuclear arsenal.

b. Massive retaliation - deterrence based on retaliating with greater force than originally used.

Massive retaliation was a term coined by Eisenhower's Secretary of State John Foster Dulles in a speech on January 12, 1954. Dulles stated that the U.S. would respond to military provocation "at places and with means of our own choosing." This was interpreted to mean that the U.S. could respond to any foreign challenge with nuclear weapons. Dulles also said that "Local defense must be reinforced by the further deterrent of massive retaliatory power." This quote forms the basis for the term massive retaliation, which would back up any conventional defense against conventional attacks with a possible massive retaliatory attack involving nuclear weapons. The doctrine of massive retaliation was based on the west's increasing fear at the perceived imbalance of power in conventional forces, a corresponding inability to defend itself or prevail in conventional conflicts. By relying on a large nuclear arsenal for deterrence, President Eisenhower believed that conventional forces could be reduced while still maintaining military prestige and power and the capability to defend the western bloc. Upon a conventional attack on Berlin, for instance, the United States would undertake a massive retaliation on the Soviet Union with nuclear weapons. The massive response doctrine was thus an extension of mutually assured destruction to conventional attacks, conceivably deterring the Soviet Union from attacking any part of the United States' sphere of influence even with conventional weapons. Massive retaliation, also known as a massive response or massive deterrence, is a military doctrine and nuclear strategy in which a state commits it to retaliate in much greater force in the event of an attack. In the event of an attack from an aggressor, a state would massively retaliate by using a force disproportionate to the

57 Booth: Ken, Supra, 51, ibid
58 Id.
size of the attack. The aim of massive retaliation is to deter an adversary from initially attacking. For such a strategy to work, it must be made to the public knowledge to all possible aggressors. The adversary also must believe that the state announcing the policy has the ability to maintain second-strike capability in the event of an attack. It must also believe that the defending state is willing to go through with the deterrent threat, which would likely involve the use of nuclear weapons on a massive scale.\(^{59}\)

Massive retaliation works on the same principles as mutually assured destruction, with the important caveat that even a minor conventional attack on a nuclear state could conceivably result in all-out nuclear retaliation. In theory, as the U.S.S.R. had no desire to provoke an all-out nuclear attack, the policy of massive response likely deterred any ambitions it would have had on Western Europe. Although the United States and NATO bloc would be hard-pressed in a conventional conflict with the Warsaw Pact forces if a conventional war were to occur, the massive response doctrine prevented the Soviets from advancing for fear that a nuclear attack would have been made upon the Soviet Union in response to a conventional attack.\(^{60}\)

It can be argued that, however, aside from raising tensions in an already strained relationship with the Soviet bloc, massive retaliation had few practical effects. A threat of massive retaliation is hard to make credible, and is inflexible in response to foreign policy issues. Everyday challenges of foreign policy could not be dealt with using a massive nuclear strike. In fact, the Soviet Union took many minor military actions that would have necessitated the use of nuclear weapons under a strict reading of the massive retaliation doctrine.\(^{61}\)

A massive retaliation doctrine, as with any nuclear strategy based on the principle of mutually assured destruction and as an extension the second-strike capability needed to form a retaliatory attack, encourages the opponent to perform a massive counterforce first strike. This, if successful, would cripple the defending state's retaliatory capacity and render a massive retaliation strategy useless.

\(^{59}\) Supra, 54, ibid.


Also, if both sides of a conflict adopt the same stance of massive response, it may result in unlimited escalation (a "nuclear spasm"), each believing that the other will back down after the first round of retaliation. Both problems are not unique to massive retaliation, but to nuclear deterrence as a whole. Though U.S had strongly withheld the principles of massive retaliation but later year under the administration of President John F. Kennedy it abandoned the policy of massive retaliation during the Cuban Missile Crisis in favor of flexible response. Under the Kennedy Administration, the U.S. adopted a more flexible policy in an attempt to avert nuclear war if the Soviets did not cooperate with American demands. If the United States only announced military reaction to any Soviet incursion (no matter how small) were a massive nuclear strike, and the U.S. didn't follow through, then the Soviets would assume that the United States would never attack. This would have made the Soviet Union far bolder in its military ventures against U.S. allies and would probably have resulted in a full-scale nuclear war. By having other, more flexible policies to deal with aggressive Soviet actions, the U.S. could opt out of a nuclear strike and take less damaging actions to rectify the problem without losing face in the international community.62

c. Mutual assured destruction - an "unlimited" form of deterrence.

The doctrine of Mutual Assured Destruction (MAD) assumes that each side has enough nuclear weaponry to destroy the other side and that either side, if attacked for any reason by the other, would retaliate with equal or greater force. The expected result is an immediate escalation resulting in both combatants' total and assured destruction.63

The doctrine further assumes that neither side will dare to launch a first strike because the other side will launch on warning (also called fail-deadly) or with secondary forces (second strike) resulting in the destruction of both parties. The payoff of this doctrine is expected to be a tense but stable peace.

The primary application of this doctrine started during the Cold War (1940s to 1990s) in which MAD was seen as helping to prevent any direct full-scale conflicts between the United States and the Soviet Union while they engaged in smaller proxy
Legal Regime on the Use of Nuclear Weapon and its Impact on Humanity

wars around the world. It was also responsible for the arms race, as both nations struggled to keep nuclear parity, or at least retain second-strike capability. Although the Cold War ended in the early 1990s, the doctrine of Mutual Assured Destruction certainly continues to be in force.\textsuperscript{64}

Proponents of MAD as part of U.S. and USSR strategic doctrine believed that nuclear war could best be prevented if neither side could expect to survive a full scale nuclear exchange as a functioning state. Since the credibility of the threat is critical to such assurance, each side had to invest substantial capital in their nuclear arsenals even if they were not intended for use. In addition, neither side could be expected or allowed to adequately defend itself against the other's nuclear missiles. This led both to the hardening and diversification of nuclear delivery systems (such as nuclear missile silos, ballistic missile submarines and nuclear bombers kept at fail-safe points) and to the Anti-Ballistic Missile Treaty. This MAD scenario is often referred to as nuclear deterrence. The term deterrence was first used in this context after World War II; prior to that time, its use was limited to legal terminology.\textsuperscript{65}

These strategies of deterrence later initiated the nuclear surmount to conclude policies on nuclear deterrence, and as such the policies are executed as an instruments of balance of power. Basically there are three advanced argument on deterrence policies on theory based justification, and the theories are developed out of these argument. The theories are:-

1. The Mutual Assured Destruction theory or the Game theory.
2. Schlesinger Doctrine of Nuclear Strike Policy.
3. Doctrine of No First Use of Nuclear Weapon.

5.5.1 The Mutual Assured Destruction theory or the Game theory.

Game theory's development accelerated at a record pace during World War II. Though it was intended for economics, both United States and the Soviet Union quickly saw its value for forming war strategies. The mutually assured destruction which is also known as game theory as the name specifies has a long history of origin. The Game theory was developed by John von Neumann (1903-1957) and Oskar

\textsuperscript{64} Id.
Legal Regime on the Use of Nuclear Weapon and its Impact on Humanity

Morganstern (1902-1977). John von Neumann was originally a physicist, contributed largely to the field of economic and is well known as the founder of Game theory in Economic. While economists recognize von Neumann for his contributions to game theory, his more significant accomplishment was as a co-inventor of the atomic bomb. As a method of applied mathematics, game theory has been used to study a wide variety of human and animal behaviors. It was initially developed in economics to understand a large collection of economic behaviors, including behaviors of firms, markets, and consumers. The use of game theory was also extended in social science, and game theory has been applied to political, sociological, and psychological behaviors as well. The application of game theory to political science is focused in the overlapping areas of fair division, political economy, public choice, war bargaining, positive political theory, and social choice theory. In each of these areas, researchers have developed game-theoretic models in which the players are often voters, states, special interest groups, and politicians. The inclusion of game theory as a policy to use nuclear weapon was a strategic approach toward deterrence theory.

As mentioned above MAD theory assumes the nuclear capacity of both the parties, and declares that in either case party in use of nuclear weapon shall be retaliated by the opposite side. Mutual Assured Destruction, or MAD, is a doctrine of military strategy and national security policy in which a full-scale use of high-yield weapons of mass destruction by two opposing sides would effectively result in the destruction of both the attacker and the defender, becoming thus a war that has no victory nor any armistice but only total annihilation. It is based on the theory of deterrence according to which the deployment of strong weapons is essential to threaten the enemy in order to prevent the use of the same weapons.

a. History.

Perhaps the earliest reference to the concept comes from the English author Wilkie Collins, writing at the time of the Franco-Prussian War in 1870: "I begin to believe in only one civilizing influence the discovery one of these days of a destructive agent so terrible that War shall mean annihilation and men's fears will

\*66 Gaffney Frank., 'Abandoning deterrence will be nuclear nightmare come true.' Insight on the News,(V13 N46, Dec. 15 1997), p30.

\*67 Supra.64, Id.
force them to keep the peace".\textsuperscript{68} Echoes of the doctrine can be found in the first document which outlined how the atomic bomb was a practical proposition. In March 1940, the Frisch-Peierls memorandum anticipated deterrence as the principal means of combating an enemy with nuclear weapons.

In practice during World War II, utter annihilation from the air had already been visited upon the enemies of the Allied forces, both in Europe and Japan, well before use of the Atomic Bomb, and with perhaps even deadlier results. The incendiary attacks on Dresden, Germany, and Tokyo, Japan, e.g., in efforts to finally force surrender and end both the European and Pacific Theaters, set the precedent for the concepts of Total War and MAD.

\textbf{b. Early cold war.}

In August 1945, the United States accepted the surrender of Japan after the nuclear attacks on Hiroshima and Nagasaki. Four years later, on August 29, 1949, the Soviet Union detonated its own nuclear weapon. Though both sides lacked the means to effectively use nuclear devices against each other with the development of aircraft like the Convair B-36, both sides were gaining a greater ability to deliver nuclear weapons into the interior of the opposing country. The official nuclear policy of the United States was one of "massive retaliation", as coined by President Dwight D. Eisenhower’s Secretary of State John Foster Dulles, which called for massive attack against the Soviet Union if they were to invade Europe, regardless of whether it was a conventional or a nuclear attack.\textsuperscript{69} During the 1962 Cuban Missile Crisis, the Soviet Union truly developed an understanding of the effectiveness of U.S. ballistic missile submarine forces, and work on Soviet ballistic missile submarines began in earnest. For the remainder of the Cold War, although official positions on MAD changed in the United States, the consequences of the second strike from ballistic missile submarines was never in doubt.\textsuperscript{70}

The multiple independently targetable re-entry vehicles (MIRV) was another weapons system designed specifically to aid with the MAD nuclear deterrence

\textsuperscript{68} Id.
\textsuperscript{70} Id.
doctrine. With a MIRV payload, one ICBM could hold many separate warheads. MIRVs were first created by the United States in order to counterbalance Soviet antiballistic missile systems around Moscow. Since each defensive missile could only be counted on to destroy one offensive missile, making each offensive missile have, for example, three warheads (as with early MIRV systems) meant that three times as many defensive missiles were needed for each offensive missile. This made defending against missile attacks more costly and difficult. One of the largest U.S. MIRVed missiles, the LGM-118A Peacekeeper, could hold up to 10 warheads, each with a yield of around 300 kilotons—all together, an explosive payload equivalent to 230 Hiroshima-type bombs. The multiple warheads made defense untenable with the technology available, leaving only the threat of retaliatory attack as a viable defensive option. MIRVed land-based ICBMs are considered destabilizing because they tend to put a premium on striking first. It is because of this that this type of weapon was banned under the START II agreement.\(^71\)

In the event of a Soviet conventional attack on Western Europe, NATO planned to use tactical nuclear weapons. The Soviet Union countered this threat by issuing a statement that any use of nuclear weapons (tactical or otherwise) against Soviet forces would be grounds for a full-scale Soviet retaliatory strike. Thus it was generally assumed that any combat in Europe would end with apocalyptic conclusions. The quote "I know not with what weapons World War III will be fought, but World War IV will be fought with sticks and stones" is generally attributed to Albert Einstein.

c. Second strike capacity.

It was only with the advent of ballistic missile submarines, starting with the *George Washington* class in 1959 that a survivable nuclear force became possible and second strike capability credible.\(^72\) This was not fully understood until the 1960s when the strategy of mutually assured destruction was first fully described, largely by United States Secretary of Defense Robert McNamara.

\(^71\)Gray, Colin. Strategic Studies and Public Policy: the American Experience. (University of Kentucky, 1982), pp76

\(^72\) Id
Legal Regime on the Use of Nuclear Weapon and its Impact on Humanity

In McNamara’s formulation, MAD meant that nuclear nations either had first strike or second strike capability. A nation with first strike capability would be able to destroy the entire nuclear arsenal of another nation and thus prevent any nuclear retaliation. Second strike capability indicated that a nation could uphold a promise to respond to a nuclear attack with enough force to make such a first attack highly undesirable. According to McNamara, the arms race was in part an attempt to make sure that no nation gained first strike capability.\(^\text{73}\)

An early form of second strike capability had already been provided by the use of continual patrols of nuclear-equipped bombers, with a fixed number of planes always in the air (and therefore untouchable by a first strike) at any given time. The use of this tactic was reduced however, by the high logistic difficulty of keeping enough planes active at all times, and the increasing priority given to ICBMs over bombers (which might be shot down by air defenses before reaching their targets).

Ballistic missile submarines established a second strike capability through their stealth and by the number fielded by each Cold War adversary. It was highly unlikely that all of them could be targeted and preemptively destroyed (in contrast to, for example, a missile silo with a fixed location that could be targeted during a first strike). Given their long range, high survivability and ability to carry many medium and long-range nuclear missiles, submarines were credible and effective means for full-scale retaliation even after a massive first strike.

\textbf{d. Late cold war.}

The original doctrine of U.S. MAD was modified on July 25, 1980, with U.S. President Jimmy Carter’s adoption of \textit{countervailing strategy} with Presidential Directive. According to its architect, Secretary of Defense Harold Brown, "countervailing strategy" stressed that the planned response to a Soviet attack was no longer to bomb Russian population centers and cities primarily, but first to kill the Soviet leadership, then attack military targets, in the hope of a Russian surrender before total destruction of the USSR (and the United States). This modified version of MAD was seen as a winnable nuclear war, while still maintaining the possibility of assured destruction for at least one party. This policy was further developed by

\(^{73}\) Supra 67, at, pp. 18-95
the Reagan Administration with the announcement of the Strategic Defense Initiative (nicknamed "Star Wars"), the goal of which was to develop space-based technology to destroy Soviet missiles before they reached the U.S.\textsuperscript{74} SDI was criticized by both the Soviets and many of America's allies (including Prime Minister of the United Kingdom Margaret Thatcher) because, were it ever operational and effective, it would have undermined the "assured destruction" required for MAD. If America had a guarantee against Soviet nuclear attacks, its critics argued, it would have first strike capability which would have been a politically and militarily destabilizing position. Critics further argued that it could trigger a new arms race, this time to develop countermeasures for SDI. Despite its promise of nuclear safety, SDI was described by many of its critics (including Soviet nuclear physicist and later peace activist Andrei Sakharov) as being even more dangerous than MAD because of these political implications. Supporters also argued that SDI could trigger a new arms race, forcing the USSR to spend an increasing proportion of GDP on defense something which has been claimed to have been an indirect cause of the eventual collapse of the Soviet Union.\textsuperscript{75}

Proponents of Ballistic Missile Defense (BMD) argue that MAD is exceptionally dangerous in that it essentially offers a single course of action in the event of nuclear attack: full retaliatory response. The fact that nuclear proliferation has led to an increase in the number of nations in the "nuclear club", including nations of questionable stability (Pakistan and North Korea, e.g.), and that a nuclear nation might be hijacked by a despot or other person or persons who might use nuclear weapons without sane regard for the consequences, presents a strong case for proponents of BMD who seek a policy which both protects against attack, but also does not require an escalation into what might become global nuclear war. Russia continues to have a strong public distaste for Western BMD initiatives, presumably because proprietary operative BMD systems could exceed their technical and financial resources, and therefore degrade their larger military standing and sense of security in a post-MAD environment. Russian refusal to accept invitations to participate in NATO BMD may be indicative of the lack of an alternative to MAD in

\textsuperscript{74} Halperin, Morton H. Nuclear Fallacy: dispelling the myth of nuclear strategy. (Cambridge: Ballinger, 1987), p.676
\textsuperscript{75} Id
current Russian war fighting strategy due to dilapidation of conventional forces after the breakup of the Soviet Union.\textsuperscript{76}
e. Post cold war.

After the fall of the Soviet Union, the Russian Federation emerged as a sovereign entity encompassing most of the territory of the former USSR. Relations between the U.S. and this new power have been less tense than they had been with its predecessor. Tensions also decreased between the U.S and China.\textsuperscript{77}

The administration of U.S. President George W. Bush withdrew from the Anti-Ballistic Missile Treaty in June 2002, claiming that the limited national missile defense system which they propose to build is designed only to prevent nuclear blackmail by a state with limited nuclear capability and is not planned to alter the nuclear posture between Russia and the United States.

While relations have improved and an intentional nuclear exchange is more unlikely, the decay in Russian nuclear capability in the post Cold War era may have had an effect on the continued viability of the MAD doctrine. An article by Keir Lieber and Daryl Press stated that the United States could carry out a nuclear first strike on Russia and would "have a good chance of destroying every Russian bomber base, submarine, and ICBM." This was attributed to reductions in Russian nuclear stockpiles and the increasing inefficiency and age of that which remains. Lieber and Press argued that the MAD era is coming to an end and that U.S. is on the cusp of global nuclear primacy.

However, in a follow up article in the same publication, others criticized the analysis, including Peter Flory, the U.S. Assistant Secretary of Defense for International Security Policy, who began by writing "The essay by Keir Lieber and Daryl Press contains so many errors, on a topic of such gravity, that a Department of Defense response is required to correct the record." Regarding reductions in Russian

stockpiles, another response stated that "a similarly one-sided examination of [reductions in] U.S. forces would have painted a similarly dire portrait."\(^7\)

A situation in which the United States might actually be expected to carry out a "successful" attack is perceived as a disadvantage for both countries. The strategic balance between the United States and Russia is becoming less stable, and the objective, technical possibility of a first strike by the United States is increasing. At a time of crisis, this instability could lead to an accidental nuclear war. For example, if Russia feared a U.S. nuclear attack, Moscow might make rash moves (such as putting its forces on alert) that would provoke a U.S. preemptive strike. An outline of current United States nuclear strategy toward both Russia and other nations was published as the document "Essentials of Post–Cold War Deterrence" in 1995.\(^7\)

e. Official Policy.

Whether MAD was the officially accepted doctrine of the United States military during the Cold War is largely a matter of interpretation. The term MAD was not coined by the military but was, however, based on the policy of "Assured Destruction" advocated by U.S. Secretary of Defense Robert McNamara during the 1960s. The United States Air Force, for example, has retrospectively contended that it never advocated MAD as a sole strategy, and that this form of deterrence was seen as one of numerous options in U.S. nuclear policy.\(^8\) Former officers have emphasized that they never felt as limited by the logic of MAD (and were prepared to use nuclear weapons in smaller scale situations than "Assured Destruction" allowed), and did not deliberately target civilian cities (though they acknowledge that the result of a "purely military" attack would certainly devastate the cities as well). MAD was implied in several U.S. policies and used in the political rhetoric of leaders in both the U.S. and the USSR during many periods of the Cold War.\(^9\)

\(^7\) Klein, Bradley. Strategic studies and world order. Cambridge: (Cambridge University Press 1994), pp.45-98
\(^9\) Id
f. Criticism.

Critics of the MAD doctrine frequently played on the similarity between the acronym and the common word for mental illness. The doctrine of nuclear deterrence depends on several challengeable assumptions.

5.5.2 Second strike capacity.

If first strike is not capable of preventing a retaliatory, second strike or else mutual destruction is not assured. In this case, a state would have nothing to lose with a first strike; or might try to preempt the development of an opponent's second-strike capability with a first strike (i.e., decapitation strike). To avoid this, countries may design their nuclear forces to make decapitation strike almost impossible, by dispersing launchers over wide areas and using a combination of sea-based, air-based, underground, and mobile land-based launchers.82

d. Perfect detection.

- No false positives (errors) in the equipment and/or procedures that must identify a launch by the other side. The implication of this is that an accident could lead to a full nuclear exchange. During the Cold War there were several instances of false positives, as in the case of Stanislav Petrov.

- No possibility of camouflaging a launch. The use of stealth technology in aircraft such as the B-2 bomber makes this assumption less likely to be fulfilled.

- No means of delivery that does not have the characteristics of a long range missile delivery, i.e. detectable far ahead of detonation. Again this assumption is challengeable with for instance stealth aircraft but also with other means, such as smuggling weapons to the target undetected. A close range missile attack from a submarine would also negate this assumption, as would position the weapons close to the intended target (exemplified in the Cuban Missile Crisis).83

- Perfect attribution. If there is a launch from the Sino-Russian border, it could be difficult to distinguish which nation is responsible and, hence, against which nation retaliation should occur.

---


e. **Perfect rationality.**

- No "rogue states" will develop nuclear weapons. Or, if they do, they will stop behaving as rogue states and subject themselves to the logic of MAD.
- No rogue commanders will have the ability to corrupt the launch decision process.
- All leaders with launch capability care about the survival of their subjects (for example, a leader with religious ideas about the end of the world might launch regardless).
- No leader with launch capability would strike first and gamble that the opponent's response system would fail.

f. **Inability to defend.**

- No fallout shelter networks of sufficient capacity to protect large segments of the population and/or industry.
- No development of anti-missile technology or deployment of remedial protective gear.

### 5.5.3 Schlesinger Doctrine of Nuclear Strike Policy

The *Schlesinger Doctrine* is the name, given by the press, to a major realignment of United States nuclear strike policy that was announced in January 1974 by the US Secretary of Defense, James Schlesinger.\(^\text{84}\) It outlined a broad selection of counterforce options against a wide variety of potential enemy actions, a major change from earlier SIOP policies of the Kennedy and Johnson eras that focused on Mutually Assured Destruction and typically included only one or two "all out" plans of action that used the entire U.S. nuclear arsenal in a single strike. A key element of the new plans were a variety of limited strikes solely against enemy military targets while ensuring the survivability of the U.S. second-strike capability, which was intended to leave an opening for a negotiated settlement.\(^\text{85}\)

a. **History**

This doctrine was propounded by James Schlesinger. The first coordinated nuclear attack policy in the United States was codified as SIOP-62 at the prompting of the Science Advisor in the Eisenhower Administration, George Kistiakowsky. Prior to

---

84 Henry Sokolski (ed), ’Getting Mad: Nuclear Mutual Assured Destruction, Its Origins and Practice’, Introduction by Henry S. Rowen, (Strategic Studies Institute, November 2004), pp45-56  
SIOP-62, each of the U.S.’s military branches had drawn up their own target lists and action plans, which led to a wide variety of overkill situations and the possibility of blue-on-blue fire. After Kistiakowsky reported on the problems this caused, Eisenhower took nuclear planning away from the individual branches, centralized it, and gave it to RAND for extensive oversight.\textsuperscript{86}

However, the plan that developed was still based on the same basic concept of an all-out war, or what Herman Kahn referred to as a "wargasm". SIOP-62 called for a single coordinated attack that used up the U.S.’s entire arsenal on a wide variety of targets in the Soviet Union and China. Concerns about the inflexibility of the plan were expressed early and often; U.S. Marine Commandant David Shoup noted that an attack by the Soviets would result in a retaliation that included China whether or not they were involved, and observed that "any plan that kills millions of Chinese when it isn't even their war is not a good plan. This is not the American way."

b. Flexible response

In the late 1950s a number of parties pointed out another serious problem with the all-or-nothing approach. If the Soviets launched a limited attack against isolated U.S. military targets, they could cause significant damage to the U.S.’s own nuclear forces without causing serious civilian casualties. If such an attack was successful, the Soviets would still have the capability of launching a second strike against U.S. cities, while the U.S. would be so reduced in power that their only militarily effective response would be an attack on Soviet cities, knowing the Soviets would respond. This would leave the Soviets in an extremely advantageous position for a negotiated peace. SIOP-62 simply had no response to this threat.\textsuperscript{87}

The "solution" to this problem was developed under the Kennedy Administration, and consisted of responding to limited attacks in kind. In this case, if the same scenario were to develop, the Soviets would be placed in the extremely uncomfortable position of having to allow the U.S. counterattack to land and damage their own forces, or immediately launching as soon as the attack was discovered. Neither course of action would not preserve any advantage, nor so it believed this policy would render the limited attack untenable. As early as 1962 Robert

\textsuperscript{87} Morgan, Patrick, Deterrence Now. (New York: Cambridge University Press 2003), p56
McNamara had proposed a flexible strategy starting with a number of limited counterforce strikes before proceeding to full-out exchanges. These plans, codified in SIOP-62, remained virtually unchanged for over a decade.\textsuperscript{88}

c. MAD

However, as nuclear forces moved from bombers to ICBMs with limited accuracy but high survivability, the ability to carry out a counterforce strike while the enemy forces were still on the ground became increasingly difficult. This difficulty further increased with every new iteration of missile, which continued to reduce reaction time to the point where catching them still in their silos would be extremely difficult. As these weapons were, at the time at least, relatively inaccurate, they were limited primarily to counter value attacks on the enemy's cities, further eroding the idea of a limited attack against them being responded to in-kind.

As a result of these technical changes, the idea of flexible response ossified, while mutually assured destruction (MAD) became the primary strategic concept of the era. McNamara became a major proponent of MAD, and used it as a reason to cancel other nuclear delivery systems, like the B-1 Lancer bomber. In testimony before Congress he stated that "The strategic missile forces for 1967-71 will provide more force than is required for ‘Assured Destruction’ ... a new advanced strategic aircraft do not at this time appear justified."

With the rise of MAD, all of the earlier problems with the "wargasm" approach returned. Adding to the problems, the U.S. now had obligations under various treaties to protect allies using their nuclear arms, the so-called "nuclear umbrella". This meant that the Soviets could launch a limited attack against an ally, leaving the U.S. with the choice of backing down, or accepting a full-scale exchange.\textsuperscript{89}

In June 1969 Kissinger briefed Nixon on the problem of MAD, and Nixon later addressed the issue in Congress in February 1970, stating "Should a President, in the event of a nuclear attack, be left with the single option of ordering the mass destruction of enemy civilians, in the face of the certainty that it would be followed by


\textsuperscript{89} Id
the mass slaughter of Americans?" Kissinger and Nixon developed plans for a return to a flexible response strategy, but had to put these plans on hold until the Vietnam War ended.

d. Schlesinger’s Reform

Nominated by Richard Nixon on May 10, 1973, Schlesinger became Secretary of Defense on July 2nd. As a university professor, researcher at Rand, and government official in three agencies, he had acquired an impressive background in national security affairs. Analyzing U.S. nuclear strategy, Schlesinger noted that the policies developed in the 1950s and 60s were based on an overwhelming U.S. lead in nuclear forces. The plans focused on doing as much damage to the USSR and its allies as possible, regardless of the actions the Soviets might take in response. Schlesinger stated that "deterrence is not a substitute for defense; defense capabilities, representing the potential for effective counteraction, are the essential condition of deterrence." He expressed grave doubts about the entire concept of mutually assured destruction (MAD).

Schlesinger felt that a credible deterrence would need to be based on several conditions; the U.S. would need to maintain some level of force parity with the USSR, the force would have to be highly survivable, and based on its survivability, there should be a wide range of plans that would not boil down to one of a number of different massive attacks. His new strategy was based on a number of limited counterforce attacks that would "limit the chances of uncontrolled escalation" and "hit meaningful targets" without causing widespread collateral damage. In most of these plans, majority of the U.S.’s nuclear force would be withheld in the hope that the enemy would not attack U.S. cities, while still inflicting serious military damage that might end any ongoing actions. He explicitly disavowed any intention to acquire a first-strike capability against the USSR.

---

Schlesinger described the new doctrine as having three main aspects:

1. The National Command Authority or its successors should have many choices about the use of weapons, always having an option to escalate.
2. Targeting should make it very explicit that the first requisite is selective retaliation against the enemy's military (i.e., tailored counterforce).
3. Some targets and target classes should not be struck, at least at first, to give the opponent a rational reason to terminate the conflict. Reduced collateral damage was another benefit of this "with hold" method. Nixon codified the basic concept as part of NSDM-242, which came into force as SIOP-5 in 1976.

In order to meet the needs of SIOP-5, a number of changes were made to the U.S. force structure. The B-1 bomber, recently cancelled, was brought back in order to provide a survivable strike option that could be launched as a show of U.S. intent. Additionally, Schlesinger put an emphasis on short range weapons that had clear counterforce capability, whose use would not signify an all-out counter value attack. This led to further work on systems like the Pershing II and various basing arrangements in Europe that would not reach fruition until the 1980s.\footnote{Id.}

e. Criticism

The basic outline of the Schlesinger Doctrine remained in effect until the period of rapid disarmament in the 1980s, although it saw numerous modifications. Throughout this period it remained highly controversial for a variety of reasons. The announcement of the Doctrine immediately caused problems during the SALT I negotiations. At the start of negotiations, the U.S. delegation had assured their Soviet counterparts that the U.S. was not seeking counterforce ability, but the Schlesinger Doctrine clearly stated that they were. During the June 1974 summit, Leonid Brezhnev vehemently criticized the Doctrine as a threat to the Soviet's forces, whose parity was a key concept of the SALT negotiations. Schlesinger's concerns about the SALT process would eventually lead to his resignation in 1975.\footnote{Peter Psychology and Deterrence, (7th Ed, The Johns Hopkins University Press, 1989), p. 56} Another concern was that while Schlesinger stated the U.S. would not invest in first strike weapons, through the 1970s and 80s a number of weapon systems were developed that would be only be useful in a first strike scenario.
The most obvious example was the AGM-86 ALCM cruise missile, a highly-accurate weapon designed primarily to attack hardened military targets. Observers both in the USSR and elsewhere, noted that such a weapon was only really useful in a "sneak attack" scenario, which would allow it to attack ICBM sites and thereby so reduce the Soviet's own counterforce abilities to render them impotent. In a MAD scenario, those targets would have already been hit by ICBMs or SLBMs. The justification of nuclear weapons as the weapon to counter WMD, if accepted in one case, could be claimed by others interested in acquiring nuclear weapons especially if they had suffered the threat or use of biochemical weapons. Abolitionists never accepted the justification for nuclear weapons. In the past, even advocates for the utility of nuclear weapons restricted their role to deterring and countering only nuclear weapons. The language of WMD is designed to justify an expansion in the role of nuclear weapon doctrines from countering nuclear to biological and chemical weapons as well.\(^{93}\)

The legitimization of nuclear weapons as usable against biochemical threats would thus have grave consequences for nuclear nonproliferation. It would be contrary to the Nuclear Nonproliferation Treaty and its associated declarations and promises. It is hard to see how a dramatic deterioration of international security could contribute to an enhancement of any country's national security.

**5.6. Legal Dimension to the Illegality of Nuclear Weapon Use**

The justification of the states to use nuclear weapon has become diplomatic policy toward international politics; can this justification outweigh the necessity of humanitarian law? Since the law has set forth the rules and standard not only on the right of vanquish but also on the right of victor and possibly it delimits the right of the states to make use of dangerous weapon against each other, at such juncture whether theories justifying the use of nuclear weapon have any legality to its contention?

So far the contention of the policy such as NFU, MAD or the Schlesinger Doctrine is concern it never assure the prohibition of nuclear weapon use. It just guarantee to an extend that the weapon shall not be use as a prior weapon of war but with an exception in either case of reprisal or under the light of self-defense the

---

parties has the right of choice.\textsuperscript{94} In this framework the enquiry will illuminate points of contentions regarding the regulation of the use of nuclear weapon and to probe how those points are complicating the overall debate.

The debate shall be in reference to the above stated theories of nuclear weapon use and shall be tested under the light of humanitarian law and the law of human rights. Thus the work will undertake three intrinsic nature of observation to the legal dimension of illegality of nuclear weapon use. Firstly it will reinterpret the theory based argument and trace the rationality of the theory. Secondly it will examine the role of, international law, human right law and international humanitarian law in regulating the use of weapon of mass destruction with specific reference to the principle of international law which renders the use of nuclear weapon illegal.\textsuperscript{95}

It’s quite interesting to note that the law that are providing an exceptional clause to use certain weapons (including nuclear weapon) are the one and the same which prohibits the inhuman weapon on the ground of humanity. But since the object of the research is to condemn the use of nuclear weapon, it would focus on those areas of law which regulates and prohibits its use in all form.

The significant law includes international law, human right law and international humanitarian law which are interdependent to each other in situation of armed conflict and distress situation of victimization of civilians.

\textbf{5.6.1. International law, human right law, international humanitarian law and It’s interdependence to each other.}

International human rights law refers to the body of international law designed to promote and protect human rights at the international, regional and domestic levels. The law of human rights is a subset of international law that deals with the obligations of States with respect to the observance and guarantee of fundamental rights of individuals. In its classical conception, States, not individuals, are the subjects of this law, although individuals are the beneficiaries, and under its terms individuals should have remedies for violation of these legal obligations.


\textsuperscript{95} Binnendijk, Hans and James Goodby. Transforming Nuclear Deterrence, Washington DC: (National Defense University Press, 1997), pp45
International human rights law is embodied in the standard forms of international law: treaties, other international agreements, customary law including *jus cogens* or peremptory norms, and soft law such as General Assembly resolutions, declarations, etc. It is often implemented through domestic legislation, including constitutional law.\(^{96}\)

International Human rights law is closely related to, but distinct from international humanitarian law. Similar, because the substantive norms they contain are often similar or related for example both provide a protection from torture. Distinct because they are regulated by legally distinct frameworks and usually operate in different contexts and regulate different relationships. Generally, human rights are understood to regulate the relationship between states and individuals in the context of ordinary life, while humanitarian law regulates the actions of a belligerent state and those parties it comes into contact with, both hostile and neutral, within the context of an armed conflict.\(^{97}\)

There is a misconception that in time of war, international human rights law no longer applies and is supplanted by international humanitarian law (IHL). This is inaccurate; human rights law co-exists with humanitarian law, but is subject to derogation in times of declared national emergency. When such a national emergency is declared, the existence of an armed conflict, human rights law, with permissible derogations, is then supplemented by the guarantees of IHL. Another way to articulate the relation is that IHL functions as *lex specialis*, elaborating general guarantees of human rights law under the special condition of a state of armed conflict.\(^{98}\)

To understand this relation, it is useful to examine the scope of permissible restrictions on human rights guarantees, including derogation, in some detail. Most civil and political rights allow in their terms for limitation, quite apart from the issue of derogation. An example is the right to peaceful assembly, recognized in most regional human rights covenants and in Article 21 of the International Covenant on Civil and Political Rights (ICCPR). Art.21 provides (emphasis added)

---

\(^{96}\) McCoubrey, Hilaire International Humanitarian Law. Aldershot, UK: (Ashgate Publishing 1999),pp18-33

\(^{97}\) Khadduri, Majid War And Peace in the Law of Islam. (New York, Lawbook Exchange,2006), p105-106

“The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public) the protection of public health or morals or the protection of the rights and freedoms of others.” Quite substantial restrictions on public gatherings may be allowed, so long as they are grounded on a legal authorization and serve one of the five enumerated interests. Any restriction, however, must be one that is also “necessary” in a “democratic” society, qualifications that impose a requirement of strict proportionality on the proposed restrictions in view of the importance of free assembly to pluralism and other democratic rights such as freedom of speech or association. While it might be reasonable on this basis for the authorities, having attempted less restrictive solutions, to prohibit or break up a demonstration that appears aimed at inciting acts of racial hatred or terrorism, it would not be reasonable to enact a ban on all meetings of a given political group that propounds extremist views.  

Derogation is an extraordinary restriction of the right beyond what is normally allowed by its terms. As derogations allow a severe limitation of a treaty right that otherwise would constitute a violation, derogation clauses tend to be restrictive, and as a matter of legal interpretation, strictly construed. Most human rights instruments specify rights that are non-derogable. Among these are the right to life; freedom from torture and cruel, inhuman and degrading punishment; slavery and servitude; debt imprisonment; ex post facto criminal liability and punishment; recognition as a person before the law; and freedom of conscience and religion. The United Nation’s Human Rights Committee has noted that the enumerated list of non-derogable rights is not exhaustive; there are additionally non-derogable aspects of rights that in other respects may be subject to derogation. Avenues of redress and safeguards of non-derogable rights may not be diminished, even in states of emergency. For example, although Article 14 of the ICCPR, which enumerates fair trial guarantees, is not among the list of non-derogable rights, the Committee has found that:

Fundamental requirements of fair trial must be respected during a state of

---

99 Douglas Roche,'Human Right to Peace',(St Pauls BYB,1999),p.56
100 Id.
emergency. Only a court of law may try and convict a person for a criminal offence. The presumption of innocence must be respected. In order to protect non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished by a State party’s decision to derogate from the Covenant.” It is useful to examine closely the contours of the derogation clause of the ICCPR in light of the commentary put forth by the United Nations’ Human Rights Committee, a panel of experts charged with interpreting the treaty and receiving and evaluating State Party reports made there under. ICCPR, Article 4 (emphasis added) provides:

“In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.”

War is the standard illustration of a national emergency that can justify derogation. The Committee, in General Comment 29, has noted, however, that “the Covenant requires that even during an armed conflict measures derogating from the Covenant are allowed only if and to the extent that the situation constitutes a threat to the life of the nation.

A. Extraterritorial application of international human rights law.

Armed conflicts often involve operations outside the territorial boundaries of a state. A preliminary question concerning the territorial scope of application of human rights law usually has to be addressed.

Today the scope of application of human rights obligations is considered to be a question of effective control and not necessarily related to the state’s territory. This position was affirmed by the International Court of Justice in the Advisory Opinion in

the Wall Advisory Opinion (2004) and in the case Democratic Republic of the Congo v. Uganda (2005). The European Court of Human Rights also refers to the effective control of a territory for the application the European Convention:

“Bearing in mind the object and purpose of the Convention, the responsibility of a Contracting Party may also arise when as a consequence of military action, whether lawful or unlawful, it exercises effective control of an area outside its national territory.”

The Inter American Commission of Human Rights has taken the following position:

“In principle, the inquiry turns not on the presumed victim’s nationality or presence within a particular geographic area, but on whether, under the specific circumstances, the State observed the rights of a person subject to its authority and control.” The UN Human Rights Committee stated that under the 1966 Covenant on Civil and Political Rights the protection is for “anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party”.104 National courts have applied the effective control standard as well (Al-Skeini and Al-Jedda cases in the United Kingdom). However, the exact meaning of the term “effective control” is yet to be determined. For now, international case law and the views of UN treaty bodies, have clarified a number of situations:

• First, a range of situations have been recognised as amounting to effective control, from ‘prolonged’ occupations, such as the 30-year Turkish occupation in Northern Cyprus (the Loizidou case, ECtHR) or the Israeli occupation of the Palestinian territories (the 2004 Wall Advisory Opinion, ICJ), down to situations which have lasted only a short time, as in the case of Ilascu v/s Moldova. In this case the ECHR found Russia to be responsible for human rights violations, although Russia had only a few troops present on the territory of Moldova. It appears that this situation would not amount to an occupation under international humanitarian law (IHL) as defined in Article 42 of the 1907 Hague Convention, but it was found to constitute effective control for the application of extraterritorial human rights obligations.105

• Second, effective control can be exercised over persons, even if this control is only temporary. This covers places of detention or situations in which state agents arrest persons abroad (e.g. the Ocalan case, ECtHR; and the Lopez Burgus case, Human Rights Committee).

In the Bankovic case, the ECtHR found that NATO’s aerial bombing of Belgrade did not amount to effective control, thereby creating a distinction between ground operations (that can exercise effective control) and air power (which the Court found did not amount to effective control in this case). In the Al-Skeini case the UK House of Lords distinguished situations of conduct of hostilities during occupation from “calm occupation”. Accordingly, if hostilities break out in occupied territories, these territories are not always under effective control as this Court required for the extraterritorial applicability of Human Rights obligations. The US and Israel, in particular, have raised objections to the application of international human rights law in occupied territories or during armed conflicts.


While it is generally agreed that international human rights law and international humanitarian law both apply in situations of armed conflict, their relationship remains quite complex. Various approaches have been taken by international bodies.

a) The lex specialis approach.

The International Court of Justice has identified three situations concerning the interaction between international humanitarian law and international human rights law:

“As regards the relationship between international humanitarian law and human rights law, there are thus three possible solutions: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of
international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as lex specialis, international humanitarian law.”

Accordingly, contradictory provisions should be regulated according to the principle of lex specialis. As international humanitarian law was specially designed to be applied in armed conflicts it represents the specific law that should prevail over certain other general rules. The Inter American Commission of Human Rights in the Coard case followed this approach, as did the International Commission of Inquiry on Darfur presided by Professor Antonio Cassese:

“Two main bodies of law apply to the Sudan in the conflict in Darfur: international human rights law and international humanitarian law. The two are complementary. For example, they both aim to protect human life and dignity, prohibit discrimination on various grounds, and protect against torture or other cruel, inhuman and degrading treatment. They both seek to guarantee safeguards for persons subject to criminal justice proceedings, and to ensure basic rights including those related to health, food and housing. They both include provisions for the protection of women and vulnerable groups, such as children and displaced persons. The difference lies in that whilst human rights law protects the individual at all times, international humanitarian law is the lex specialis which applies only in situations of armed conflict.”

b) The Complementary and Harmonious approach

The Human Rights Committee stated that:

“the Covenant applies also in situations of armed conflict to which the rules of international humanitarian law are applicable. While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive.”

106 Ibid
The Human Rights Committee does not use the term lex specialis but refers to the more specific norms of international humanitarian law. By avoiding the lex specialis approach the Human Rights Committee seems to indicate that there is no need to choose one branch of law over the other, but rather to look for their simultaneous and harmonizing application. According to this approach, as international human rights law and international humanitarian law are two branches of law that have a common objective of protecting persons, they should be harmonized and interpreted in a way that they complement and reinforce each other. In some cases, international humanitarian law will specify the extant rules and their interpretation, and in other cases it will be international human rights law, depending on which branch of law is more detailed and adapted to the situation.\(^{109}\)

c) Towards an interpretive approach.

The approach proposed by Professor Marco Sassòli seems to offer an alternative approach to the lex specialis and the complementarity approaches mentioned above. According to Sassòli, “the relationship between human rights law and humanitarian law must be solved by reference to the principle ‘lex specialis derogat legi general’…” The reasons for preferring the more special rule are that the special rule is closer to the particular subject matter and takes better account of the uniqueness of the context”.

However, Sassoli points out that using the lex specialis paradigm does not necessarily result in humanitarian law prevailing over human rights law.\(^{110}\)

“The principle does not indicate an inherent quality in one branch of law, such as humanitarian law, or of one of its rules. Rather, it determines which rule prevails over another in a particular situation.”

Thus, each situation need to be analyzed individually in order to determine which rule would apply: it could be an international humanitarian law rule or a human rights rule, depending which rule is more detailed and adapted to the situation. After determining that the lex specialis rule applies, Sassòli emphasises that “the other branch of law, the lex generalis still remains in the background. It must be taken into


\(^{110}\) Addison, Human rights: status of international instruments.(New York. 1987), pp34-42
account when interpreting the lex specialis; to the extent possible, an interpretation of the lex specialis that creates a conflict with the lex generalis must be avoided, and, instead, an attempt to harmonize the two norms made.”

Thus, for example, with regard to the rules of fair trial, as international humanitarian law may provide a higher threshold of protection with a set of rights which are non-derogable, it may regulate the applicable legal standards. On the other hand, for the international standards of detention one should look at the human rights rules, which may be more up to date and elaborated.\footnote{Id.} Also with regard to the prohibition on torture, it is international human rights law that provides the relevant definition of torture. The right to life is another example, although a more complex one, of a possible use of the interpretive approach. In this situation the international humanitarian rules on distinction between military and civilian objectives may clarify the concept of arbitrary killing under human rights conventions during conflicts.

5.6.2 The Theory of Nuclear Weapon Use (NFU); Needs a Balance Approach from Necessity to Demand.

a) The theory based argument

As mentioned above the concept of \textbf{No first use} apparently came after the notion of MAD theory and subsequent proliferation of nuclear weapon. The MAD theory (mutually assured destruction) or the game theory was more in the form of deterrence wherein the nuclear powerful states would respect the authority of one another and prevent the use of nuclear weapon in the light of deterrence.\footnote{Bailey, Sydney D. ‘War and conscience in the nuclear age’, (New York : St. Martin's Press, 1988), pp90-102} The presumption seems to be more apparent when one rely on the statement of British Prime Minister Winston Churchill as “the worse things get, the better they are the greater the threat of mutual destruction, the safer the world would be”. During cold war the U.S and Soviet Union were the only superpower with nuclear weapon and application of MAD might have appeared more flexible to them. However on one side with the increase in number of nuclear state and nuclear proliferation, the situation has changed, the confined appearance of threat is emancipated as of such the result is that the whole living species of this universe endangers their right of existence.
And on the other, the world community realized the consequent threat that could be encountered globally. In light of this, several conventions and treaties were concluded to restrict its proliferation, but in vain, the countries who were parties to such conventions and treaties hardly relied on the principles. (For instance Non-proliferation treaty prohibits both vertical and horizontal proliferation but few countries having affirmed the NPT has seriously violated this norm of NPT by increasing and enhancing its nuclear strategy) No first use (NFU) refers to a pledge or a policy by a nuclear power not to use nuclear weapon as a means of warfare unless first attacked by an adversary using nuclear weapons. The concept can also be applied to chemical or biological warfare.

b) The rationalism of the theory.

Of MAD and NFU there seem to be a vertical relationship some were like two vertical pillars supporting a horizontal slab. Both these theories have a similar picture but the only difference is the circumstance when it is applicable. The concept of MAD theory promulgates sudden step to be taken against the aggressor for instance country A is an attacking nation and country B is an attacked nation. A first strike would be the first use of nuclear weapons by one nuclear-equipped nation against another nuclear-equipped nation. If the attacking nation did not prevent the attacked nation from a nuclear response, then a second strike could be deployed against the attacking nation. The MAD indirectly promises the right of the nuclear country and recognizes their status to make use of the nuclear weapon and comes out more in the form of game were the “best shooter shall win”. Whereas NFU stand with the possibilities that nuclear weapon shall not be a weapon of war but forebodes the right of retaliation in case the countries existence is in question. But the things get perplexed when the issue of retaliation is analyzed from the legal perspective, especially when the war is a nuclear war. At this point let me recollect the incident of 1964 when British aircraft undertook an attack against a small fort situated in Yemeni

113 John Finnis, Joseph M. Boyle, Germain Gabriel Grisez,'Nuclear deterrence, morality, and realism', (Oxford University Press, 1987), p.34
115 The theory developed due to balance of power between the eastern and western blocs, resulting in the fear of global destruction, prevented the further military use of atomic bombs. This fear was even a central part of cold war strategy, referred to as the doctrine of Mutually Assured Destruction.
territory just across the border from south Arabian Federation for the defense of which the Britain had treaty obligation.

Britain’s action was severally criticized on the allegation that it was essentially a retaliation or reprisal. Britain on its behalf denied the allegation and contended before Security Council that a clear distinction has to be drawn between two forms of self-defense. The one, which is of retributive or punitive nature, known as retaliation and the other that is contemplated and authorized by the Charter as “self defense against armed attack”. Britain further contended that legitimate action of a defensive nature may sometime have to take the form of counter-attack as such, destruction of the fort was necessary to prevent the Yemeni from further act of aggression and in sequence Britain had used minimum force as defensive measure which was proportionate and confined to the necessity of the case.116

However Security Council did not accept the United Kingdom’s view keeping in mind the resolution adopted by the members of the United Nations, condemning the act of reprisal as incompatible with the purpose of the UN Charter. Thus on several occasions the Security Council was made to repeat that states shall not be entitled to act upon its own qualification. The task endowed to Security Council for maintaining the international peace and order was difficult to be accomplished, whenever the territorial integrity of a state was violated and the same act was suppressed with a counter attack, and with a justification that the action was necessary to deter future attack as to punish in respect of past misdeed. In all this circumstance Council found it difficult either to define the scope of the act of self-defense or to suppress the increasing violence. Hence it confined the criticism to more extreme act of vengeance. To perceive, any act of counter-attack in the form of vengeance is condemned by the Security Council.117 Thus this perception gives good standpoint to Bowett definition that acts of self defense should not be to punish or restore ones right over another. To him relevant distinction would not be between self defense and reprisal but between the reprisals which are likely to be condemned and which may

not be due to the existence of reasonableness. Bowett concept of reasonable reprisal finds support both in theory and practice and is very correspondent to international customary law which recognizes reprisal against prior illegality as lawful, provided the force used was proportionate to the original illegal act.

Now the point is, if the nuclear weapon is used at the time of war what would be the nature of reprisal, whether it would be a punitive reprisal or reasonable reprisal (self defense)? Nevertheless there seem to appear two propositions with regard to the justification of reprisal when the weapon used is a nuclear weapon. Firstly if the reprisal is in punitive form then purpose of war is unjust, secondly if it is a reasonable reprisal that is (minimum for minimum) then the act would be justifiable as per the states practice. However looking at the present position of the nuclear countries it can be argued that the justification of reasonable reprisal will also be defeated due to the increased intrigue of the nuclear weapons and the possibility of its destructive potentiality, if used it would result into an extreme act of vengeance (maximum for minimum) to put in other word there cannot be a reasonableness of nuclear war and strictly speaking this justification will severely defeat the purpose of UN Charter.\textsuperscript{118}

c) The concept of necessity to demand.

Nuclear weapon is an inhuman weapon with a greater possibility of mass destruction and that’s why the law of war lays down a guiding rule to the states that, no such weapon shall be used against each other, due to the well known truth that the attacker should spare the innocent men, women and children and that the war is always confined to few person and many are innocent. Now this principle has long been in run. So, this is one humanitarian ground were combatants are expected to act morally in the battle field.\textsuperscript{119} Such exceptions were more complied when the state party to war made use of permissible weapon compared with the new technological weapon. Well, to say so is rubbish isn’t it, perhaps this is what the states practice shows and just to give one example here is Art 2 of the Treaty on prohibition of nuclear proliferation which stipulates that “the party to the treaty shall strictly prohibit the vertical or horizontal proliferation”. Further the docket of the treaty is peaceful use of nuclear energy. In spite of the existing conventions and treaties prohibiting the

\textsuperscript{118} Supra 115, also Russell Hardin, 'Nuclear deterrence: ethics and strategy,' (University of Chicago Press, 1985), pp.56-98
proliferation of nuclear weapon there seems a surprising increase in nuclear weapon and the number of countries willing to possess the same.\textsuperscript{120} What does the whole picture convey? Let’s have a bilateral approach to the problem:-

Firstly, is there a \textit{necessity} of such a weapon? Is it an indispensable part of the countries defense strategy? If yes, then the next question is can the weapon be used absolutely against their enemy country or whether the countries are obliged to comply with certain norms or \textit{demand} on humanistic perspective? Secondly is it possible to undo the done or reverse an action or its effect. To say in other word the secret of nuclear energy is revealed to the world at large and no country can be prevented physically from making use of it. At such point of time how does the theory of NFU helps to retain the balance of power among the nuclear surmount?

d) States perspective.

To the first question that the nuclear weapon is an indispensable part of defense strategy, let’s analyses the problem from the states point of view. The epic tradition of international relation shows that there had been subsequent mock behaviors among the nations with regard the development of defense strategies. Perhaps that must be either due to the fear that any new strategical development of weapon by their neighbor would put them behind or probably it could emanate a threat to their sovereignty possibly suppress or bully them and if the matter is all about the territorial sovereignty of the country, states would in fact bother to adopt a balance approach of power in a more diplomatic way. For instance, the fact for this pretext would be the increasing number of nuclear country.\textsuperscript{121} More and more the developed country enhances and polishes their technological substitute toward nuclear weapon, the more it would attract the conscious of the rest countries and put them in par with these ideological countries. Thus the best competitors turn out to be the worst

\textsuperscript{120} The theory is Non evaluative and focuses on application rather than development. Here [necessity] refer to an indispensable or essential condition of the states to use the weapon of their choice; however the right of choice is not an absolute one when the law delimits this right to mitigate the urgent or peremptory request of humanity [Demand], also see, BARBOZA, Julio. "Necessity (Revisited) in International Law", in Essays in International Law in Honour of JudgeManfred Lachs (Makarczyk ed),( Martinus Nijhoff, The Hague, 1984), pp.27-43.

\textsuperscript{121} Bordwell, Percy. The law of war between belligerents: a history and commentary. (Littleton, Colo. : F.B. Rothman, 1994), pp.102
enemy, causing threat equally to each other. In fact the outbreak of World War II paved way for development of earth’s future prospects which had a dark side.122

The post war effort to disown the nuclear weapon like the “ban the bomb” movement never gained much form the American scientists and scholars.123 In fact all post war effort to eliminate the threat of nuclear weapon collapsed. The fact reveals that the major issue of nuclear weapon was not just the matter of state defense strategy but something more associated with the international politics. According to Dr. Attar chand “Nonalignment is a challenge to the bipolar international system which has become rigidified over the years through the doctrine of nuclear deterrence and the legitimization of nuclear weapon through Nuclear Non Proliferation Treaty. Indeed there is an urgent necessity on the part of these nonaligned to act to lessen the rigidity of the bipolar alliance and denigrate the role of nuclear weapon in international politics and strip them of their glamour and prestige”.124

Nevertheless all post war effort to eliminate the threat of nuclear weapon can be said to have collapsed, causing a greater threat to the future, that in case of any third world war or if so the chances of use of nuclear weapon seem to be more definite. The great nuclear scientist who unleashed the secret of nuclear energy also predicted the threat of nuclear war. In 1955 noble prize winner Albert Einstein and Bertrand Russell issued the statement prior to the Big Four summit meeting in Geneva as follow-;

“In view of the fact that in any future war, nuclear weapon will certainly be employed, and such weapon threaten the continued existence of mankind, we urge the government of the world to realize and to acknowledge publicly that their purpose cannot be furthered by a world war and we urge them consequently to find peaceful means for the settlement of all matters of dispute among them.” It’s almost clear from this statement that the nuclear weapon would become the significant part of every countries defense strategy and the possibility of its use in future is more. Indeed the sovereign right of a country to maximize it strategical weapon for the defense can

123 Id.
124 Builder, Carl H. and Morlie Hammer Graubard. The international law of armed conflict: implications for the concept of assured destruction. (Santa Monica, CA : Rand Corporation, 1982).pp100-134
never be questioned but what bothers is the possibilities of its use which the law of war can certainly object.125

e) Humanistic perspective.

Long back it was indispensable on the part of the states to invent such weapon that would mitigate the mechanical need and help them to win the war regardless anything. But today the purpose of invention has reached far beyond the need and embarked into a weapon of unnecessary death.126 Hence there is an urgency to draw the attentions of almost all the nation who are in run to be the nuclear super power, at least to think once that, if any of the states makes use of nuclear weapon the consequence extends to all. Thus the necessity of the states has to credit the ultimate demand of humanity, “definitely the eternal right of existence”.127 True to the fact that the war can never be prevented but the effect of the war can be minimized. The international law of war to a greater extent concern’s over the grievances of the victims of war and tries to mitigate the effect of war by minimizing the use of certain weapon. The states cannot exercise extreme liberty to choose the weapon they like as a means of warfare for the following reasons,

1. Firstly the means of war fare to greater extend is limited by the traditional and new law of war. 2. Secondly the governing principle under international treaties and conventions prevents the state parties to treaties from making use of the nuclear weapon.

1. The traditional law of war consists of those principles adopted by the state as a code of conduct of war. For instance in European tradition the law relevant to war can be considered in two main segments: that of just war (just ad bellum) and that of just conduct of war (just in bellow) the first system analyses the circumstance in which it is justifiable to go to war. The second system analyses in the context of war already underway, “what constitute just conduct of the parties in that war”.128 The body of

---

learning in regard to just war goes back as far as the 5th century, starting with the writing of St. Augustine. The law of just conduct in war represents, in a sense, an attempt to resolve the tension that exists between the polar opposite of military necessity and humanitarianism.

Both just ad bellum and just in bellow contains important principles that bear on the issue of nuclear war. In recent year especially since World War 2, Human Right Treaties and Principles have also grown to such a volume that Human Right law has become an important discipline in its own right. Under the system of just ad bellum the legal principle regarding the right to go to war remains the same. The term force requires to be interpreted in a different angle when the means and method of war changes. However the total destructiveness of nuclear weaponry requires that certain distinction to be made on the basis of which type of force is to be used at least on humanitarian ground whether the purpose of war is to be just or unjust.129

Augustine’s writing also had enormous influence upon European concept of the legitimacy of war. While war was not outlawed, the justice of given war was made strictly depending upon certain condition. These were right authority, just cause, right intent, the prospect of success, proportionality and that war should be a last resort. In addition to these Roman custom and tradition relating to war, St. Augustine used certain concepts already established in the Greek philosophy. To this Augustine added Biblical and early Christian material in his writing.

It is quite interesting to notice that even by the standard laid down by St. Augustine, nuclear war would not be permissible. It fails to satisfy at least two of his requirement, the prospect of success and proportionality. No nation can succeed in nuclear war and the damage inflicted would be out of all proportion to the provocation, even if the provocation were very great. These ancient theological requirements, subject of numerous theological and legal commentaries over the centuries are still invoked in the contemporary discussion of justification for possible superpower conflict. The contemporary writing on the means of warfare begins with

prominent work of Lieber code, St.Petersburg Declaration of 1868 and De Martens Clause.\textsuperscript{130}

In the year 1863 Francis Lieber, an international lawyer prepared set of instructions to be followed by American army during American civil war. The Lieber code provided detail rules to be followed by the belligerents were in it was specified that the belligerents shall have no unlimited right to chose weapon of their choice to cause unnecessary suffering and disastrous damage. The code also stipulates on the right conduct of the belligerent in the battle field. Another noteworthy contribution to humanize war was St.Petersburg Declaration of 1868. In fact this is the first Declaration renouncing the use of explosive projectiles in war. Last but not least the trustworthy work of Frederic de Martens attempts to conciliate military requirement with the principle of humanity in war. In one or the other way all this work contributed for the development of humanitarian law. However Geneva and Hague convention reinterprets the customary and contemporary principles of law of war. For instance Article 22 of the Hague Regulation which has passed from the customary international law provides that belligerents have no unlimited right to chose the weapons to injury the enemy. Further Article 23of the regulation particularly forbids to employ arms projectile or material apt to cause unnecessary suffering. This Article seems to be more substantial with moral and legal value. It serve as a very significant source of inspiration in as much as it sets forth one of the general humanitarian grounds on which state should endeavor either to refrain from developing new weapons or to ban their use. This is more absolved with the stand taken by the states in 1973-1975 both in U.N. General Assembly and at the Geneva diplomatic conference on humanitarian law of armed conflicts were in it was agreed that one of the reason for prohibiting through conventional rules the new weapons was due to their causing unnecessary suffering. Thus Article 23 constitutes reiteration of what was already spelled out in 1868 St.Petersburg Declaration.\textsuperscript{131}

\textsuperscript{130} See Jonathan Schell, ‘The Fate of the a Earth’ (Stand ford University press,1980), pp.13-122

2. Reassertion of General principles on means of war.

General principle of international rules on weapon comes out as a guiding prescript to almost all states that means of warfare has to be limited to a greater extent. These principles are further elaborated under part III of Additional Protocol to Geneva Convention 1949. The part III has three fold purposes; -

Firstly means of weapon cannot be the unlimited choice of combatants.

Secondly, it prohibits indiscriminate means of warfare. Thirdly method of warfare should not exceed to the dead end of environmental disaster.  

The weapon expressly prohibited includes those which cause superfluous injury and unnecessary suffering, definitely which could affect the mankind and the nature alike. The provision strictly prohibits blind, non tactical atomic and nuclear weapon, this is further elaborated by prohibiting the adoption and use of new weapon. In addition to this the state parties to the convention are under obligation to prohibit the indiscriminate means of attack. Indiscriminate attack includes:-

(a) Those which are not direct at the specific military object
(b) Those which employ a method or means of combatants which cannot be directed at a specific military objective or
(c) Those which employ a method or means of combat the effect of which cannot be limited as required by this protocol.

It also includes:-

(a) Bombardment by any method or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town village or other area containing a similar concentration of civilians and civilian objects; and

(b) an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian object or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

---


133 Dr Subhas C. Khare, Use of Force under U.N. Charter (Metropolitan Book Co.(P) LTD New Delhi 1985), pp.7-63
5.6.2.1 The Applicability of Humanitarian Law to Nuclear Weapon and Arguments in the Atomic Bomb Decision.

How the general principles are described above interpreted and applied when considering the use of nuclear weapons? What are the legal conditions for their use? Evidently there are two approaches one relies on interpreting and applying by analogy, the general rules of Hague regulations recognizing that “massive indiscriminate destructive force” and their range and space and time of radiation “render nuclear weapon to be weapon that impart unnecessary suffering” and therefore are illegal.\(^\text{134}\) A second interpretation asserts that while no articles specifically bans nuclear weapon per se, nevertheless nuclear belong to the categories of the “poison or poisoned weapons” prohibited by Article 23(a) of 1907 Hague Convention, “the asphyxiating or deleterious gas” prohibited by July 29, 1899 Second Hague Declaration, or the “asphyxiating, poisonous, or similar gases….and all analogous liquids, materials or device” prohibited by the 1924 Geneva Protocol on poison Gas and thus illegal.\(^\text{135}\)

There are counter argument to each of these rationales. Against the first rational it is argued that nuclear weapons were completely unanticipated at the time the Hague principles were formulated, therefore these principles are not applicable to such weapons. Against the second rationale, it is argued that Article 23( a) of the 1907 Hague Regulation on the War on the Land does not consider the kind of “poison” that result from nuclear reactions. The Second Declaration on July 1899 prohibits the use of projectiles the sole object of which is the diffusion of asphyxiating or deleterious gases. As to whether nuclear weapons fall under the category of the “asphyxiating, poisonous or similar gases prohibited by the 1925 Geneva Poison Gas Protocol, the argument would be that radiation from an atomic bomb differs fundamentally in its effects from conventional poison gases.\(^\text{136}\)

All weapons serve the same purpose beside; there are degrees of similarity and difference among various weapons. Given the generality and abstractness of the law, overly strict interpretation of the basis of excessive legal positivism would seem


\(^{135}\) Id.

\(^{136}\) Id.
contrary to the spirit of humanitarian principles of the laws of war. In reality atomic bombs were new weapons when first used in World War II. There was no customary international law or treaty targeted specifically at the legal regulation of nuclear weapons. However the notion that nuclear weapons per se are illegal due to their inhumanity was for some time widely accepted.\textsuperscript{137}

The 1960s was a period of transition in the debate over the legal nature of nuclear weapons as will be discussed below. The Atomic Bomb Decision by the Tokyo District Court was handed down in the midst of that debate. The court found that “it is not too much to say that the pain brought by the atomic bomb is sever than that from poison and poison-gas, and we can say that the act of dropping such cruel bomb is contrary to the fundamental principle of the law of war that unnecessary pain must not be given. However the court’s stance is not necessarily confident. The plaintiff argued that even if the international laws of war of the time could not be applied as they are because “the atomic bomb is new weapon they should still be logically interpreted and applied by analogy in keeping with the legislative spirit of the entirety of the statues including relevant clauses. They also argued that international laws of war prohibiting weapons causing unnecessary suffering were founded on natural law and logical international law and those they were violated by the dropping of the atomic bomb. The Japanese Government, as defendant, responded that because there was at the time no positive international law regulating the use of atomic weapons, and also because the Hague Regulations on War on Land did not address atomic weapons, as expanded interpretation of the intent of those laws (e.g., the Martens Clause) should be precluded. Therefore, they argued that it was difficult to determine immediately whether the dropping of the atomic bomb was a violation of positive international law.\textsuperscript{138}

Both argument represent typical interpretation at that time, but the crux of the controversy was the balance between military necessity and humanitarian principles. The court held on one hand that “atomic bombs are not necessarily automatically disallowed due to their inhumane characteristic; if the military effect is extraordinary compared to their inhuman consequence then they may not necessarily be prohibited

\textsuperscript{137} Jonathan Schell, Supra 130, at, p78
\textsuperscript{138} Id
under international law. Such rationale places a priority on military necessity. On the other hand, the court also found that since suffering caused by the atomic bomb was greater than the poisoned weapons (prohibited by Article 23 of the 1907 Hague Regulations on war on Land, dum dum Bullets or poison by the 1899 Declaration Prohibiting Dum –DUM Bullets) or poison gas (prohibited by the 1899 Second Hague Declaration (Hague Gas Declaration) it used would naturally be illegal. So the court not only found itself trying to bring about a balance between various inhumane weapons. However the court’s reasoning was not stable.

Thus it’s clear from the context of these provisions that use of nuclear weapon or biological weapon at the time of war is prohibited and if used it would discard the rule totally resulting in the grave breach of the agreement. More pleasant appearance of the provision comes out were in not only the rule is made to prohibit the inhuman weapon but humanize the war in more gentle way.

It should be pointed out however that in the past it was possible to invoke the doctrine of just war for the purpose of offensive or aggressive war. This is no longer possible under current International law, for Article 2(4) of the UN Charter prohibits the threat or use of force against territorial integrity or political independence of any state. Current International law permits the use of force only in one circumstance, individual or collective self defense. Hence the relevance of just war doctrine must necessarily be confined within the limit of concept of defense. Indeed nuclear weapon states admit to no other rational, for their arsenal and the point ultimately is that, whether any defensive use or threat of use of nuclear weapon, first strike or second strike strategic may be considered contrary to international law.

5.6.2.2 Transforming the Debate on the Legal Nature of Nuclear Weapon and Redefining Customary Law.

Whether nuclear weapon per se or their use is illegal, depends on how one balance military necessity and humanitarian principles. Since this depend on the interpreter’s system of values and methodology for interpreting international law, it is

139 See the Geneva Convention of August 1949 and Protocols Additional to the Geneva Conventions of 12 August 1949, ICRC,19 Avenue de la paix, Geneva,pp. 27-28
extremely difficult to reach a definitive conclusion. This is true for several reasons:(1) whether one proceed from strict legal positivism or a belief that humanitarian principles have forces as the spirit of international law depends on who is making arguments;(2) apart from the adopted legal positivism or emphasized humanitarian principles, there are also view like those of M.S. McDougal, who take a legal sociological or policy-oriented view which opposes the idea that principles formed under the international legal and political conditions of the nineteenth century can be applied to the twentieth century and particularly post World War II realities. McDougal notes in his criticism for example prohibition of specific weapons achieved in the past acquires relevance in the evaluation of new weapons, only for polices that infuse them the analogical interpretation by Schwarzenegger and other are that words have absolutistic meaning which can be projected onto the future without regard to original and contemporaneous context, and that future interpreters must accept these pristine meaning irrespective of fact and policies in contemporary context. (3) This leads to the issue of how to conform old international law to new societal problems such as the emergence testing and deployment of nuclear weapons. Nevertheless until the 1960s, that gap could not be filled by cotemporary treaties and treaty making process such as the UN General Assembly resolution rise to the level of an opinon juris.\textsuperscript{142}

Amid such legal and politics realities opinions among international legal scholars diverged, with no agreement on the illegality of the nuclear weapon \textit{per se} the discussion shifted at the academic level from questioning the intrinsic nature of nuclear weapon \textit{per se} to a discussion of whether, as with all other weapons their use must be directed exclusively at the military objective and for the safeguarding of the civilian population. This problem was first considered in the 1956 ICRC (International Committee of Red Cross) Draft Regulation to Limit the Exposure of General Populace to Danger that influenced the debate at the \textit{Institut de Droit International} throughout 1960s.\textsuperscript{143} The Fifth Committee of the institute adopted as its theme “problems caused by the existence of weapon of mass destruction and

\textsuperscript{142}Detter Delupis, Ingrid. The law of war, 2nd ed. Cambridge ; (New York : Cambridge University Press, 2000), p.81
\textsuperscript{143}Richard A. Falk, et al., eds. The International law of civil war. (Baltimore; Johns Hopkins Press, 1971), p.34
distinction between military and non-military objectives in general.” Baron von der Heydte, the report on this theme in 1961 believed that “whether the weapon of mass destruction are or are not legal will be decided by whether the effect of such weapon of such weapon can be limited to the military objective Andrassy who felt that the primary task of the committee was to define weapons of mass destruction and to prohibit their use, responded with his opposition to using the distinction between military and non-military objective as a starting point. These discussions at the Institut de Droit International bore fruits in the 1967 Institut Report and the 1969 Edinburgh Resolution. The activities of the ICRC and the Institute de Droit International subsequently influenced one another in a way that helped codify important source of humanitarian law. The Edinburg Resolution includes the following:\textsuperscript{144}

1 Existing international law prohibits, irrespective of the type of weapon used any action whatsoever designed terrorize the civilian population. Existing international law prohibits the use of all weapon which by their nature effects indiscriminately both military objective and non-military objective or both armed forces and civilian populations. In particular it prohibits the use of weapons, the destructive effect of which is so great that it cannot be limited to specific military objectives or is otherwise uncontrollable as well as blind weapons.

2 Existing international law prohibits all attacks for whatsoever motive or by whatsoever mean by annihilation of any group region or urban center with no possible distinction between armed forces and civilian populations or between military objectives and non-military objectives.

Careful examination of the nature of actual weapons was avoided. Resolutions prohibited the use of these weapons depending on their effects. Conversely, therefore, if military targets could be distinguished from civilian or military objectives from non-military objectives, and if the effect from such weapon of mass destruction could be imparted to a targeted object then the possibility remained for interpretation which would permit the use of such weapons. The timing of the atomic bomb decision corresponded to the period when this transition was underway.

\textsuperscript{144} Id.
5.6.2.3 Humanitarian Law Based Argument and Self-Defense Based Argument in the Charter; Theoretical Independence and Actual Interaction toward the status of Nuclear weapon.

Broadly there are two legal systems for regulating the use of nuclear weapon (I) Humanitarian law (II) Definition of enforcement measure in Chapter VII of the UN Charter. As stated above Humanitarian law was taking shape as customary law at the time of the atomic bombing of Hiroshima and Nagasaki. Humanitarian law in turn encompasses two point of controversy. One examine the nature of nuclear weapons and ask whether the use of nuclear weapon is illegal (intrinsic illegality), from the standpoint of the humanitarian law. The other asks about the nature of nuclear weapon per se, but whether the form or method of such use violates the basic principle of humanitarian law, that bans indiscriminate attack (extrinsic illegality).

The definition of enforcement measure (collective security system and the right of self-defense) in Chapter VII of the UN Charter is premised on the principle of Article 2(4) prohibiting the use of force. Since Article 2(4) prohibits the exercise of force, the use of threat of using such nuclear weapon is illegal in that context. At the same time the Chapter VII of the Charter specifies a collective security system and the right of individual or collective self-defense as countermeasure against Article 2(4) and justifies certain use of force on that basis. The possibility of using or threatening to use nuclear weapon in such context is thus presented, and the point of controversy thus becoming whether such use is lawful or unlawful. If that is deemed lawful, then further conditions for such use apply namely (a) the principle of proportionality and (b) the law of armed conflicts (in the broad sense of humanitarian law).

The humanitarian law and the Charter frameworks discussed above differ in both the timing and background of their creation, and accordingly should be viewed as theoretically independent, with divergent underlying assumption in their reasoning. Nevertheless in the actual debate the two positions (intrinsic illegality and extrinsic illegality) interact with each other within humanitarian law. At the same time humanitarian law based argument and the Charter based argument however differ in their assumptions, mutually interacts on the same plane. The point of controversy

---

have become more layered as argument regarding the application of humanitarian law change and as possibilities for the use of nuclear weapon have arisen within the measure under Chapter VII of the Charter thus complicating the debate.\textsuperscript{146} New arguments arise within the two legal frameworks but the new arguments do not necessarily displace the old ones. In other word debate about restricting the use of nuclear weapon from the standpoint of humanitarian law which evolved as customary law, has no, been made obsolete by structural changes in international law. Rather it has been carried forth as a valid argument to till present, even as the Charter has acquired force.\textsuperscript{147}

The mid 1960s saw great changes in the way in which humanitarian law was applied to nuclear weapons. For several years after atomic bombs were dropped on Hiroshima and Nagasaki, the strong tendency was to try to prove the intrinsic illegality of nuclear weapon per, se, but in the mid 1960 the focus of that debate shifted to extrinsic regulation relating to the conditions under which nuclear weapon could be used. The eight and a half year gap between the filing of the suit by Ruichi shimod and four others in 1955 and the Atomic Bomb Decision by the Tokyo District Court in 1963 correspond just to the period when the focus of argument for regulating the use of nuclear weapon was shifting in the academic circle around the world. The debate was on the character of nuclear weapon per se and the basis for their use. At the same time the Court’s decision as a whole exemplified debate underway at that time, when the problem of nuclear weapons was still being considered from a purely humanitarian standpoint. Although this was a domestic trial in a country that had been the victim of bomb, statements of opinions from scholars of international law were cited and international legal scholars around the world lauded the decision itself. Following their use on Hiroshima and Nagasaki lawyers and commentators debated the existence of nuclear weapon per se and the conditions for their use as targets for regulation under humanitarian law.\textsuperscript{148} However it soon became impossible to explicitly regulate these weapons under humanitarian law or to designate them as being subject to international legal controls. Underlying this was the historical

\textsuperscript{146} Fleck, Dieter & Michael Bothe. The handbook of humanitarian law in armed conflicts. (New York : Oxford University Press, 1995), p.34
\textsuperscript{147} Green, L. C. The contemporary law of armed conflict, (2nd Ed. Yonkers, N.Y. : Juris Publishing ; Manchester : Manchester University Press, 2000), p.39
\textsuperscript{148} Bailey, Sydney D. War and conscience in the nuclear age. (New York : St. Martin's Press, 1988),pp.56-78
circumstance that nuclear weapon has evolved technically and militarily become indispensable tools for certain states. Politics among those states were conducted within the framework of the Charter, concluded after World War II, which outlawed the use of force. The intense US soviet nuclear rivalry shifted rapidly toward nuclear deterrence following the 1962 Cuban missile crisis. In the context of these international political realities, the focus of international legal regulation in 1960s shifted from the lawfulness of nuclear weapon per se to the lawfulness of conditions for their use in order to accept the use of weapon within the UN Charter’s collective security system and the exercise of the right of self-defense. This acceptance allows international law to focus only on the regulation of conditions for use of nuclear weapons rather than on nuclear weapon per se.  

Legal reasoning in 1963 atomic bomb decision did not reflect the principle of self-defense in the UN Charter, nor did it include the then emerging notion of nuclear deterrence. Subsequently debate about regulating the use of nuclear weapons, especially in recent times have incorporated argument from the UN Charter and the Nuclear Non Proliferation Treaty, as well as arguments from the law of war. The nuclear states, that play such a prominent role in international politics, inevitably have very different views from those of the non nuclear states about regulating the use nuclear weapons. Paragraph 2(E) of the dispositif of July 6, 1996 International Court of Justice Advisory opinion on Legality of the threat or Use of Nuclear Weapons epitomize the complex logical structure created by the coexistence of argument arising out of two divergent legal systems.

5.6.2.4 The Changing Relationship between military necessity and humanitarian Principles.

The reference points for debating the legality of mass destruction including nuclear weapons, shifted in the 1960s to the prohibition of “indiscriminate” attack on undefended cities or territories. This prohibition is premised on the distinction between combatants and non-combatants, and between military objectives and non-military objectives. The application of these principles was limited to cases in which the damage to civilians and the general populace would be excessive compared to the

---

149 Id
150 Advisory Opinion on Legality of the Threat or Use of Nuclear Weapons,(1996) ICJ Rep.,pp. 226-227
military benefit obtained. This was confirmed in the 1977 Addition Protocol I to the four Geneva Conventions of 1949 (Article 51-5(b), Article 56-2, Article 57-2(a).

whether damaged wreaked by an attack is excessive becomes the basis for determining lawfulness? Where to strike the balance between military benefit and humanitarian principles does become the crux of the argument? If there is a military necessity (particularly when there is self defense justification from a *just ad bellum* view point) the military objective expands and the potentials for applying the humanitarian brake recedes. On the other hands the relative weight of humanitarian principles capable of challenging military objectives has also increased since World War II, with the awareness of human right and the development of positive environmental law. The problem of balancing the expanding military necessity with expanding humanitarian principles cannot generally or easily be resolved. In a situation where states are the primary agents exercising force and as such they interpret and apply humanitarian principles in light of military necessity, inevitably military necessity tends to take precedence.¹⁵¹

a) The Expansion of Military Necessity and Military Objective.

The scope of military objective has effectively expanded over time with the trends toward total war. In fact methods of warfare have developed dramatically during World War I and II, and the concept what constitute a military objective has also expanded with the advent of total war. Military objectives are defined in Article 2 of the Hague Convention concerning Bombardment by Naval Forces in Time of War (signed at the Hague, 1907) as works, military or naval establishments, depots of arms or war material, workshops or plants which could be utilized for the needs of the hostile fleet or army, and the ships of war in the harbor, “and in the 1922 Hague Rules of Air Warfare, Article 24, Section 2 as “military forces, military works; military establishments or deposits; factories constituting important and well know centers engaged in the manufacture of arms, ammunition or distinctively military supplies; lines of communication or transportation used for military purposes. On the other hand, in Article 52, paragraph 2 of the 1977 Additional Protocol I to the four Geneva Conventions of 1949, military objectives are broadly defined as “those objectives which by their nature, location, purpose or use makes an effective contribution to

military and whose total or partial destruction, capture or neutralization, this result in the expansion of military factories as innocent “non-combatants”. In the dropping of the atomic bomb on Nagasaki for example it is know that the US Army’s bombing target was the Urakami district, site of the Mitsubishi steel and Mitsubishi Arms work ordnance complex.152

This expanded military necessity presented the opportunity to use nuclear weapons, an opportunity that was in fact taken. As a result, we have learned how unexpectedly vast the effect of radiation are over time and space. This leads to two questions when we apply the principle of prohibiting indiscriminate attacks to nuclear weapons: (a) does the use of nuclear weapon per se necessarily constitute an indiscriminate attack? And (b) are there ways to use nuclear weapon which do not constitute an indiscriminate attack? Regarding arguments (a) the non nuclear countries and humanity in general would interpret that given the wide rage overtime and space of their effect the use of nuclear weapon does not violate the already discussed prohibition against the indiscriminate attack. But there are two counter arguments to this view. The first considers the new development of nuclear weapon in the light of (b) the seconds adds a future element to the concept of military necessity.153

The first counter argument is that current nuclear weapon technology permits the development of tactical nuclear weapons whose effect can be limited to only military objectives, making it possible to wage limited nuclear war without violating the principle of military objectives. According to Paul de visschier, who had expressed his agreement with the 1969 institute Edinburgh Resolution “The evolution of technology turned certain of the nuclear arms into tactical weapons whose precision exceeded that of the large bombers used during the second world war or the Vietnam War…… the meanings of the question of the legality of nuclear weapon has changed, for it no longer relates to the intrinsic nature of the weapon, but as is the case for all categories of arms, it concerns the way these weapons may be used directing them exclusively at military objective and safeguarding the civilian population.” The core of this thinking is that the military effect of tactical nuclear

153 Id
Legal Regime on the Use of Nuclear Weapon and its Impact on Humanity

weapons is simply the destruction of military targets and that the consequences can somehow be limited to just those military targets.\textsuperscript{154}

In this interpretation, the consequences of nuclear weapons used are considered to be limitable to apparent military targets. No consideration is given to the fact that radiation from nuclear weapon might spread over time and space beyond the destructed site nor is their consideration of the fact that long term effects on the human body are far greater and more persistent than on the military target itself. An evolution of the effect of the radiation on the human body is imperative. Such evaluation has to consider the future of humanity. However in the comparative weighing of military necessity and humanitarian principles by the state agent this point of view is inevitably left out. The second counter argument comes from Henery Stimson, Secretary of war under Truman, and the first and the only president to use the atomic bomb. He wrote “we estimate that if we should be forced to carry this plan to its conclusion the major fighting would not end until the latter part of 1964 at the earliest… might be expected to cover a million causalities to American force alone.” By arguing that American solders’ lives were saved by the use of the atomic bomb, the US positioned the bomb as a life saving weapon and identified a military necessity for its use. Subsequent statement by President Truman justifies the dropping of the bombs also referred to it as having saved the lives of many American soldiers. That was where its military necessity has been sought.\textsuperscript{155}

b) Expansion of Humanitarian Principles.

As noted above the expansion of military objective and military necessity leaves less room for the deterring effect of humanitarian principles. On other hand the relative humanitarian principles to counter this expansion has also been growing as human right law, environmental law, and the like have taken on the status of positive law. Particularly since World War II there has been growing trend recognizing toward recognizing the primacy of humanitarian principles over military necessity, at least at the \textit{jus in bello} level. This trend has been reinforced by increasing number of small and medium size states and non nuclear states supporting those laws and by various

\textsuperscript{154} Friedman, Leon, ed. The law of war, a documentary history. (New York : Random House, 1972), p.34
\textsuperscript{155} Id
UN General Assembly resolutions.\textsuperscript{156} The 1996 ICJ Advisory Opinion states that the use of nuclear weapons which destroy the environment and flaunt human rights is illegal. This is an indication that new humanitarian principles are developing to outlaw the use of the force, which is also taking effect under modern international law and the UN Charter. As the principles of military necessity and humanitarian principles each expand in scope, it has become extremely difficult to reach a general consequence on the relative weighting of each. In reality, with regard to the states that interpret and weigh it against humanitarian principles and have the primary discretion to exercise force, there is an inevitable tendency for military necessity to take precedence. This has always been true in international relations and analysis the ICJ Advisory opinion shows that it continues to be so.

c) Balance between Military Necessity and Humanitarian Principles.

1 The balance between the military necessity and the international Covenant on Civil and Political Right and the Convention on Genocide.

According to the 1996 ICJ Advisory Opinion on the legality of the threat or the use of the nuclear weapon, some of the proponent on the nuclear weapons illegality have argued that such use would violate the right to life as guaranteed in Article 6 of the International Covenant on Civil and Political Rights as well as in certain regional instrument for the protection of human rights. Article 6 paragraphs 1 of the International Covenant provides as follow “every human being have the inherent right to life. This right shall be protected by law no one shall be arbitrarily deprived of his life”\textsuperscript{157}

In reply other contended that the international Covenant on Civil and Political right makes no mention of war or weapons and it had never been envisaged that the legality of the nuclear weapon was regulated by those instrument. It was suggested that covenant was directed to the protection of human right in peace time but that question relating to the unlawful loss of life in hostilities were governed by the law applicable in armed conflict.\textsuperscript{158}

\textsuperscript{156} Holland, Thomas Erskine. The laws of war on land: written and unwritten. (Aalen : Scientia Verlag Aalen, 1977), p.49
\textsuperscript{157} Green, L. C, supra, 147 Ibid
\textsuperscript{158} Id
To this the ICJ responded: “the court observes that the protection of right to life under International Covenant on Civil and Political Right does not ceases in time of war, except by operation of Article 4(1) of the Covenant whereby certain provision may be derogated from in a time of national emergency. Respect for right to life is not however such a provision. In Principle, the right not to arbitrarily deprive once life also applies in hostilities. The test of what is an arbitrary deprivation of life, however than falls to be determined by the applicable *lex specialis* namely, the law applicable in armed conflict which is designed to regulate the conduct of the hostilities”. The balance between military necessity and humanitarian principles is the fundamental principles of the law of armed conflict, traditionally that balance has interpreted to favor the former. Moreover as long as sovereign takes the decision to use forces authoritatively above all the principles of law, it will be impossible to decide the taking of life under the principle of military necessity as “arbitrary deprivation”. Referring to the 1948 convention on genocide, some state contended that intention to destroy groups could be inferred from the use of nuclear weapon which is prohibited by the convention. The court avoided the direct conclusion and finding and held that “it would only be possible to arrive at such a conclusion after having taken due account of the circumstances specific to each case.” It must note clearly that the first decision take in each case would be by the state exercising the force”.

2. *The balance between military necessity and environmental regulation according to paragraph 27 of the ICJ advisory opinion.*

“In both their written and oral statement, some states further more argue that in use of nuclear weapon would be unlawful by the reference to existing norms relating to the safeguarding in protection of the environment, in view of their essential importance”. The following description then follows… specific references were made to various existing international treaties and the instrument. These included additional Protocol I of 1977 to the four Geneva Conventions of 1949. Article 35 paragraph 3, which prohibits the employment of “methods or means of warfare which are intended, or may be expected to cause wide spread, long term and sever damage to the natural environment”. And the Convention of 18th May 1977 on the prohibition of

---

159 John Burroughs, International Association of Lawyers Against Nuclear Arms, *The legality of threat or use of nuclear weapons: a guide to the historic opinion of the International Court of Justice*, LIT (Verlag Münster, 1998), p.78
military or any other hostile use of environmental modification techniques, which prohibits the use of weapons which have wide spread and severe effect on the environment. Also cited were principle 21 of the Stockholm Declaration of 1972 and principle 2 of the Rio Declaration of 1992 which express the common convention of the states to concern the duty to ensure that activities within their jurisdiction are controlled and do not cause environmental damage to the other states of the areas beyond the limits of national jurisdiction. These instruments and other provision relating to the protection and safeguarding of the environment were set to apply at all times, in war as well as in peace, and it was contended that they would be violated by the use of nuclear weapon, whose consequence would be wide spread and would have trans-boundary effect. Opposing opinions were also introduced. Such as the primary purpose of the environmental treaties and regulation is to preserve the environment during the peace time, or that such treaties do not concern the use of nuclear weapons during hostilities.

In response the court stated that it does not consider the treaties in question could have intended to deprive a state of the exercise of its right of self-defense under international law because of its obligation to protect the environment. None the less, the states must take environmental consideration into account when assessing what is necessary and proportionate in the pursuit of legitimate military objective, and that while “existing international law relating then protection and safeguarding of the environment does not specifically prohibits the use of nuclear weapons. It indicates the environmental factors that are probably taken into account in the context of the implementation of the principles and the rules of the law applicable in armed conflict. Having assumed that nuclear weapon can be used by states in exercise of self-defense, the ICJ is here pointing out the need to consider the exercise of force of nuclear weapon in such cases that would confirm with the requirement of environmental law. It seems clear that the court was taking account of sovereign requirement.
d) Analysis and Evaluation of the Tokyo District Court Decision in the Atomic Bomb Suit.

The applicability of the humanitarian law was already specified in the above discussion in the Atomic Bomb decision. Let’s analyze and evaluate the special character of this trial. The special character of this trial was that victims of the atomic bomb argued with their own government in a domestic Japanese court, based on the law of war codified until World War II. The issues were (1) the illegality of the atomic bomb as a weapon and (2) the legality of its use. The opinion of the USA appeared nowhere. We have looked at point (1) in section III-3. Here we will consider the point (2) the legality of its use.

i. The dropping of the atomic bomb from the standard of the “distinction between combatants and non-combatants,” “Distinction between military objectives and non military objectives

a. What were the military objective at Hiroshima and Nagasaki?

The gist of the courts finding on this point were as follows. First, Hiroshima and Nagasaki were not cities resisting a possible occupation attempt by land forces at the time. Although both cities were defended with anti-aircraft guns etc and had military installation they were not in the pressing danger of enemy occupation. In short they were undefeated cities. Both cities had military objectives such as troop’s military operation and munitions factories, but there were also some 330,000 civilians in Hiroshima and some 270,000 in Nagasaki. This meant that even if the atomic bomb attack was targeted only for military objectives, the tremendous power of destruction of the atomic bomb led to the same result as a blind attack, making it an illegal act of hostility as the indiscriminate aerial bombardment of undefended cities.\(^{163}\)

Second there was an argument that aerial bombardment of objective zones is legal when the munitions factories ad military installation are concentrated in relatively small area and with strong and solid defenses against air raids; because it was difficult to confirm individual military targets. However the cities of Hiroshima and Nagasaki cannot be described as such concentrated military objective zone.\(^{164}\)

\(^{163}\) Douglas Holdstock, Frank Barnaby,'Hiroshima and Nagasaki: retrospect and prospect', (Routledge, 1995), p93

\(^{164}\) Id
b. Was Military Necessity an Exemption from Responsibility?

Regarding the legal evaluation of the “military necessity” in World War II, we should realize that the form of war has changed, starting with World War I, to total war, and that military objectives have come to involve not only armed forces and weapons, but economic factors such as energy, materials, and the productive capacity of industry. I have already described some way in which definition of military necessities for victory has changed. Nevertheless the general perception at the time and that of the Tokyo District Court in this case was that the distinction between military objectives and non-military objectives had not completely disappeared. Rather, as already discussed the measure for weighing the illegality of weapons shifted in the 1960s from the characteristics of the weapons per se to the method and result of their use, making the distinction between military and non-military objectives even more important than before.¹⁶⁵

Second, there is a view that the dropping of atomic bomb on Hiroshima and Nagasaki was an intentional attack whose goal was to destroy the Japanese publics will to fight. The resulting losses greatly exceed what might be accepted as collateral damage on military facilities and military plants. Therefore immunity based on “military necessity could not be asserted.

ii Evaluating the Tokyo District Court Decision.

The atomic bomb suit, filed in 1955 ruled upon the district court in 1963, spanned a period of transition during which, as discussed above, the issue for legal regulation of the atomic weapon was shifting from the inhumanness of the weapons per se to the way in which such weapons were to be used. During that debate, the argument arose that weapons whose use inevitably contradicted the limitation to the military objectives and protection of civilian should be illegal. In this sense, the 1963 atomic bomb decision incorporates two points of view.¹⁶⁶ One portion judges applied the rule that the use of nuclear weapon was illegal for the reason that they are “new weapons” which causes unnecessary suffering. The other portion applied the military objectives standard to be determined whether Hiroshima and Nagasaki were military

¹⁶⁶ Id at, p.121
objectives and whether the attack could be avoided instead of indiscriminate attack, arguing that this standard was not met. Strict logic might suggest that if the use of nuclear weapon were found to be illegal it would not actually be necessary to subsequently apply the principle of military objective and the principle of prohibiting indiscriminate attack to determine the legality of that weapon use. I believe that irresolute judgment reflect the shift in the debate within the academic circle at that time from the intrinsic legality of the nuclear weapon per se to their extrinsic legality, both of which coexisted during this transitional period.


Article 2(4) states that the use of force is illegal. Clearly the use of force by means of nuclear weapons is illegal by implication. At the same time, however the UN Charter provides for a collective security system and the right of self-defense against states that excise force in violation of Article 2(4). Here the question arises whether the use of nuclear weapon is allowed as part of the enforcement measure of the collective security system and the exercise of the right of self-defense. The committee on the Charter of the United Nations at the 50th conference of the ILA (International Law Association) in 1962 debated this problem in detail. The debate was based on the “Report on self-defense under the Charter of the United Nations and use of prohibited weapons”. During the discussion K. Holloway states “the prohibition of the war must necessarily carry a sanction of its criminal breach on a rule of law and not on the victor’s right of subjugation. Further Louis B.Sohn develops his opinion, saying “If the aggression can be stopped only by nuclear weapons, their use cannot be avoided…… If the aggressor should succeeded in his aggression the whole legal system of United Nation would collapse... Thus the most fateful aspect of the right of individual self-defense and collective defense under the Charter of the United Nation; the lawfulness of using otherwise prohibited weapons is self-defense or collective defense has become the focus of the discussion of the

---

167 Kalshoven, F. Constraints on the waging of war. Geneva : (International Committee of the Red Cross, 1987), p91
Legal Regime on the Use of Nuclear Weapon and its Impact on Humanity

committee. Underlying frame of their discussion is the relationship between substantive law and procedural law, which I would present in this chapter.¹⁶⁸

Coincidently as noted above 1960s saw a shift in interest toward the legal characteristic of nuclear weapons. The focus moved from the questioning the legality of the use of nuclear weapon per se to the way in which those nuclear weapon are used. The use of nuclear weapon in self defense began to acquire a mantle of legitimacy.

a) Is the Use of Nuclear Weapon Permitted within the Enforcement Measure of the Collective Security System and the Right of the Self-Defense?

The possibility of using nuclear weapon under the UN system is suggested in the following context of the ICJ Advisory Opinion. (1) States processing nuclear weapon asserted that the use of nuclear weapon is legal “in certain circumstance”. They referred in particular to the exercise of inherent right of self-defense in Article 51 of the UN Charter and the “exercise of the right of self-defense against an armed attack threatening… vital security interest”. The ICJ avoids a clear response on this point. (2) The court notes its appreciation of positive and negative security assurance proposal by Security Council member states “Negative” security refer to assurance by nuclear weapon states that they will not use nuclear weapon against non-nuclear weapon states that are parties to the Treaty on the Non-Proliferation of Nuclear Weapons.¹⁶⁹ “Positive” security means that when a nuclear attack or the threat of a nuclear attack occurs against a non-nuclear state, the nuclear weapon states will, as Security Council members immediately consult the Security Council and adopt expedient measure to render assistance to the state being attacked. (3) When referring to the use of nuclear weapons within the exercise of its right of self-defense, the ICJ states that it does not believe environmental laws “could have intended to deprive a state of the exercise of its right of self-defense, but that respect for the environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality.” Although not from the ICJ, the idea was expressed during the 1950s that “as laws are made not only for the protection of human life but also for the preservation of ultimate value of society, it is possible that

¹⁶⁸ Laurence Boisson de Chazournes, Philippe Sands, International law, the International Court of Justice and nuclear weapons’, (Cambridge University Press, 1999), p.65
¹⁶⁹ Id
should those value be imperiled by an aggressor intent upon dominating the world, the nation thus threatened might consider themselves bound to assume the responsibility of exercising the supreme right of self-preservation in manner which while contrary to a specific provision of International Law, they alone deem to be decisive for the ultimate vindication of the law of the nations. I would note that the danger of this argument in the absence of any authority to determine who the aggressor is was also pointed out in the 1950s.

Considered is isolation there appears to have been no opposition to the notion that the use per se of nuclear weapons as part of the right of self-defense cannot be deemed illegal. At least at the time of the 1996 ICJ Advisory Opinion there seem to be consensus that even for self-defense, the form of nuclear weapons use should be regulated by the law of armed conflict, the principles and rules of humanitarian law, or environmental law etc.

b) ICJ Observation on Legality of Threat or the Use of Nuclear Weapon.

The whole thing makes a difference when the question on legality of nuclear weapon was put forward by the WHO in 1993, were in the Court criticized the use of nuclear weapon illegal to the extent of self-defense if it fails to meet the necessary requirement of Art.51 of the UN Charter. However both the observation has a slight variation which is explained below.

The initial request for an advisory opinion by the ICJ was presented by the World Health Organization (WHO) on 3 September 1993, but the ICJ did not render any opinion on this request because the WHO was ultra vires, or acting outside its legal capacity. Another request was presented by the United Nations General Assembly in December 1994 and accepted by the Court in January 1995, the ICJ handed down an advisory opinion on 8 July 1996 the Legality of the Threat or Use of Nuclear Weapons case. The decision provides one of the few authoritative judicial decisions concerning the legality under international law on the use or the threatened use of nuclear weapons. The court was asked by United Nations General Assembly.
Is the threat or use of nuclear weapons in any circumstances permitted under international law?

In a split decision the ICJ ruled that but... 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, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defense.

Beyond this central question, many more general issues were touched upon by the Court or raised in the pleadings. These included institutional issues such as the proper role of international judicial bodies, and the ICJ's advisory function. The main substantive issues regarded sources of international legal obligation and the interaction of various branches of international law, particularly the norms of international humanitarian law (jus in bello) and the rules governing the use of force (jus ad bellum). In addition, the proceedings explored the status of "Lotus approach", and employed the concept of non liquet. There were also strategic questions such as the legality of the practice of nuclear deterrence or the meaning of Article VI of the 1968 Treaty on the Non-Proliferation of Nuclear Weapons.

1. Legality of Nuclear Weapon use by state in Armed Conflict-General list No-93

A. REQUEST OF THE WORLD HEALTH ORGANIZATION

An advisory opinion on this issue was originally requested by the World Health Organization (WHO) on 3 September 1993. ...In view of the health and environmental effects would the use of nuclear weapons by a state during war or other armed conflict amount to breach of its obligations under international law including the WHO Constitution?

The ICJ considered the WHO's request, in a case known as the Legality of Nuclear Weapon use by state in Armed Conflict (General List No. 93) also known as the WHO Nuclear Weapons case, between 1993 and 1996. The ICJ fixed 10 June 1994 as the time limit for written submissions, but after receiving many written and

---

173 Id
oral submissions, later extended this date to 20 September 1994. After considering the case the Court refused to give an advisory opinion on the WHO question. On 8 July 1996 it held, by 11 votes to three, that the question did not fall within the scope of WHO's activities, as is required by Article 96(2) of the UN Charter.\footnote{Donald K. Anton, Dinah Shelton, ‘Environmental Protection and Human Rights,’ (Cambridge University Press, 2011), p89}

2. Legality of the Threat or the Use of Nuclear Weapons-General List No 95

B. Request of the United Nations

On 15 December 1994 the UN General Assembly adopted resolution A/RES/49/75K. This asked the ICJ urgently to render its advisory opinion on the following question…….. Is the threat or use of nuclear weapons in any circumstances permitted under international law? The resolution, submitted to the Court on 19 December 1994, was adopted by 78 states voting in favour, 43 against, 38 abstaining and 26 not voting.\footnote{Jim Des Rocher, How to Achieve World Peace: (The Second Greatest Book Ever Written, Trafford Publishing, 2004), pp67-98}

The General Assembly had considered asking a similar question in the autumn of 1993, at the instigation of the Non-Aligned Movement (NAM), which ultimately did not that year push its request. NAM was more willing the following year, in the face of written statements submitted in the WHO proceedings from a number of nuclear-weapon states indicating strong views to the effect that the WHO lacked competence in the matter. The Court subsequently fixed 20 June 1995 as the filing date for written statements.\footnote{Ibid}

Altogether forty-two states participated in the written phase of the pleadings, the largest number ever to join in proceedings before the Court. Of the five declared nuclear weapon states only the People's Republic of China did not participate. Of the three "threshold" nuclear-weapon states only India participated. Many of the participants were developing states which had not previously contributed to proceedings before the ICJ, a reflection perhaps of the unparalleled interest in this matter and the growing willingness of developing states to engage in international judicial proceedings in the "post-colonial" period.\footnote{Id. 105}
Oral hearings were held from 30 October to 15 November 1995. Twenty-two states participated: Australia, Egypt, France, Germany, Indonesia, Mexico, Iran, Italy, Japan, New Zealand, Philippines, Qatar, Russian Federation, San Marino, Samoa, Marshall Islands, Solomon Islands, Costa Rica, United Kingdom, United States, Zimbabwe, Malaysia; as did the World Health Organization. The secretariat of the UN did not appear, but filed with the Court a dossier explaining the history of resolution 49/75K. Each state was allocated 90 minutes to make its statement. On 8 July 1996, nearly eight months after the close of the oral phase, the ICJ rendered its Opinion.\textsuperscript{179}

3. Court’s analysis on illegality of nuclear weapons use.

a. Deterrence and "threat"

The court considered the matter of deterrence, which involves a threat to use nuclear weapons under certain circumstances on a potential enemy or an enemy. Was such a threat illegal? The court decided, with some judges dissenting, that, if a threatened retaliatory strike was consistent with military necessity and proportionality, it would not necessarily be illegal.\textsuperscript{180}

The court then considered the legality of the possession, as opposed to actual use, of nuclear weapons. The Court looked at various treaties, including the UN Charter, and found no treaty language that specifically forbade the possession of nuclear weapons in a categorical way.\textsuperscript{181}

The UN Charter was examined in paragraphs 37-50 (paragraph 37: "The Court will now address the question of the legality or illegality of recourse to nuclear weapons in the light of the provisions of the Charter relating to the threat or use of force"). Paragraph 39 mentions: “These provisions [i.e. those of the Charter] do not refer to specific weapons. They apply to any use of force, regardless of the weapons employed. The Charter neither expressly prohibits, nor permits, the use of any specific weapon, including nuclear weapons. A weapon that is already unlawful per

\textsuperscript{179} \textit{Id.}

\textsuperscript{180} ICJ on Legality of Nuclear Weapon, 1996 (Judgment paragraphs 37–50)

\textsuperscript{181} William M. Evan, Ved P. Nandam, Nuclear proliferation and the legality of nuclear weapons, (University Press of America, 1995), p.112
Treaties were examined in paragraphs 53-63 (paragraph 53: "The Court must therefore now examine whether there is any prohibition of recourse to nuclear weapons as such; it will first ascertain whether there is a conventional prescription to this effect"), as part of the law applicable in situations of armed conflict (paragraph 51, first sentence: "Having dealt with the Charter provisions relating to the threat or use of force, the Court will now turn to the law applicable in situations of armed conflict"). In particular, with respect to "the argument [that] has been advanced that nuclear weapons should be treated in the same way as poisoned weapons", the Court concluded that "it does not seem to the Court that the use of nuclear weapons can be regarded as specifically prohibited on the basis of the [...] provisions of the Second Hague Declaration of 1899, the Regulations annexed to the Hague Convention IV of 1907 or the 1925 Protocol" (paragraphs 54 and 56). It was also argued by some that the Hague Conventions concerning the use of bacteriological or chemical weapons would also apply to nuclear weapons, but the Court was unable to adopt this argument ("The Court does not find any specific prohibition of recourse to nuclear weapons in treaties expressly prohibiting the use of certain weapons of mass destruction", paragraph 57 in fine).

With respect to treaties that "deal exclusively with acquisition, manufacture, possession, deployment and testing of nuclear weapons, without specifically addressing their threat or use," the Court notes that those treaties "certainly point to an increasing concern in the international community with these weapons; the Court concludes from this that these treaties could therefore be seen as foreshadowing a future general prohibition of the use of such weapons, but they do not constitute such a prohibition by themselves." (paragraph 62 of ICJ Ruling.)

Also, regarding regional treaties prohibiting resource, namely those of Tlatelolco (Latin America) and Rarotonga (South Pacific) the Court notes that while those "testify to a growing awareness of the need to liberate the community of States

---

183 Id
and the international public from the dangers resulting from the existence of nuclear weapons", "[i.e. the Court] does not, however, view these elements as amounting to a comprehensive and universal conventional prohibition on the use, or the threat of use, of those weapons as such." (paragraph 63).

The court also pointed out that customary international law provided insufficient evidence that the possession of nuclear weapons is universally regarded as illegal.

Ultimately, the court was unable to find an *opinio juris* (that is, legal consensus) that nuclear weapons are illegal to possess. (paragraph 65) However, in practice, nuclear weapons have not been used in war since 1945 and there have been numerous UN resolutions condemning their use (however, such resolutions are not universally supported most notably, the nuclear powers object to them). (paragraph 68-73) The ICJ did not find that these facts demonstrated a new and clear customary law absolutely forbidding nuclear weapons.  

However, there are many universal humanitarian laws applying to war. For instance, it is illegal for a combatant specifically to target civilians and certain types of weapons that cause indiscriminate damage are categorically outlawed. All states seem to observe these rules, making them a part of customary international law, so the court ruled that these laws would also apply to the use of nuclear weapons. (paragraph 86) The Court decided not to pronounce on the matter of whether the use of nuclear weapons might possibly be legal, if exercised as a last resort in extreme circumstances (such as if the very existence of the state was in jeopardy). (paragraph 97)

b. Decision

The court undertook seven separate votes, all of which were passed:

1. The court decided to comply with the request for an advisory opinion;
2. The court replied that "There is in neither customary nor conventional international law any specific authorization of the threat or use of nuclear weapons";

---

185 Id at, p 97
3. The court replied that "There is in neither customary nor conventional international law any comprehensive and universal prohibition of the threat or use of nuclear weapons as such";\(^\text{186}\)

4. The court replied that "A threat or use of force by means of nuclear weapons that is contrary to Article 2, paragraph 4, of the United Nations Charter and that fails to meet all the requirements of Article 51, is unlawful";\(^\text{187}\)

5. The court replied that "A threat or use of nuclear weapons should also be compatible with the requirements of the international law applicable in armed conflict, particularly those of the principles and rules of humanitarian law, as well as with specific obligations under treaties and other undertakings which expressly deal with nuclear weapons."

6. The court replied that "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, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defense, in which the very survival of a State would be at stake."

7. The court replied that "There exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control."

c. Split decision

The only significantly split decision was on the matter of whether "the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict", not including "in an extreme circumstance of self-defense, in which the very survival of a State would be at stake".\(^\text{188}\) However, three of the seven "dissenting" judges (namely, Judge Shahabuddeen of Guyana, Judge Weeramantry of Sri Lanka, and Judge Koroma of Sierra Leone) wrote separate


\(^{188}\) George Abi-Saab. 'The Court and the Bomb: a Case of Mutual Deterrence' 7 Iowa Journal of Transnational Law 1997, p429.
opinions explaining that the reason they were dissenting was their view that there is no exception under any circumstances (including that of ensuring the survival of a State) to the general principle that use of nuclear weapons is illegal. A fourth dissenter, Judge Oda of Japan, dissented largely on the ground that the Court simply should not have taken the case. Vice President Schwebel remarked in his dissenting opinion that “It cannot be accepted that the use of nuclear weapons on a scale which would - or could - result in the deaths of many millions in indiscriminate inferno and by far-reaching fallout, have pernicious effects in space and time, and render uninhabitable much or all of the earth, could be lawful.”

And Higgins noted that she “did not exclude the possibility that such a weapon could be unlawful by reference to the humanitarian law, if its use could never comply with its requirements.”

Nevertheless, the Court's opinion did not conclude definitively and categorically, under the existing state of international law at the time, whether in an extreme circumstance of self-defense in which the very survival of a State would be a stake, the threat or use of nuclear weapons would necessarily be unlawful in all possible cases. However, the court's opinion unanimously clarified that the world's states have a binding duty to negotiate in good faith, and to accomplish, nuclear disarmament.

4. International reactions.

a. United Kingdom.

The Government of the United Kingdom has announced plans to renew Britain's only nuclear weapon, the Trident missile system. They have published a white paper The Future of the United Kingdom's Nuclear Deterrent in which they state that the renewal is fully compatible with the United Kingdom's treaty commitments and international law. These arguments are summarized in a question and answer briefing published by UK Permanent Representative to the Conference on Disarmament.

• Is Trident replacement legal under the Non Proliferation Treaty (NPT)? Renewal of the Trident system is fully consistent with our international obligations, including those on disarmament.

• Is retaining the deterrent incompatible with NPT Article VI? The NPT does not establish any timetable for nuclear disarmament. Nor does it prohibit maintenance or renewal of existing capabilities. Renewing the current Trident system is fully consistent with the NPT and with all our international legal obligations.

The white paper *The Future of the United Kingdom’s Nuclear Deterrent* stands in contrast to two legal opinions. The first, commissioned by Peace rights, was given on 19 December 2005 by Rabinder Singh QC and Professor Christine Chinkin of Matrix Chambers. It addressed;\(^{191}\)

Whether Trident or a likely replacement to Trident breaches customary international law? Drawing on the International Court of Justice (ICJ) opinion, Singh and Chinkin argued that:

*The use of the Trident system would breach customary international law, in particular because it would infringe the "intransgressible" [principles of international customary law] requirement that a distinction must be drawn between combatants and non-combatants.*

The second legal opinion was commissioned by Greenpeace and given by Philippe Sands QC and Helen Law also of Matrix Chambers, on 13 November 2006. The opinion addressed:

*The compatibility with international law, in particular the jus ad bellum, international humanitarian law (‘IHL’) and Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons (‘NPT’), of the current UK strategy on the use of Trident...The compatibility with IHL of deploying the current Trident system...[and] the compatibility with IHL and Article VI NPT of the following options for replacing or upgrading Trident: (a) Enhanced targeting capability; (b) Increased yield flexibility; (c) Renewal of the current capability over a longer period.*

\(^{191}\) Jozef Goldblat, David Cox, *Nuclear weapon tests: prohibition or limitation?* (Oxford University Press, 1988), p78
With regards to the *jus ad bellum*, Sands and Law found that\(^\text{192}\)

*Given the devastating consequences inherent in the use of the UK’s current nuclear weapons, we are of the view that the proportionality test is unlikely to be met except where there is a threat to the very survival of the state. In our view, the ‘vital interests’ of the UK as defined in the Strategic Defense Review are considerably broader than those whose destruction threaten the survival of the state. The use of nuclear weapons to protect such interests is likely to be disproportionate and therefore unlawful under Article 2(4) of the UN Charter.*

The phrase "very survival of the state" is a direct quote from paragraph 97 of the ICJ ruling. With regards to international humanitarian law, they found that

*It [is] hard to envisage any scenario in which the use of Trident, as currently constituted, could be consistent with the IHL prohibitions on indiscriminate attacks and unnecessary suffering. Further, such use would be highly likely to result in a violation of the principle of neutrality.*

Finally, with reference to the NPT, Sands and Law found that;

* A broadening of the deterrence policy to incorporate prevention of nonnuclear attacks so as to justify replacing or upgrading Trident would appear to be inconsistent with Article VI; b) Attempts to justify Trident upgrade or replacement as an insurance against unascertainable future threats would appear to be inconsistent with Article VI; c) Enhancing the targeting capability or yield flexibility of the Trident system is likely to be inconsistent with Article VI; d) Renewal or replacement of Trident at the same capability is likely to be inconsistent with Article VI; and e) In each case such inconsistency could give rise to a material breach of the NPT.

b. Scots law

On 27 September 1999, peace activists Ulla Roder, Angie Zelter and Ellen Moxley had been acquitted of charges of malicious damage to Her Majesty’s property at Greenock Sheriff Court. The three women had boarded the *Maytime* a barge moored in Loch Goil and involved in scientific work which ensured the radar

\(^{192}\) Peter H. F. Bekker, “Recent Developments at the World Court.” The American Society of International Law Newsletter, (September-October,1996), pp89-115
invisibility of the four Vanguard-class (i.e., capable of carrying the Trident nuclear missile system) submarines berthed in the nearby Gareloch, and caused £80,000 worth of damage. As is often the case in trials relating to such actions, the defendants attempted to establish that their actions were necessary, in that they had prevented what they saw as "nuclear crime". However, this was the first case in which the ICJ's Opinion was used in establishing the illegality of the relevant nuclear weapons.\textsuperscript{193}

The acquittal of "The Trident Three" resulted in the High Court of Justiciary, the supreme criminal court in Scots Law, presenting a Lord Advocate's Reference, the first detailed analysis of the ICJ Opinion by another judicial body.\textsuperscript{194} The High Court was asked to answer four questions:

1. In a trial under Scottish criminal procedure, is it competent to lead evidence as to the content of customary international law as it applies in the United Kingdom?
2. Does any rule of customary international law justify a private individual in Scotland to damage or destroy property in pursuit of his or her objection to the United Kingdom's possession of nuclear weapons, its action in placing such weapons at locations within Scotland or its policies in relation to such weapons?
3. Does the belief of an accused person that his or her actions are justified in law constitute a defense to a charge of malicious mischief or theft?
4. Is it a general defense to a criminal charge that the offence was committed in order to prevent or bring to an end the commission of an offence by another person?

The four collective answers given by Lord Prosser, Lord Kirkwood and Lord Penrose were all negative. This did not have the effect of overturning the acquittals of Roder, Zelter and Moxley (Scots Law, like many other jurisdictions, does not allow for an acquittal to be appealed); however, it does have the effect of invalidating the ratio decidendi under which the three women were able to argue for their acquittal, and ensures that similar defenses cannot be present in Scots Law.\textsuperscript{195}

\textsuperscript{193} Id.
5.6.2.6. Regulating Nuclear Weapon Use within the Right of Self-Defense

1. Regulating the use of nuclear weapon in view of the principles of necessity and proportionality

Even if nuclear weapons use is recognized within the right of self-defense, the use should be subjected to the principle of necessity and proportionality. Permissible case would be either the case in which the other party used the nuclear weapon or the case in which the other party attacked with a quantity of conventional weapons so huge that it could only be countered by nuclear weapons. In that case, could such nuclear weapons use conform to the requirement of necessity and proportionality?

The ICJ Advisory Opinion develops the following opposing arguments (a) “The very nature of nuclear weapons, and the high probability of an escalation of nuclear exchanges, mean that there is an extremely strong risk of devastation. The risk factor is said to negate the possibility of the condition of proportionality being complied with. (b) “In some case, such use of low yield nuclear weapon against warships on the High Seas or troops in sparsely populated area; it is possible to envisage a nuclear attack that caused comparatively few civilian casualties.”

The affirmative argument stems from the later development of nuclear weapons, which did not exist immediately following the dropping of the atomic bomb. To this argument the court merely responded that those “profound risks…..are further consideration to be born in mind by States believing they can exercise a nuclear response in self-defense in accordance with the requirement of proportionality.”

2. Regulating the use of nuclear weapons in view of the principle and rules of humanitarian law

Even when the use of nuclear weapons under the right of self-defense is justified under *jus ad bellum*, it must be subject to legal instrument such as the Hague Laws of war and the 1949 four Geneva Convention. The nuclear weapon states should also recognize this. According to the UK written statement quoted in 1996 ICJ Advisory statement, “Assuming that the state’s uses nuclear weapon to meets the requirements of self-defense, it must then considered its action in conformity to the

---

196 Truman, Legality of nuclear weapon use, Question before ICJ ,(Cambridge,2000), p.67
fundamental principles of the law of armed conflict regulating the conduct of hostilities.”

However, new issues arising from the now-established realities of the post-1960 nuclear weapon developments and deterrence had taken on decisive importance by the time of 1996 Advisory opinion. This materialized the ICJ’s discussion of the applicability on the basic principles of the laws of armed conflict to use nuclear weapons. This presented different characteristics from the discussion developed in the Tokyo District Court.¹⁹⁷

The ICJ Advisory Opinion assumes that the effect of using nuclear weapons will extend widely over time and space, but at the same time quotes the written and the oral statement of the UK and the USA which declares that there can be indeed uses of nuclear weapon consist with the principles of the law of armed conflict. “The reality is that the nuclear weapon may be used in wide variety of circumstances with very different result in term of likely civilian casualties. In some cases such as the use of low yield nuclear weapon against warship on the High Sea or troops in sparsely populated areas, it is possible to envisage a nuclear attack which caused comparatively few civilian casualties. It is by no means the case that every use of nuclear weapon against a military objective would inevitably cause very great collateral civilian casualties.” The ICJ also introduced the position that the use of nuclear weapon is illegal in light of the principle of humanitarian law, given that “their effects, largely uncontrollable, could not be restricted, either in time or in space, to lawful military targets.”

The Court’s response to this division of opinion was that they could determine whether the “clean” use of low yield tactical nuclear weapon can be achieved, or what the circumstance justifying such use would be. It can be presumed to means a determination can only be made in actual instances. They also refer to the “overriding consideration of humanity” at the heart of the “principles and rules of law applicable in armed conflict,” and recognize the near impossibility of squaring the use of nuclear weapons with those principles.¹⁹⁸ Still the court says “it does not have sufficient elements to enable it to conclude with certainty that the use of nuclear weapon would

¹⁹⁷ Id, at p.153
¹⁹⁸ Id, at 45; also see, Douglas P. Lackey, Moral principles and nuclear weapons, (Rowman & Littlefield, 1986), p.67
necessarily be a variance with the principles and rules of law applicable in armed conflict,” and recognize the near impossibility of squaring the use of nuclear weapons would necessarily be at variance with principles and the rules of law applicable in armed conflict in any circumstance”. They also say the court “cannot lose sight of the fundamental right… to self-defense, in accordance with Article 51 of the Charter, when its survival is at stake.”

5.6.2.7 Analysis and Evaluation of the ICJ Advisory Opinion

Paragraph 2(E) of the dispositif of the advisory opinion reads as follow…

“Threat or use of nuclear weapon would generally be contrary to the rules of international law applicable in armed conflict and in particular the principles and the rules of humanitarian law. However the court cannot conclude definitely whether threat or the use of nuclear weapon would be lawful or unlawful in any extreme circumstance of self-defense. In which the very survival of a state would be at stake.”

The court stated simply there are two arguments: one refers to traditional humanitarian law (jus in Bello) the other is premised on the UN Charter (jus ad bellum). These two premises divided into two arguments co-exist without a clearly defined relationship. (1) The timing of establishment and assumption behind the international law which underlines the two arguments differs, making them independent of one another. (2) Nevertheless the advisory opinion makes no conscious distinction between each of their underlying foundation and logical assumptions.

Therefore both arguments advance on the same plane, thus resulting in circular and endless debates. The jus ad bellum and jus in bello frame is presented to explain the above dual structure and alternative frame about the relationship of substantive law and procedural law. An analysis of the ICJ Advisory Opinion from this standpoint will expose the current level of development and the direction of future development of international law regarding the nuclear weapon use.

200 ld.
**a. Circular arguments created by interaction between the differing arguments**

In the midst of a discussion about the legality or illegality of the use of nuclear weapons in the context of traditional humanitarian law, human right law, and environment law, the court interjects arguments about legality of exercise of the right of self-defense, under the UN Charter, saying in essence, “but self-defense is another story. It continues however, that while the use of nuclear weapon is possible under the UN Charter right of self-defense, that use is regulated by humanitarian law. Here the counter-argument responds that since the use of nuclear weapons would inevitably violate the principle of humanitarian law, such use would also be illegal in context of the right of self-defense. The argument thus contradicts its starting point “self-defense is another story.” In short, the question of legality under self-defense and the rule of proportionality under humanitarian law make the argument circular and unending.

**b. Can the logic between jus ad bellum and jus in bello resolve the circular and endless argument**

In order to analyze the relationship between the first and second part of paragraph 2(E) of the dispositif of Advisory Opinion the “jus ad bellum and jus in bello” frame is introduced. Under this frame the first part of the paragraph 2(E) addresses jus in bello issues and the second part addresses the problem of the use of nuclear weapon in self defense which is to say jus ad bellum. So far as this co-relation is convincing however, this does not necessarily succeed in analyzing the relationship between the first and the second part of paragraph 2(E). This is because there is no meditating logic between the meaning of jus ad bellum and jus in bello. In order for this frame to be productive defining the relationship between the two positions is required. In essence, the co-relation is not disclosed by the concept of jus ad bellum and jus in bello themselves. We have inherited a form of thinking from the age when war was considered acceptable, where question about the reason for the exercising force was not an issue (the issues of jus in bello level), however now is an age in which the use of force itself is considered illegal, raising the possibility of exempting the use of force as sanctions or enforcement measures in reaction to such illegal force. This use of force under jus ad bellum is still subject to jus in bello. We
Legal Regime on the Use of Nuclear Weapon and its Impact on Humanity

need to advance beyond the traditionally inherited relegation of *jus ad bellum* and *jus in bello* to separate dimension.\(^{201}\)

c. Alternative frame: the relationship between the substantive and procedural law.

The relationship between the substantive and procedural law can help to analyze the relationship between the first and second part of the above paragraph of 2(E) of the *dispositif* of the Advisory Opinion. Substantive law and procedural law here refer to particular subdivision of particular legal system functioning as social control. Substantive law refer to laws that determine the right and obligations of acting entities; procedural law refer to law use to implement the rights and the obligations of acting entities; procedural law refer to the law used to implement the rights and the obligations of substantive law. The law performs a double function of social control through these two subsystems of the substantive and procedural law.\(^{202}\)

The substantive and procedural law can be conceptually distinguished in international law. The obligation not to exercise force under Art 2(4) of the Charter is the concept of substantive law. Whereas the measure stipulated in Chapter VII (collective security and the right of self-defense) that are permitted as sanction against states violating under Article 2(4) of the UN Charter are procedural law. Hence the relationship between Article 2(4) and Chapter VII of the Charter can be interpreted as corresponding to the relationship between the substantive law and the procedural law, which should be included as inherent qualities of the legal system. However, practically, this separation is difficult to be implemented in the current absence of any enforcement or implementation agency, operating as a supranational organ in the international community.\(^{203}\)

True, substantive and procedural law may not be fully differentiated in international law at present, but the distinction is growing with the dynamic international law. A model for correlating the substantive and the procedural law that are conceptually embodied, if only in latent form, within international law, it is necessary in order to cogently analyze the diversity of thought in the international community and dynamic changing realities surrounding the use of nuclear weapons.

\(^{202}\) Id
\(^{203}\) John Burroughs, supra 193, at, p34
Legal Regime on the Use of Nuclear Weapon and its Impact on Humanity

This would clarify the meaning of what at first glance appears to be mutually contradictory argument in the ICJ Advisory opinion, and to more deeply reveal the current structure of international law.

d. Interpreting the issues.

The question of illegality of nuclear weapons has been controversial with the Advisory opinion of the ICJ; in fact the Court failed to take clear stand over the question of illegality of nuclear weapons.\textsuperscript{204} Rather the court preferred to maintain balance between the humanitarian principles and the UN Charter. Humanitarian law based about the legality of nuclear weapons may have shifted in the 1960s from the stance described in the above paragraph, which cover the question of use of nuclear weapon \textit{per se} to the stance described in regulation of nuclear weapon use, which also focus on limitation to military objective and the prohibition of indiscriminate attack. However this does not mean that humanitarian law based argument about the lawfulness of nuclear weapon use \textit{per se} have been invalidated. Thus, the ICJ advisory opinion incorporated the following opposing interpretations. (1) The interpretation that the use of nuclear weapon cannot be consistent with the humanitarian principles and is therefore illegal, even for self-defense, and (2) the interpretation that the use of nuclear weapons \textit{per se} is not illegal, and may be legal if the method of use follows principles of humanitarian law. The Edinburg Resolution clearly embraces interpretation (2). The courts itself however, does not indicate a judgment as to which of (1) or (2) should be adopted as the result of applying humanitarian law. One aspect of the circular and endless problem comes from this point.\textsuperscript{205}

First, interpretation (1) is widely accepted in the international community without any further reasoning of its own. “Whatever the reason, nuclear weapons are illegal and that’s the end of it.” The ICJ itself has said that “a weapon that is already unlawful \textit{per se}, whether by treaty or custom, does not become lawful by reason of its being used for a legitimate purpose under the Charter.” Those arguing against this interpretation counter that the use of nuclear weapons in self-defense is another matter. Such arguments rely on the legitimacy of the right of self-defense under

\textsuperscript{204} Id
\textsuperscript{205} John Burroughs,“World Court Verdict: Kill Nuclear Weapons.” South Carolina Independent Newsmonthly, Vol. 7, No. 61, August 1996,p.90
Article 51 of the UN Charter, which is distinct from humanitarian law. Ultimately the two arguments fail to engage one another.

Second interpretation (2) preserves the potential for UN Charter based arguments (i.e. humanitarian law) namely that the use of nuclear weapons is lawful in certain circumstances within the right of self-defense. However the self-defense argument is itself independent of humanitarian law and therefore does not need to be directly linked from interpretation (1) or (2). Put another way, whichever of the two interpretations is selected as a result of interpreting humanitarian law, the potential still remains for revisiting the problems of nuclear weapons use within the UN Charter’s right of self-defense.

e. Argument regarding the use of nuclear weapons in the UN Charter’s right of self-defense should be considered independently.

First we must establish whether a jus ad bellum justification exist for using nuclear weapons within the right of self-defense. The whole discussion developed in the 1962 ILA Committee on the Charter of United Nations endorsed this. In the 1996 ICJ Advisory Opinion, a counterargument on this point is asserted which declares nuclear weapons illegal from the standpoint of humanitarian law. But no counterargument arises from the perspective of the UN Charter’s right of self-defense. Secondly, if the principles of humanitarian law are applied to the legitimate exercise of the right of self-defense, then the application of such principles will determine the lawfulness of nuclear weapons use as the legitimate exercise of right of self-defense. Even if nuclear weapon use occurred as a legitimate exercise of the right of self-defense, it would be illegal if it violated humanitarian law. The reasoning in this case should be closed here. At last the debate should be closed either by concluding that an abstract and general determination of lawfulness or unlawfulness is unachievable, or that each specific incident must be judged individually. To once again raise the argument that “we can’t ignore the inherent right of each nation to exist” (the Article 51 right of self-defense) at this point the process

206 Id.
of applying humanitarian law leads to circular arguments, as already discussed, not to the solutions.\textsuperscript{208}

Certainly there is also a statement that the principle of proportionality and basic principles of the law of armed conflict must still be followed in the use of nuclear weapons within the right of self-defense. Once the matter has been entrusted to the law of armed conflict, a conclusion should be reached by weighing military necessity against humanitarian principles. The debate should be closed here. If anything, counter argument should take the form of objecting that the right of self-defense within the UN Charter cannot provide a justification for the use of nuclear weapons. Third, some states asserts that because nuclear weapon can be used in certain circumstance within the right of self-defense, the use per se of nuclear weapon is lawful. This assertion results in one more two divergent points of controversy and inviting circular arguments. The legality of the use of nuclear weapons under humanitarian law, and legality in the context of the exercise of self-defense under United Nation Charter should be differentiated, as belonging to different sub-legal systems.\textsuperscript{209}

\textbf{f. Nuclear Deterrence, its Relationship to Art 2(4) of UN Charter}

The deterrence concept which has been touched upon in this chapter earlier was in the context of theory of nuclear politics which justified the use of nuclear weapon, however the same concept and principle fails to maintain status quo under international law and law of humanity. Before the ICJ in 1996 the predominant question was on the threat of use of nuclear weapon. In arguing for the legality of the nuclear weapons use, the court asserted in Advisory Opinion that it cannot ignore the practice referred to as the policy of deterrence, to which an appreciable section of international community adhered for many years. “It gives the impression that in course of \textit{jus in bellow} arguments, the court avoided making a judgment at that level, taking refuge in \textit{jus ad bellum} and political arguments. The deterrence concept was significantly put forward before the court of law to find the status of use of nuclear

\textsuperscript{208} Merav Datan and Saul Mendlovitz. Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons: A Narrative of Affirmative Appreciation and Judge Werramantry’s Grotian Quest. A. Anghie & G. Sturgess (eds), (Cambridge, 1997), p78

\textsuperscript{209} Dino Kritsiotis, "The Fate of Nuclear Weapons after the 1996 Advisory Opinions of the World Court."1 Journal of Armed Conflict Law, 1996, p95.
weapon, as with the concept of ‘threat of use’, which is one of the matter on which the court’s opinion is sought.\textsuperscript{210}

i. Meaning of deterrence.

Deterrence means in essence that the party resorting to deterrence is intimating to the rest of the world that it means to use nuclear power against any states in the event of first state being attacked. The concept calls for some future examination. Deterrence as used in the context of nuclear weapons is deterrence from an act of war, not deterrence from action which one opposes. One of the dangers of the possession of nuclear weapon for purpose of deterrence is the blurring of this distinction and the use of power. The nuclear weapon gives for the purpose of deterring unwelcome action on the part of another state.\textsuperscript{211} The Arguments of course applies to all kind of armaments, but a fortiori to nuclear weapons. As Polanyi observes, the aspects of deterrence that is most feared in the temptation to extend it beyond the restricted aim of deterring war to deterring unwelcome actions. It has been suggested for example that deterrence can be used for the protection of nation’s “vital interest”. What are vital interests and who defines them? Could they be merely commercial interests? Could they be commercial interest situated in any other country or different area of the globe?

Another phrase used in this context is the defense of “strategic interests”. Some submission adverted to the so-called “sub-strategic deterrence”, affected through the use of low yield “warning shot” when a nation’s vital interest are threatened. This opinion will not deal with such type of deterrence but rather with deterrence in the sense of self-defense against an act of war. This definitely leads one to think upon the degree of deterrence.\textsuperscript{212}

ii. Degree of deterrence.

As already made clear in the earlier discussion that Deterrence can be of various degrees ranging from the concept of maximum deterrence to what is described

\textsuperscript{210}Id
\textsuperscript{211}Id at,p112
\textsuperscript{212}Id
as minimum nuclear deterrent strategy. Minimum nuclear deterrence has been described as:

“Nuclear strategy in which a nation maintains minimum number of nuclear weapons necessary to inflict unacceptable damage on its adversary even after it has suffered a nuclear attack”.

The deterrence principle rest on the threat of massive retaliation, and as professor Brownlie has observed:213

“If put into practice this principle would lead to lack of proposition between the actual threat and the reaction to it. Such disproportionate reaction does not constitute self-defense as permitted by Article 51 of the UN Charter.”

In the word of same author, “the prime object of deterrent nuclear weapon is ruthless and unpleasant retaliation. They are instrument of terror rather than weapon of war”. Since the question posed is whether the use of nuclear weapon is legitimate in any circumstances, minimum deterrence must be considered. One of the problems with deterrence even of minimal character is that the action perceived by one side as defensive can all too easily be perceived by the other side as threatening. Such a situation is the classical backdrop to the traditional arms race, whatever be the type of weapons involved. With the nuclear arms it triggers off nuclear arms race thus raising variety of legal concerns. Even minimum deterrence thus leads to counter-deterrence, and to an ever ascending spiral of nuclear armament testing and tension. If therefore there are legal objections to deterrence, those objections are not removed by that deterrence being minimal.214

iii. Problem of credibility.

Deterrence needs to carry the conviction to the other parties that there is a real intention to use those weapons in the event of an attack by other party. A game of bluff does not convey that intention, for it is difficult to persuade another of one’s intention unless one really has that intention. Deterrence thus consists in a real intention to use such weapons. If deterrence is to operate, it leaves the world to

213 Degree of deterrence analyzed to determine illegality of nuclear weapon as it was neither proved before the ICJ whether there could be minimum consequence of limited nuclear deterrence, the contention seems to be inefficient in determining the desired result.
214 Merav Datan and Saul Mendlovitz, supra, 201.id
believe and enters the field of seriously intended military threats. Deterrence therefore raises the question not merely whether the threat of use of such weapons is legal, but whether their use is legal. Since what is necessary for deterrence is assured destruction of the enemy, deterrence thus comes within the ambit of that which goes beyond the purpose of war. Moreover in the split second response to an armed attack, finely graded use of appropriate strategic nuclear missiles or “clean” weapons which cause minimal damage does not seem a credible possibility.215

iv. Deterrence distinguished from possession.

The concept of deterrence goes a step further than mere possession. Deterrence is more than the mere accumulation of a weapon in a storehouse. It means the possession of weapon in a state of readiness for actual use. This means the linkage of weapons ready for immediate action. It means that weapons are attached to the delivery vehicles. It means that personnel are ready night and day to render them operational at a moment’s notice. There is a vast difference between weapons stocked in a warehouse and weapons so readied for immediate action. Mere possession and deterrence are thus concepts which are clearly distinguishable from each other.216

v. Legal problems of intentions.

For reasons already outlined, deterrence becomes not the storage of weapons with intent to terrify, but a stockpiling with intent to use. If one intends to use them, all the consequence arises which attach to intention in law, whether domestic or international. 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 purpose of war. Such intentions provide the mental element implicit in the concept of threat. However, a secretly harbored intention to commit a wrongful or criminal act does not attract legal consequence, unless and until that intention is followed through by corresponding conduct. Hence such a secretly harbored intention may not be an offence. However, if, the intention is announced, whether directly or by implication, then it becomes the criminal act of threatening to commit illegal act in question. Deterrence is by definition the very opposite of secretly harbored intention

to use nuclear weapons. Deterrence is not deterrence if there is no communication whether by word or implication, of the serious intention to use nuclear weapons. It is therefore nothing short of threat to use. If an act is wrongful, the threat to commit it and more particularly, a publically announced threat must also be wrongful. Act of deterrence as explained above takes a new twist if the weapons are used by terrorist network and in such case the question of deterrence or threat cannot be inquired or debated into. The law at this point has to confirm it’s individuality on the status of nuclear weapon, since it’s a matter of great concern. A thorough discussion on this matter is required.217

vi. The temptation to use the weapon maintained for deterrence.

Another aspect of deterrence is the temptation to use the weapon maintained for this purpose. The court has referred numerous instance of the possible use of nuclear weapon of which the Cuban missile crises is probably the best known. A study based on Pentagon documents, to which were referred, lists numerous such instance involving the possibility of the nuclear use from 1964 to 1980.

5.6.2.8. Principles of International Law and Nuclear Weapon.

The above discussion states that the status of nuclear weapon cannot be said to be a permissible weapon of war, and hence discard its use in any form. The present discussion shall be based on the principles of international law and seek to establish the proposition that the use of nuclear weapon is illegal and crime against humanity. It then argues that whether or not it be a crime under international law, it is an international delict or tort, that is an act which is wrong, whether or not it be criminal.218

International law consists as we have seen not merely treaties. Among the source of international law enumerated by Article 38 of the Charter of the International Court of Justice are International custom, the general principles of law recognized by civilized nation, judicial decision, and the opinions of the outstanding jurist, all of which strongly establishes the illegality of nuclear weaponry. The

217 Robert Green, THE NAKED NUCLEAR EMPEROR: DEBUNKING NUCLEAR DETERRENCE 63 (2000). Portions of the text are available at the website http://www.disarmsecure/publications/books.org accessed on 12/7/2011@3.45pm,
218 Francis Anthony Boyle, 'The criminality of nuclear deterrence,' (Clarity Press, 2002), p89
absence of a specific treaty banning the use or manufacture of nuclear weapons means that only one of the sources of international law is absent. All the other international custom, general principles of law recognized by civilized nation, judicial decision and jurist writing can be strongly invoked in support of this proposition. The advent of the nuclear bomb and the manufacture of the nuclear weaponry in several countries have not displaced these principles. There is also a strong body of international declarations which, although they do not have the force of law in themselves, do strongly indicate the sense of international community on these issues and reinforce the contention that such a principle now forms a part of customary international law. It is sometime argued that nuclear weapon do not come within the scope of laws of war which they formulated before their invention.\textsuperscript{219} This is a spurious argument, for the same could then apply to the dum-dum bullet and chemical warfare. What is important is the principle underlying the rule. Specific application of the general principles occurs in the light of event and the circumstances only arise late. Nearly every piece of legislation and nearly every constitution must be applied to situations that were not envisaged when they were formulated.

These sources of law would only be inoperative if they had no general principle which would cover the new situation in the case of nuclear weapon, those general principle do exist.\textsuperscript{220} There are number of reason why nuclear weaponry should be include in the category of weapons forbidden by customary international law and general principles of law recognized by civilized nations they include:

\begin{itemize}
\item[a.] **Reason 1.** Causation of indiscriminate harm to the combatants and noncombatants.
\end{itemize}

As we have seen in the preceding chapter that the tradition law of war greatly regulated the ancient warfare methodology. For instance Ramayana tells us that the use of a weapon of war which would destroy the entire race of the enemy was forbidden by the virtuous Prince ram. The reason given was that the weapon would destroy eve those who did not bear arms: such destruction en-masse was forbidden by

\begin{flushright}
\textsuperscript{219} Id
\textsuperscript{220} magazine, International law perspective, Volume 9,International Law Perspective, 1987,p56
\end{flushright}
the ancient laws of war even though Rama’s adversaries was fighting an unjust war.\textsuperscript{221} So strong was the ancient tradition that a historian’s record that in the face of invading armies Indian peasants would pursue their work in their field, confident of the protection afforded them by the tradition that war was a matter between the combatants. This is an ancient principle of several other cultural traditions.\textsuperscript{222}

In 19\textsuperscript{th} century and in the years immediately preceding World War I this principle received such wide approval that it came to be embodied in the military and the naval manuals of the great powers. For example a standard manual of the military law issued by the British war office in 1914 states: “it is however universally recognized rule of international law that hostilities are restricted to the arms force of the belligerents, and the ordinary citizens of the contesting states, who do not take up arms and who abstain from hostile acts, must be treated leniently, must not be injured in their lives or liberty, except for cause or after dual trail, and must not as a rule be deprived of their private property.\textsuperscript{223} It is true that civilian causalities incidental to an attack upon a military target have been regarded as legitimate and part of the necessary incidents of warfare. A distinction must be made, however between the incidental causation and such causalities and their deliberate and direct causation. Noncombatant, sick and wounded cannot legally be attacked nor can religious institutions, cultural institution, or hospitals. Article 6 of the Nuremberg Charter declares that the extermination of the civilian population whether in whole or in part constituted a crime against humanity.\textsuperscript{224} Lest it be thought that the Nuremberg principles reflected merely victor’s justices after the event, it should be pointed out that the prior existence of such principles can be demonstrated from pronouncement of the nations which were ranged against each other during World War II. Thus the U.S. protested against the Japanese bombing of Nanking in 1937 in this term:

\textsuperscript{221} Vālmīki, The Ramayan of Valmeeki, in the Original Sanskrit, Varanasi, central library. Thomson The Ramayan of Valmeeki (Translated in English, Volume 2, (Harvard University press,2007), pp90-115
\textsuperscript{222} Jean Pictet, International Institute of Human Rights, Development and principles of international humanitarian law: course given in July 1982 at the University of Strasbourg as part of the courses organized by the International Institute of Human Rights, (Martinus Nijhoff Publishers, 1985), pp56-90
\textsuperscript{223} Id
\textsuperscript{224} Id 108
“The government holds the view that any general bombing on the extensive area wherein there reside large populations engaged in population peaceful pursuits is unwarranted and contrary to the principle of law and humanity.”

The supreme court of Japan in the Shimoda case likewise affirmed these principles in great detail, although the claim of the plaintiff against the Japanese Government concerning injuries suffered from atomic bombs was dismissed for other reasons. In the post war period, the proclamation of Teheran, adopted by the General Assembly in Resolution 2442 (XXIII) by 115 votes to none against and I abstention, affirmed that the right of belligerents parties to adopted means of injuring the enemy is not unlimited and that it is prohibited to attack civilian population as such.\(^{225}\) This is one of many such resolutions. Singly they do not have the force of law, but their cumulative effect is evident for generally accepted body of customary international law. They certainly provide the evidence that there has been no abrogation in the postwar years of such rules as were undoubtedly part of customary international law in the earlier times.\(^{226}\)

Further confirmation of this is provided by the protocols to the Geneva Conventions. The 1977 Protocol I affirm in Article 48 that parties to the conflict shall all time distinguish between the civilian populations and the combatants. Of the four Geneva Conventions one relates specifically to protection of civilian person in time of war. Embodying principles recognized earlier, the Conventions places the belligerents under obligation to spare those parts of the population that take no part in the fighting. To this end it provides a whole series of practical measures including the establishment of the safety Zones, civilian hospitals and relief supplies, and provision to child welfare and the circulation of the family news. Civilians are protected from ill-treatment and pillage and are declared entitled in all circumstance to respect for their person. They are to be humanely treated and protected against all acts of violence. The opinion of the eminent jurist also provides confirmation of the existence of such a principle of the post war year. The meeting of the institute of the international law in Edinburgh in September 1969 declares in Article 6 of its conclusion that “existing international law prohibits respective of the type of the

\(^{225}\) MARESCA, LOUIS, "Regulating Explosive Remnants of War", in : Yearbook of International Humanitarian Law, 5 (2005), pp.360-374

weapon used, any action whatsoever designed to terrorized the civilian population.”

Article 6 also stated, “Existing international law prohibits the use of all weapons which by their nature, affect indiscriminately both military objectives, or both armed forces and civilian populations. In particular it prohibits the use of weapons the destructive effect of which is so great that it cannot be limited to specific military objectives or is otherwise uncontrollable.\textsuperscript{227}

It is thus established that the weapon that causes indiscriminate harm to combatants and non combatants alike are contrary to international law and that this principle has not been abrogated by contrary practice. The proportion of civilian affected by war seems to be steadily rising owing to the destructiveness of the modern weapon. Of those killed in World War I some 5% were civilian. In World War II the number was 50%. In the Vietnam War it was estimated that 70% of the deaths were deaths of civilians. In World War III, should it occur, the percentage will be the total proportion the non combatant population bears to the combatant? If it is valid law that the civilians are entitled to protection then obliviously the use of nuclear weapon is illegal since there is no way for civilians to be protected. Indeed the damage which the nuclear war would inflict would go beyond even the scope genocide which has been declared a crime against humanity. Genocide is the extermination of only one group of human beings. Nuclear war would exterminate not only defined group but whole human being both combatants and noncombatant, without regard to any principle of selection. It destroys all living things and the environment as well. Therefore it has sometimes been described as “omnicide (human extinction as result of human action) as opposed to “mere” crime of genocide.\textsuperscript{228}

An interesting test of whether the mass killing resulting from the use of nuclear weaponry would qualify as a crime against humanity is the test of role reversal suggested by Professor Richard Falk and others. If the Germans or Japanese had used atomic bombs against North American and Europe, there is little doubt that the use of this weapon would have been looked upon as international crimes “of signal magnitude.” Professor Falk observes, “To adopt this perspective of role reversal is helpful in orienting our understanding of the present status of nuclear weaponry and

\textsuperscript{227} KEITH, K.J., “The present state of international humanitarian law”, in : Australian Year Book of International Law, 9 (1985), pp. 13-45
\textsuperscript{228} GREIG, D.W., "The underlying principles of international humanitarian law", in : Australian Year Book of International Law, 9 (1985), pp.46-93
strategic doctrine. The use of this weapon against Japanese cities was of course 
shielded from immediate legal scrutiny because of the outcome of the war; there was 
no disposition to self-judge the legally dubious military polices of the victors."  

b. **Reason 2. Aggravation of pain and suffering.**

It is illegal to cause needless aggravation of pain and suffering. The first 
support for such a principle comes, again from ancient traditions of many cultures. 
The cross bow and siege machines were outlawed by the Second Lateran Council on 
this ground in 1139. The mainstream of 19th century European international law 
pursued these principles in regard to specific cases as increasing cruel weapons of war 
were made available by modern technology. When the dum-dum or expanding bullet 
was invented, the 1986 St. Petersburg affirmed that the right of a nation state to injure 
belligerents was not unlimited. It also affirmed that the legitimate object of the war 
was to weaken the military forces of the enemy that this object would be exceeded by 
the employment of arms which h uselessly aggravate the suffering of disabled men or 
render their death inevitable; and that the use of such arms would be contrary to the 
laws of humanity.

Hague Declaration of 1889 regarding Asphyxiating Gases declared that if a 
projectile has the sole object of diffusing such gases; it is so heinous and odious as to 
be unequivocally illegal. This declaration extends to production, possession, threat or 
use of any poisonous substance or emission as weapons of war. The British military 
manual issued by the War office in 1914 is interesting in this connection as 
representative of widely accepted principles. It reads: “It is expressly forbidden to 
employ arms projectiles or material calculated to cause unnecessary suffering. Under 
this heading might be included such weapon as lances with a barbed head, irregular 
shaped bullets, projectiles filled with broken glass, and like; also the scoring of 
surface of bullets, the filing of the end of their hard case, and smearing on them any 
substance likely to inflame a wound.” There can be little doubt that by the end of 19th 
century this principle could clearly be described as “a general principle of law 
recognized by civilized nations.”

---

229 Id. 
Legal Regime on the Use of Nuclear Weapon and its Impact on Humanity

The 1925 Geneva Gas Protocol prohibited the use of gases and bacteriological means of warfare. The protocol applies not only to gases but to “all analogous liquids, materials and devices,” whether solid liquid or gases. The 1980 convention on prohibition or restrictions on the use of certain conventional weapons which may be deemed to be excessively injuries or to have indiscriminate effect agreed, *inter alia* to ban fragmentary weapons which inflict wounds with particles which are not detectable by x-rays. It also agrees to limit the use of air delivered incendiary bombs. It is to be remembered that while the laws of war permits action which further the aims and purpose of war, the infliction of suffering *per se* does not fall within these purposes. Hence prohibits “unnecessary suffering” and “superfluous injury”. Nuclear weaponry by all accounts causes so much suffering to the survivors as to make them envy the dead. The sufferings of the *Hibakusha* (atom bomb victims of Japan) are well documented a visit to the Hiroshima museum will more than suffice to provide evidence of their suffering to any one with the courage to bear it for those unable to make the trip to the museum, some idea of the horrors is given in John Hersey’s Hiroshima. Other works consulting are Hiroshima: in memoriam and today, which contains the story of Hiroshima survivors and M. Hachiya, Hiroshima diary; The Journal of a Japanese Physician, the leukemia’s, the keloids the cancers, the retarded babies and the lifelong physical and social sufferings need to be appreciated in detail if is to understand the full horror involved.\(^\text{231}\)

c. **Reason 3.** Violation of the laws of humanity.

International law has always contradicted the proposition that “all is fair in love and war”. One cannot massacre prisoners or deliberately destroy hospitals, or refuse treatment to enemy sick and wounded. Such principles stem from consideration of humanity, which are part of the inheritance of civilization. Numerous historical documents, such as the 1868 declarations of St. Petersburg and the 1925 Geneva

Protocol prohibiting chemical weapons another strands of humanitarian concern woven into the law.

European attention came to focus on humanitarian law when Henry Dunant, a young Swiss banker, wrote his book *A memory of Solferino* in 1862, Dunant had been in *Solferino* in northern Italy by chance when the famous battle was fought against Austria by France and Italy, resulting in over 40,000 dead and wounded. Dunant concerned himself mainly with lessening the suffering of the military personal involved but his efforts helped to concentrate attention on the horrors of war in general. His work led to the foundation of the Red Cross and to the Geneva Convention of 1864, the precursor of many other Conventions which did not limit themselves only to combatants. With the progressive increase in the destructiveness and cruelty of military weapons in the 19th century, feelings of conscience led to the banning of certain category of weapons and the formulation of the customary rules of war. The feelings intensified in the 20th century when the two World Wars demonstrated how destructive modern conditions of warfare could be clearly the wars of law promulgated in the 19th century needed even more precise formulation, amplifications and developments. With the formation of the United Nations and the Proliferation of international committees and agencies, which set the stage in turn for series of Conventions, Declarations and Resolutions, more clarity and substance were given to the broad general principles previously formulated.232

The “De Martens Clause” in the preamble of the Hague Convention IV on the law of land warfare provides that in case not covered by the Regulations, inhabitants of the occupied territories and belligerents “remain under the protection and the rule of the principles of the law of the nations, as they results from the usages established among civilized peoples from the law of humanity and the dictates of the public conscience. This was a specific recognition of the significance of the laws of humanity in international law. The parties to the Geneva Convention of 1949 expressly recognize the De Martens Clause as a living part of international law. The suffering induced by nuclear weaponry clearly makes these weapons illegal by the law of humanity.

d. **Reason 4.** Contradiction of the Principle of Proportionality.

Having dealt briefly with the principle of proportionality in the context of the just war doctrine the principle is one of the most ancient and respected rules of warfare, many traditions decided the European tradition recognized it. Thus in the Mahabharata it is recorded that the warrior Arjun refrained from using a hyper destructive weapon because the fight was retracted to ordinary conventional weapons. Moreover a sword was to fight against sword, a horseman was to fight against the horseman, swords were not to fight against clubs or horseman fight against foot soldiers and if the opponent was mounted on a horse it was contrary to the laws of war to fight against him on an elephant.233

The Islamic law of war had similar principle and the laws of chivalry prescribed no less they required complete equality of weaponry and equipments, especially were duals were involved. The principle of proportionality becomes relevant both in attack and defense. In attack it prevents the causing of harm which is disproportionate to the military objective. It also prevents the causing of sufferings to civilian which is disproportionate to the military objectives sought. In defense the principle means that the retaliatory force must be proportionate to the nature of the attack. This principle has its analogue in the principle of self-defense in criminal law. One does not use a sledge hammer to kill a fly. Criminal law acknowledges of course, that grades of force cannot be weighed on fine scale but there must be no obvious disproportion between the suffering inflicted in defense and that which is necessary for the purpose for the defense. A war fought with nuclear weapons would violate proportionality not only in causing unprecedented suffering but in another ways also. If war is fought to avert an evil, the means must be propitiated to the evil to be avoided. With nuclear weapons this is not possible. One writer states who are we beings with a life expectancy of decades to discuss the entire future of the planet in terms deriving exclusively from are concerns, which may be expected to come for

---

nothing in a few millennia, with or without nuclear war. There is megalomania madness in supposing that we can be important enough to make the judgment.

e. **Reason 5. Nullification of return to peace.**

As formulated by Aristotle in universally accepted terms, the proper object of war is the establishments of conditions which are intended are to bring about a just and lasting peace. This is to say that war is never an end in itself. Moreover once a victory is achieved on one side or the other, the object and the interest of both sides is the return to peace. Unless one wishes to speak of the “peace” of a graveyard, there is no chance to return to peace after a nuclear war. All that will be left of both victors and vanquished is virtually dead mass of territory. To speak of “peaceful coexistence” in such a context would be a mockery. It is true that there have been war in the past which have come close to decimating the population of the vanquished country. However even this devastation bears no comparison with the destruction of persons, property and life-support system that would take place in nuclear war.234

It is worth recalling that St Augustine stipulated that “reasonable chance of success was one of the prerequisite without which a Christian should not make a war. Such success cannot exist when, as in nuclear war, there is no chance for a return to peace afterwards. Immanuel Kant wrote in 1797 that in war there should be no resort to act which make the return to peace difficult. Perfidy and treachery are traditional examples, for they obstruct the re-establishment of harmony. Nuclear war would be infinitely stronger example. In 1830 Carl won Clausewitz, the Prussian General and military writer, wrote his famous work on war, which became so important to political thinkers between the Napoleonic era and World War I that the whole period has been described as the clausewitzean century. One of this pre basic proposition was that the goal of all state is to increase their power at the expense of other states. The interest of nation being therefore always in a state of conflict, the power contest was the normal condition and war its manifestation.235 The struggles for power, colonies and markets were all driving forces which lead naturally to war yet even Clausewitz stress that war is meaningless when divorced from political intercourse. He stated, “war can never be

---

235 D. Gridge The concept of peace under international politics, (Cambridge, 2009), pp45-67
Legal Regime on the Use of Nuclear Weapon and its Impact on Humanity

separated from political intercourse and if in the consideration of the matter, this is
done in anyway, all the threads of the different relations are to a certain extend
broken, and we have before us a senseless thing without an object.”

f. **Reason 6. Destruction of the ecosystem**

Like the general rules of international law, the laws of war cannot stand still. They must take account of fresh development in weaponry and international affairs. The nuclear age began more than 40 yrs ago and it is more than time that the international law adapts to the unprecedented change.

Since the rate of change is so rapid in modern times, the rule of international law must change at a similarly rapid pace; one can no longer wait the long periods which it took in former period for principles to be settled. We need new concepts and principles; the consequence of nuclear war cannot possibly be handled adequately with the conceptual legal tools we have inherited. Among the new principles needed is law which would make destruction of the eco-system a crime. It should be realized that if and when the eco-system has no future, humanity doesn’t either.\(^\text{236}\)

Some provisions for the protection of eco-system are made in Protocol I Additional to Geneva Convention of 1949. In Article 55 on Protection of Natural Environment, it says in paragraph 1. “Care shall be taken in warfare to protect the natural environment against the widespread, long-term and severe damage. This protection include a prohibition of the use of method and means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population. Paragraph 2 states; “attacks against natural environment by way of reprisal are prohibited”

Since nuclear weapon has the power to cause permanent destruction to the environment, this should be enough *per se* to outlaw the weapon and if traditional international law does not embody such principles, the laws need to be created. In fact there has been foreshadowing of creations of such principles both in the Geneva Convention and in the international documents such as the 1967 treaty of Tlatelolco. The latter spelled out that nuclear weapons, through the persistence of the radio

activity they release, constitute “an attack on the integrity of the human species and ultimately may render the whole earth uninhabitable. It may be argued, therefore, that this new principle has already engrafted itself upon the existing principles of customary international law. It is also interesting to note that the general assembly in resolution 3264 of December 9, 1974 emphasized the necessity to adopt through the conclusion of an appropriate international convention, effective measure to prohibit action to influence the environment and climate for military and hostile purpose.\(^{237}\)

g. **Reason 7. The Extermination of Population and the decimation of mankind**

As we have seen the Nuremburg Charter did not for the most part, make new law in declaring the extermination of the civilian population in whole or in part, to be a crime against humanity. Even if the Tribunal is to be criticized on the ground that it was the creation of victors, it cannot be denied that to a great extent it may really clarify and apply pre-existing principles. However it did put these principles in sharper relief than ever before this was the case in the clarification of the notion that duty toward the international community overrides an individual’s duties toward his own state. The specific case of the attempted extermination of the Jewish people provided the occasion for the formulation of the crime of genocide as a crime against humanity. The formulation was new in referring to the extermination of a group identified by such factors as race and religion, but the underline humanitarian principle were of course ancient.\(^{238}\)

Even if the prior existence of such principles be contested, there is no doubt that by the acceptance of the international community they are now part of the recognized body of international law.\(^{239}\)

h. **Reason 8. The possibility of extinction of the human race.**

Throughout the history of war mankind had to endure the thought of death, in the past there was always the possible consolation that if the individual perished, his family remained; if his family perished his group remained if the group perished his nation remains if his nation perished his species. At times the individual’s families


\(^{239}\) Id.
groups nations have perished together still the species has remained. Now for the first time in the history even the extinction of the species itself possible, perhaps even probable. In the past the killing of an individual has been considered heinous crimes, the killing of a family even worse the killing of a group even worse, the killing of a nation even worse. For each of them traditional law has had words to describe how great an offence they are.\textsuperscript{240} But we have no words that even begin to describe how grave an offence the killing of the species would be. Some say that even if a nuclear war were to take place, that ultimate offence will not be committed. They say that no matter how many bombs are exploded there will always be some who will survive, and that life will be started a fresh. Perhaps it is to so though if it boggles the mind to imagine what kind of human life could a start a fresh in a nuclear winter. The real point is that even if the chance of extinction were a slight one, it is not a chance which, under any stander we are entitled to take. Nor it is a chance which we can afford to take. New principles of international law must arise to see that the chance is taken by no one not by individuals and not by nations, not for any consideration. To take that chance would not only be criminal but criminally insane.\textsuperscript{241}

i. **Reason 9. Intergenerational damage.**

In western legal system there is a tendency to toiler legal concepts only in relation to the needs and desire of the current generation. There is usually little attention paid to problems, such as those of the environment, which do not affect the current generations but would affect the future generations.\textsuperscript{242} By way of contrast, such legal system as the customary ones of Africa and Melanesia and the legal tradition of China respect the rights of future generations. In customary African law, the community participating in the legal system thought of being not only the living but those who have gone before and those who are yet to come. The right of both forebears and posterity must be protected under law. The introduction of this mode of thinking into western jurisprudence is long overdue.\textsuperscript{243}

\begin{itemize}
\item \textsuperscript{240} Criminal Law Forum: An International Journal 7, no. 2 Contains written submissions to the International Court of Justice, pro and cons of the legality of Nuclear Weapons, by the United States and Solomon Islands, USA,1996,p.78
\item \textsuperscript{241} Id
\item \textsuperscript{242} Nagendra Singh, Human Right and the Future of Mankind, Motilal Nehru memorial Lecture,( Vanity Books, 1981),p83
\item \textsuperscript{243} Nagendra Singh, Nuclear weapons and International Law, (Preager,N.Y.,1959), p45
\end{itemize}
The explosion of the nuclear weaponry would affect generation yet unborn, even if mankind should survive the holocaust. Genetic damage, global pollution and the extinction of various species of fauna and flora are all necessary consequence of nuclear war. International law needs to develop laws that would outlaw the causing of intergenerational damage.\textsuperscript{244}

\textbf{j. Reason 10.} The express prohibition of asphyxiating gases and analogous materials.

While discussing the principles regarding the aggravation of pain and suffering, we referred to two international instruments, The Hague Declarations of 1889 regarding Asphyxiating Gases and Geneva Gas Protocol of 1925. Besides illustrating those principles in a general way, it is arguable that they constitute in more specific terms a prohibition of nuclear weaponry. The phraseology of the first extends to the use of any poisonous substance or emissions as weapons of war. Radiations are arguably a poisonous emission. Indeed it can be emission fatally poisonous to entire population if it is on a sufficient scale.\textsuperscript{245}

In regard to the Gas Protocol, the General Assembly Resolution 2603A of 1969 interprets it to mean that any chemical agents of warfare, whether solid liquid or gaseous, which might be employed because of their direct toxic effects on man, animals or plants would be contrary to the generally recognized rule of international law. A large number of states, including the Soviet Union in 1928 and the United States in 1975, have become party to the Gas Protocol. It lends itself to a similar argument, for it prohibits not only gases but “all analogous liquid material and devices”, whether solid liquid or gas. Radiation may not strictly be a gas, but it is an analogous destructive agency. It was not contemplated at the time, the only categories of agencies then under the considerations being the solids liquids and gases, but the general tenor of the instrument clearly shows an intention to cover injurious agencies of this sort.

By showing a strong resentment at allegations of violation of either of these instruments, the international community has demonstrated the intention to make them effective. In fact they have been, on the whole, remarkably well observed. This strong international consensus of a control- intention can reasonably by extended to

\textsuperscript{244} Id at, p87
\textsuperscript{245} UN General Assembly Resolution 47/37 (1992)
nuclear weapons. There have been many reservations by states in regard to the exact scope of the Gas Protocol, but this does not alter the general principles of interpretation advanced above.²⁴⁶

k. Reason 11. Destruction and Damage to neutral states.

It is a well accepted principle that deliberate damage to civilian population of belligerents’ states must be avoided in time of war. That principle must apply a fortiori to the destruction of the population of neutral countries. In nuclear war this would occur on an unprecedented scale, and there is no conceivable means by which such damage could be avoided. Since this is known and certain, any discussion to engage in nuclear war implies a deliberate discussion to destroy other nations not engaged in the conflict. If international law means anything at all, it means that neutral nations cannot be destroyed merely to further interest of the belligerent nations, however powerful the belligerents might be and however essential such destruction might seem to them.²⁴⁷

5.7 Human Right Dimension to the Illegality of Nuclear Weapon

In addition to the rules of customary international law that are pertinent to war, there is no another section of international law which in the post war years, has assumed a place of increasing importance: the law relating to human rights. Many section of this body of doctrine are entrenched in international law by treaty; other is parts of the body of international customary law.

Many of these human rights norms supports the proposition that nuclear war is illegal, but none more so than the fundamental human right on which all other human rights rest, namely the right to life even the most absolutist political theory of the past, such as that of Hobbes, accorded this right to the individual; and John Lock a philosopher to whom modern human rights doctrine is greatly indebted, categorized the right to life as one of those fundamental right which no ruler could take away from his subjects more recently, the express formulation of this right is found both in the Universal Declaration of Human Rights (Art 3) and in the International Covenant on

²⁴⁷ The Bulletin of the Atomic Scientists is the premier public resource on scientific and technological developments that impact global security. Published by Educational Foundation for Nuclear Science, Inc. Mar 1996, p.23
Legal Regime on the Use of Nuclear Weapon and its Impact on Humanity

civil and Political Right (Art 6). Although the Universal Declaration of Human rights is only a declaration, common acceptance has elevated it to the level of international customary law. The Covenant on civil and political right is binding on its signatories as a treaty.

By these standards the actual use of nuclear weapons is an obvious illegality, in that it would violate the inalienable right of human being to live. Its illegality is also manifest under the Genocide Convention, which declares that under international law it is a crime to commit acts which intend to destroy, in whole or in part a national ethical racial or religious group as such. One could also easily make a catalog of those other human right social cultural, economic, civil and political right which get violated by the launching of a nuclear attack.248

In less obvious way the arms race itself is a violation of human rights, not least of all because it represents an action totally inconsistent with the recognition of the right to live. But it also leads to the undermining of many other human rights.

For example, the tight security surrounding the manufacturing of nuclear weapons necessarily places severe restriction on the rights of workers from freedom of movement, freedom of speech and freedom of association. The growing militarization of society at all levels which accompanies the arms race spreads this denial of rights through all levels of the populations.

Arms race also results in violation of economic rights. Billions of dollars pumped into armaments represent a substantial section of current global resources; all these resources are there by deviated from serving to eradicate global poverty, poor medical care, unemployment, and world hunger. It has been rightly said that “even if the arms are not ultimately used in war, they kill” indirectly by diverting scares economic resources from basic development such as nutrition medical care, housing and education. This link between the arms race and underdevelopment is now an established part of human rights doctrine. In the expressive words of President Eisenhower, “Every gun that is made, every warship launched, every rocket fired, signifies in a final sense a theft from those who are hunger are not fed, from those who are cold and are not clothed.”

248 Roberta Arnold, 'International humanitarian law and human rights law: towards a new merger in international law,' (BRILL, 2008), p.178
A great number of other human rights are violated directly or indirectly through the arms race. One class of them that is violated irreparably is the group dependent on the environment; such rights range from the right of life itself to such human rights as the right to food and the right to aesthetic enjoyment of the environment. In connection with this it should be noted that the 1972 Stockholm Conference on the Environment resolved “to call upon states intending to carry out nuclear weapons tested to abandon their plans to carry out tests, since they may lead to further contamination of the environment.”

5.8. Analytical Summary

The justification of nuclear weapon use even in the light of sovereign right cannot be emphasized. Since the issues has diversified from the national interest to the international interest of individual’s right. To me the subject matter of nuclear weapon stands out as a matter of each man’s debate because if any state uses the weapon against any other state it would concern the whole mankind in or the other way.

According to justice Weeramantry;

“...The use or threat of use of nuclear weapons is illegal in any circumstances whatsoever.... It contradicts the fundamental principal of the dignity and worth of the human person on which all law depends. It endangers the human environment in a manner which threatens the entirety of life on the planet.

Legal argument becomes almost superfluous, for it can scarcely be contended that any legal system can contain within itself a principal which permits the entire society to decimated and destroyed along with the natural environment which has sustained it from time immemorial.... No nation can be seen as entitled to risk the destruction of civilization for its own national benefit.

The intergenerational effects of nuclear weapons mark them out from other classes of weapons. The adverse effects of the bomb are virtually permanent reaching into the distant future of the human race. Apart from damage to the environment which successive generations will inherit far into the future, radiation also causes...
genetic damage and will result in a crop of deformed and defective offspring. No generation is entitled, for whatever purpose, to inflict such damage on succeeding generations.

Equipped with the necessary array of principals with which to respond, international law could contribute significantly towards rolling back the shadow of the mushroom cloud, and heralding the sunshine of the nuclear-free age.

5.9. Conclusion

The actions of countries in times of war are governed by International Law that constantly changes with advancements in weapons technology. There is however no provision under international law that specifically addresses the use of nuclear weapons. The Geneva Conventions, in 1949, outlined rules to protect populations during armed conflict. They require distinguishing between civilians and soldiers, and prohibit indiscriminate methods of attack that are not directed at a specific military target. The conventions also prohibit weapons that cause unnecessary injury and those that cause long-term and severe environmental damage. Specific types of weapons are not mentioned. Many believe that given the extremely destructive power of nuclear weapons, they should be specifically prohibited. These critics contend that the use of nuclear weapons clearly violates international humanitarian law regarding armed conflict.

To clarify this issue, the United Nations General Assembly asked the International Court of Justice (ICJ) for an Advisory Opinion regarding the legality of the threat or use of nuclear weapons. The opinion of the ICJ, handed down on July 8, 1996, is the most authoritative statement regarding the legality of nuclear weapons under international law. The ICJ concluded unanimously that the threat or use of such weapons should be consistent with existing international laws. The ICJ did not declare such weapons specifically illegal, but did state that the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, leaving the issue of Self-Defense open.

Advocates of nuclear disarmament contend that based on this ruling of the ICJ, the threat or use of nuclear weapons violates international law. Article VI of the United States Constitution states, "all treaties made, or which shall be made, under the
authority of the United States, shall be the supreme law of the land." The reasoning is
that since the threat or use of nuclear weapons violates international treaties that the
United States has signed and ratified (e.g., the Geneva convention), then the threat or
use of these weapons should be illegal.  

Since the ICJ opinion was delivered in 1996, direct actions by the public in
support of nuclear disarmament have increased. Some courts have recognized the
legality of such actions. In October 1999, a Scottish judge dismissed a case against
three women who had caused damage at a base, which was part of a Trident nuclear
submarine defense program. The judge cited the ICJ opinion and claimed that the
women were justified in their actions because they were attempting to thwart the use
of illegal weapons. In June 1999, a jury in the state of Washington found four activists
not guilty of blocking traffic into a Trident nuclear submarine base. The court relied
on international law, including the ICJ opinion.

Under the treaty of Non Proliferation the possession of nuclear weapons is
prohibited by all states, except for the Nuclear Weapon States (NWS). The treaty
defines an NWS as one that had manufactured and exploded a nuclear weapon or
other nuclear explosive device prior to January 1, 1967, which limits membership to
the United States, the former Soviet Union (and its successor state, Russia), the
United Kingdom, France, and China. Those few states possessing nuclear weapons
are under obligation, as set forth in Article VI of the NPT, to "pursue negotiations
in Good Faith on effective measures relating to cessation of the nuclear arms race at
an early date and to nuclear disarmament."  

While the Nuclear Weapon States pledged to negotiate nuclear disarmament,
the Non-Nuclear Weapon States (NNWS) pledged not to acquire nuclear weapons. As an incentive, the NNWS were promised assistance with research, production, and
use of nuclear energy for peaceful purposes "without discrimination." Each NNWS
also agreed to accept safeguards under the auspices of the international atomic energy
agency. These safeguards do not apply to the NWS

250 Manfred Mohr, "Advisory Opinion of the International Court of Justice on the Legality of the Use of
Nuclear Weapons under International Law - A Few Thoughts on its Strengths and Weaknesses." 316
251 Rebecca Johnson, Non-proliferation treaty: challenging times (Acronym Institute, 2000), p.67
252 Id, at, p.89
The NPT was signed in 1968, and entered into force in 1970. Its initial duration was 25 years. In 1995, it was extended indefinitely, with a review conference to be held every five years. Nearly every country in the world, 188 totals, is a party to the NPT, with three notable exceptions: India, Israel, and Pakistan. Each of these countries possesses nuclear weapons. Under the ICJ opinion, however, the obligation to negotiate elimination of nuclear arsenals applies to those states as well as the NWS.