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Nuclear Weapons and Compliance
with International Humanitarian Law and
the Nuclear Non-Proliferation Treaty

by

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Law is a means of controlling, directing, and constraining potential actions. If law as in institution is to have international relevance it must apply to critical issues. The existential survival of humanity depends on how we address threats posed by nuclear weapons. Science in the service of excessive military means of pursuing peace and security has placed civilization at risk. Law has a duty to control this risk. At the Security Council Summit of September 26, 2009, President of Costa Rica, Oscar Arias, a Nobel Peace Laureate, described our current historical moment: “While we sleep, death is awake. Death keeps watch from the warehouses that store more than 23,000 nuclear warheads, like 23,000 eyes open and waiting for a moment of carelessness.”⁴

These devices are possessed by the five permanent members of the United Nations Security Council which are also members of the Nuclear Non-proliferation Treaty (NPT) -- United States and Russia United Kingdom, France, and China -- as well as India, Pakistan, and Israel.⁵ The United States, alone, has over 5,000 nuclear weapons in its present deployed stockpile and an additional 4,000 stored in an assembled state.⁶ Russia has over 4,500 in its deployed stockpile and also over 7,000 stored in an assembled state.⁷ The global stockpile of deployed weapons, however frightening, can be quantified with a credibly high degree of accuracy.⁸ But the destructive magnitude of a bomb dwarfs imagination. A one megaton device is approximately 80 times the destructive capacity of the relatively small bomb that leveled Hiroshima. To get an idea of this destructive capacity, Ambassador Thomas Graham suggests imagining a train with TNT stretching from Los Angeles to New York.⁹ The Soviet Union produced a 50 megaton bomb in the 1960s, an equivalent to 5,000 Hiroshimas.¹⁰ It is scant solace that most deployed weapons are only in the range of several hundred kilotons, since a 300 kiloton weapon represents 24 Hiroshimas.

Former CIA Director Stansfield Turner described the actual effects of one bomb:

The fireball created by a nuclear explosion will be much hotter than the surface of the sun for fractions of a second and will radiate light and heat, as do all objects of very high temperature.

⁴ Press Release, Security Council, Historic Summit of Security Council Pledges Support for Progress on Stalled Efforts to End Nuclear Weapons Proliferation SC/9746 (Sept. 24, 2009) *available at* <http://www.un.org/News/Press/docs/2009/sc9746.doc.htm>

⁵ Status of World Nuclear Forces <http://www.fas.org/programs/ssp/nukes/nuclearweapons/nukestatus.html> (last visited ___).

⁶ Hans M. Kristensen, United States Discloses Size of Nuclear Stockpile (May 3, 2010) <http://www.fas.org/blog/ssp/2010/05/stockpilenumbr.php>.

⁷ Robert S. Norris & Hans M. Kristensen, *Russian Nuclear Forces*, 2010 66 BULL. OF THE ATOMIC SCIENTISTS 74 (Jan./Feb. 2010) *available at* <http://thebulletin.metapress.com/content/4337066824700113/fulltext.pdf>

⁸ Status of Nuclear Weapons States and Their Nuclear Capabilities (March 2008), <http://www.fas.org/nuke/guide/summary.htm>

⁹ AMBASSADOR THOMAS GRAHAM, JR., COMMON SENSE OF WEAPONS OF MASS DESTRUCTION 10 (2004).

¹⁰ Proliferation of Nuclear Weapons (August 2010), http://www.nti.org/f_wmd411/fla4_1.html

Because the fireball is so hot and close to the earth, it will deliver enormous amounts of heat and light to the terrain surrounding the detonation point, and it will be hundreds or thousands of times brighter than the sun at noon. If the fireball is created by the detonation of a 1-MT (megaton) nuclear weapon, for example, within roughly eight- to nine-tenths of a second each section of its surface will be radiating about three times as much heat and light as a comparable area of the sun itself. The intense flash of light and heat from the explosion of a 550-KT weapon can carbonize exposed skin and cause clothing to ignite. At a range of three miles surfaces would fulminate and recoil as they emanate flames. Particles of sand would explode like pieces of popcorn from the rapid heating of the fireball. At 3.5 miles, where the blast pressure would be 5psi, the fireball could ignite clothing on people, curtains and upholstery in homes and offices, and rubber tires on cars. At four miles, it could blister aluminum surfaces, and at six to seven miles it could still set fire to dry leaves and grass. This flash of incredibly intense, nuclear-driven sunlight could simultaneously set an uncountable number of fires over an area of close to 100 square miles.¹¹

Experts suggest that a nuclear exchange between India and Pakistan would have a devastating impact on the planet's climate, causing a global famine that could kill one billion people.¹² This cold scientific data does not give as powerful a testimony as the simple eye witness accounts recorded by Charles Pelligrino in *The Last Train From Hiroshima*, as he describes the so-called "ant-walking alligators" survivors saw all about them, as people who "were now eyeless and faceless – with their heads transformed into blackened alligator hides displaying red holes, indicating mouths." He continues: "The alligator people did not scream. Their mouths could not form sounds. The noise they made was worse than screaming. They uttered a continuous murmur – like locusts on a midsummer night. One man, staggering on charred stumps of legs, was carrying a dead baby upside down."¹³

Can the use of weapons of such horrific effect on humans and the environment be compatible with the dictates of human conscience and with international humanitarian law? For even in war, law and its rule cannot be ignored, if we are to remain civilized. The current readiness to use nuclear weapons¹⁴ places us all under a cloud that could

¹¹ Stansfield Turner, CAGING THE NUCLEAR GENIE 127-28 (1997)

¹² Steven Starr, The Climatic Consequences of Nuclear War (Mar. 12, 2010), <http://www.thebulletin.org/web-edition/op-eds/the-climatic-consequences-of-nuclear-war>

¹³ Dwight Garner, *After Atom Bombs' Shock, the Real Horrors Began Unfolding*, N.Y. TIMES, Jan. 19, 2010 available at http://www.nytimes.com/2010/01/20/books/20garner.html?_r=1&pagewanted=print

¹⁴ Charles Moxley sets forth the existential reality of the preparedness exercised ostensibly to bring us peace and security:

Train military personnel to use nuclear weapons; conduct regular exercises reinforcing the training; put the weapons and controls in the hands of the military personnel; provide them with contingency plans

burst and within a few hours end everything we value. If law is to have any significance, it must meaningfully constrain this danger.

With this precept in mind, when the International Court of Justice, in its landmark decision in the 1996 Nuclear Weapons Advisory Opinion, addressed the legality of the threat or use of nuclear weapons, it affirmed the application of international humanitarian law to nuclear weapons.¹⁵ When parties to the NPT met in May 2010, they unanimously reaffirmed “the need for all States at all times to comply with applicable international law, including international humanitarian law.”¹⁶

This politically powerful commitment was obtained through arduous negotiations.¹⁷ There is a pressing need to promptly set forth exactly what are the requirements to bring the current policies of nuclear weapons states into compliance with international humanitarian law (IHL) and the NPT.

as to the circumstances in which they are to use the weapons; instill them with a sense of mission as to the lawful and significant purposes of such weapons in upholding the national defense and honor; make them part of an elite corps; have them stand at the ready for decades at a time waiting for the call; instill firm military discipline; make the weapons a publicly advertised centerpiece of the nation’s military strategy; locate the weapons so as to leave them vulnerable to preemptive attack; villainize the enemy as godless and evil or as a rogue and terrorist nation; convey to military personnel that the weapons will be a major target of enemy attack and that it may be necessary to use them quickly before they can be destroyed; warn the enemy that, in the event of attack, the weapons may or will be used; inculcate in military personnel the notion of intra-war deterrence whereby nuclear weapons may need to be used following an enemy attack to deter further capacity to defeat the enemy attack; cut numerous nuclear weapons bearing units and control centers off from each other and from contact with higher authorities; create a situation of hopelessness where the whole society is about to be destroyed, at least unless these weapons can be gotten off fast to destroy and restrain the enemy; give the President and other upper level command authorities only an imperfect understanding of the options and repercussions and accord them only 5 to 10 minutes, or even a matter of seconds, to decide, against the background of a Single Integrated Operating Plan (SIOP)-based computer and other plans, decades in the making and ostensibly reflecting a broad historical consensus as to approach – do any number of these things, and the stage is set for the actual use of the nuclear weapons.

Charles J. Moxley, Jr., NUCLEAR WEAPONS AND INTERNATIONAL LAW IN THE POST COLD WAR WORLD 535-36 (2000).

¹⁵ *Legality of Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 2006, I.C.J. Reports 1996, p. 226 (“Nuclear Weapons Advisory Opinion”), at ¶¶ 42, 86, 105(2)D.

¹⁶ Final Document of the 2010 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons (Final Document), NPT/CONF.2010/50 (Vol. I) (hereinafter “Final Document”), at 19, I(A)(v), available at <http://www.reachingcriticalwill.org/legal/npt/revcon2010/FinalDocument.pdf>.

¹⁷ Rebecca Johnson, *Assessing the 2010 NPT Review Conference*, 66 BULL. OF THE ATOMIC SCIENTISTS 1 (Jan./Feb. 2010) available at http://www.acronym.org.uk/npt/2010_NPT_REJ_Bulletin_07.10.pdf.

In this article we address the requirements of international humanitarian law and the NPT and apply those requirements to contemporary State practice. We discuss international humanitarian law in Part I and the NPT in Part II. The result, we find, is that such practice falls far short of the legal requirements.

In short, review of the matter reveals that the use of nuclear weapons would violate international humanitarian law and that the threat of such use, including under the policy of nuclear deterrence, similarly violates such law. Analysis further reveals that the nuclear weapon states' existing obligation to bring their policies into compliance with IHL is reinforced by the NPT disarmament obligation as spelled out by the 2010 NPT Review Conference, in particular by its declaration of the need to comply with IHL. The most fundamental implication of the incompatibility of threat or use of nuclear weapons with IHL is the energetic and expeditious fulfillment of the NPT obligation to achieve the global elimination of nuclear weapons through good-faith negotiations.

PART I: INTERNATIONAL HUMANITARIAN LAW

In this Part, we first set forth the substance of the requirements of international humanitarian law applicable to nuclear weapons and then proceed to apply such requirements to contemporary state practice. Accordingly, we start with a discussion of the key rules of distinction, proportionality, and necessity and the corollary rule of controllability, as well as international law as to reprisals and as to individual responsibility. We then address the application of this body of law to the use and threat of use of nuclear weapons.

Before, however, delving into the law, we set forth a further discussion of the applicable facts.

NUCLEAR WEAPONS FACTS RELEVANT TO APPLICATION OF INTERNATIONAL HUMANITARIAN LAW

Obviously the law has to be applied to the facts. The facts as to nuclear weapons are now widely familiar. The ICJ in its decision in the Nuclear Weapons Advisory Opinion defined the "unique characteristics" of nuclear weapons:

The Court ... notes that nuclear weapons are explosive devices whose energy results from the fusion or fission of the atom. By its very nature, that process, in nuclear weapons as they exist today, releases not only immense quantities of heat and energy, but also powerful and prolonged radiation. According to the material before the Court, the first two causes of damage are vastly more powerful than the damage caused by other weapons, while the phenomenon of radiation is said to be peculiar to nuclear weapons. These characteristics render the nuclear weapon potentially catastrophic. The destructive power of nuclear weapons cannot be contained in either space or time. They have the potential to destroy all civilization and the entire ecosystem of the planet.

The radiation released by a nuclear explosion would affect health, agriculture, natural resources and demography over a very wide area. Further, the use of nuclear weapons would be a serious danger to future generations. Ionizing radiation has the potential to damage the future environment, food and marine ecosystem, and to cause genetic defects and illness in future generations.

36. In consequence ... it is imperative for the Court to take account of the unique characteristics of nuclear weapons, and in particular their destructive capacity, their capacity to cause untold human suffering, and their ability to cause damage to generations to come.¹⁸

Other judges in their individual decisions in the ICJ's nuclear weapons case elaborated on the effects of nuclear weapons. Judge Weeramantry noted the danger of nuclear winter, whereby fires from exploded nuclear weapons could release hundreds of millions of tons of soot in the atmosphere, causing huge clouds and debris blotting out the sun and destroying agriculture.¹⁹ He noted that radiation from nuclear weapons is not containable in space or time and unique as a source of "continuing danger to human health, even long after its use," given the half-lives in the many thousands of years of the by-products of a nuclear explosion.²⁰ Judge Weeramantry also noted the electromagnetic pulse as a further effect of the use of nuclear weapons, stating that this very sudden and intensive burst of energy throws all electronic devices out of action, including communications lines, such as nuclear command and control centers.²¹

Judge Koroma noted, with respect to the atomic attacks on Hiroshima and Nagasaki:

Over 320,000 people who survived but were affected by radiation still suffer from various malignant tumours caused by radiation, including leukaemia, thyroid cancer, breast cancer, lung cancer, gastric cancer, cataracts and a variety of other after-effects. More than half a century after the disaster, they are still said to be undergoing medical examinations and treatment.^{22 23}

Judge Shahabuddeen quoted Javier Perez de Cuellar, Secretary-General of the United Nations:

"The world's stockpile of nuclear weapons today is equivalent to 16 billion tons of TNT. As against this, the entire devastation of the Second World War was caused by the expenditure of no more than 3 million tons of munitions. In other words, we possess a destructive capacity of more than a 5,000 times what caused 40 to 50 million deaths not too long ago. It should suffice to kill every man, woman and child 10 times over."²⁴

As to the radiation effects of nuclear weapons, Judge Shahabuddeen stated:

To classify these effects as being merely byproducts is not to the point; they can be just as extensive as, if not more so than, those immediately produced by blast and heat. They cause unspeakable sickness followed by painful death, affect the genetic code, damage the unborn, and can render the earth uninhabitable. These extended effects may not have military value for the user, but this does not lessen their gravity or the fact that they result from the use of nuclear weapons. This being the case, it is not relevant for present purposes to consider whether the injury produced is a byproduct or secondary effect of such use.

Nor is it always a case of the effects being immediately inflicted but manifesting their consequences in later ailments; nuclear fall-out may exert an impact on people long after the explosion, causing fresh injury to them in the course of time, including injury to future generations. The weapon continues to strike for

¹⁸ Nuclear Weapons Advisory Opinion ¶ 35, at 21-22, 35 I.L.M. at 821-22.

¹⁹ Dissenting opinion of Judge Weeramantry at 15, 35 I.L.M. at 887 (citing NAGENDRA SINGH & EDWARD MCWHINNEY, *NUCLEAR WEAPONS AND CONTEMPORARY INTERNATIONAL LAW* 29 (1989)).

In his dissenting opinion in the WHO Advisory Decision proceeding, Judge Koroma stated that "in a conflict involving the use of a single nuclear weapon, such a weapon could have the destructive power of a million times that of the largest conventional weapon." The WHO Advisory Opinion, 1996 I.C.J. 68, 173.

²⁰ *See id.* at 15, 35 I.L.M. at 868.

²¹ Dissenting opinion of Judge Weeramantry at 25, 35 I.L.M. at 873 (citing *DICTIONNAIRE ENCYCLOPEDIQUE D'ELECTRONIQUE*).

²² Dissenting opinion of Judge Koroma at 1, 35 I.L.M. at 934.

²³ *Id.* at 9, 35 I.L.M. at 929.

²⁴ Dissenting opinion of Judge Shahabuddeen at 5-6, 35 I.L.M. at 863-864 (quoting Javez Perez de Cuellar, *Statement at the University of Pennsylvania, 24 March 1983*, in *DISARMAMENT*, vol. VI, no. 1, 91).

years after the initial blow, thus presenting the disturbing and unique portrait of war being waged by a present generation on future ones—on future ones with which its successors could well be at peace.²⁵

Judge Shahabuddeen further cited the preamble to the Treaty of Tlatelolco:

The preamble to the 1967 Treaty of Tlatelolco, Additional Protocol II of which was signed and ratified by the five [nuclear weapons states], declared that the Parties are convinced

“That the incalculable destructive power of nuclear weapons has made it imperative that the legal prohibition of war should be strictly observed in practice if the survival of civilization and of mankind itself is to be assured.

That nuclear weapons, whose terrible effects are suffered, indiscriminately and inexorably, by military forces and civilian population alike, constitute, through the persistence of the radioactivity they release, an attack on the integrity of the human species and ultimately may even render the whole earth uninhabitable.”²⁶

With such facts in mind, we look at the law.

Scope of International Humanitarian Law

There is a robust body of conventional and customary international law governing the use and threat of use of nuclear weapons that is recognized by States throughout the world, including by the United States and other nuclear weapons States, and its principles have been explicitly articulated by the International Court of Justice.

This is the body of international law known variously as international humanitarian law, the law of armed conflict, the law of war, and *jus in bello*, terms that are generally synonymous.²⁷ This centuries-old body of law applies to the use of all weapons, including nuclear weapons.

There are also numerous conventions, including the Nuclear Non-Proliferation Treaty²⁸ (NPT), that apply specifically to nuclear weapons. Under Article VI of the NPT, the United States and other nuclear weapons signatories have agreed to negotiate nuclear disarmament in good faith.

International humanitarian law also includes vigorous provisions governing the potential exposure to criminal prosecution of individuals in the armed services, in government, and in industry who act on behalf of or in conjunction with States in matters involving weapons, including nuclear weapons.

At the broadest level, this body of law not only establishes limits on the use and threat of use of weapons, including nuclear weapons, but establishes and defines war crimes, crimes against the peace, and crimes against humanity--international crimes for

²⁵ *Id.*

²⁶ *Id.*

²⁷ See, e.g., *Legality of the Threat or Use of Nuclear Weapons*, International Court of Justice, Advisory Opinion, General List at ¶ 75, at 27, No. 95 (July 8, 1996) [hereinafter *Nuclear Weapons Advisory Opinion*], available at <http://www.icj-cij.org/> also available at *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 ICJ LEXIS 8 (July 8).

²⁸ Treaty on the Non Proliferation of Nuclear Weapons, 1 July 1968, 21 UST 483; TIAS 6839 (1970).

which individuals are subject to criminal sanctions, including the death penalty.

Of central importance, this body of law regulates threats as well as overt actions, specifically making it unlawful for States – and individuals acting on behalf of States – to make threats to take actions that are contrary to international humanitarian law. This becomes of central significance to the policy of nuclear deterrence, which is founded on the threat to use nuclear weapons.

In an effort to take our statement of the applicable law out of contention, we largely base it on statements of such law by the United States, including U.S. statements of the law in its arguments to the ICJ in the Nuclear Weapons Advisory case²⁹ and in the military manuals of the U.S. armed forces used for training U.S. forces, planning and conducting military operations, and evaluating the performance of U.S. personnel for legal purposes.³⁰ Based on our review, these U.S. statements of the applicable law, subject to certain exceptions (which we discuss) accurately and fairly state the rules of international humanitarian law applicable to the use and threat of use of nuclear weapons. We have also reviewed the written memoranda and oral presentations of the three other

²⁹ Nuclear Weapons Advisory Opinion at pt. VI, 35–36.

³⁰ See U.S. DEP'T OF THE AIR FORCE, AIR FORCE OPERATIONS AND THE LAW (2009) available at www.afjag.af.mil/shared/media/document/AFD-100510-059.pdf [hereinafter “Air Force Operations and the Law”]; U.S. DEP'T OF THE AIR FORCE, DOCTRINE DOC. 2-1.9, TARGETING (2006) available at www.fas.org/irp/doddir/usaf/afdd2-1.9.pdf [hereinafter “U.S. Air Force Targeting Doctrine”]; U.S. DEP'T OF THE AIR FORCE, DOCTRINE DOC. 2-12, NUCLEAR OPERATIONS (2009) available at <http://www.fas.org/irp/doddir/usaf/afdd2-12.pdf>; [hereinafter “Air Force Nuclear Operations Doctrine”]; U.S. DEP'T OF THE AIR FORCE, THE MILITARY COMMANDER AND THE LAW (2009) available at www.afjag.af.mil/shared/media/document/AFD-091026-025.pdf [hereinafter “Military Commander and the Law”]; UNITED STATES DEPARTMENT OF THE ARMY, THE LAW OF LAND WARFARE (FM27-10/18 July 1956) with Change No. 1 (15 July 1976) [hereinafter “The Law of Land Warfare”]; INT'L & OPERATIONAL LAW DEP'T, U.S. DEP'T OF THE ARMY, LAW OF WAR DESKBOOK, 141 (2010) available at http://www.loc.gov/r/rfd/Military_Law/pdf/LOW-Deskbook-2010.pdf; INT'L & OPERATIONAL LAW DEP'T, U.S. DEP'T OF THE ARMY, OPERATIONAL LAW HANDBOOK (2010) available at [www.jagcnet.army.mil/8525751D0057F1B6/0/9AA89AFB204D01BE8525776100451636/\\$file/Operational%20Law%20Handbook%20%282010%29.pdf](http://www.jagcnet.army.mil/8525751D0057F1B6/0/9AA89AFB204D01BE8525776100451636/$file/Operational%20Law%20Handbook%20%282010%29.pdf); U.S. DEP'T OF THE NAVY, NWP 1-14M, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS (2007) available at [http://www.usnwc.edu/getattachment/a9b8e92d-2c8d-4779-9925-0defea93325c/1-14M_\(Jul_2007\)_NWP](http://www.usnwc.edu/getattachment/a9b8e92d-2c8d-4779-9925-0defea93325c/1-14M_(Jul_2007)_NWP) [hereinafter “Naval Commander's Handbook”] (This manual is issued by the U.S. Naval War College and applies to the Navy, Marines and Coast Guard. *Id.* at 1); U.S. DEP'T OF THE NAVY, ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATION (1999) available at www.usnwc.edu/Research---Gaming/International-Law/RightsideLinks/Studies-Series/documents/Naval-War-College-vol-73.aspx.

See also the following earlier editions of U.S. military manuals and manuals that are no longer in effect but contain statements of international law of continuing significance: U.S. DEP'T OF THE AIR FORCE, COMMANDER'S HANDBOOK ON THE LAW OF ARMED CONFLICT (Air Force Pamphlet 110-34, 25 July 1980); U.S. DEP'T OF THE AIR FORCE, INTERNATIONAL LAW—THE CONDUCT OF ARMED CONFLICT AND AIR OPERATIONS (Air Force Pamphlet 110-31, 19 November 1976) [hereinafter THE AIR FORCE MANUAL ON INTERNATIONAL LAW]; JOINT PUB 3-12.1 DOCTRINE FOR JOINT THEATER NUCLEAR OPERATIONS (Feb. 9, 1996) (Chapters 2, 25-26, 30); UNITED STATES DEPARTMENT OF THE NAVY ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS (Naval Warfare Publication 9, 1987).

declared nuclear weapons states that participated in the ICJ case, Russia³¹, the UK³², and France³³ (China did not participate), the written and oral presentations of Iran³⁴, and the written presentations of India³⁵ and North Korea³⁶ (Pakistan and Israel did not participate).³⁷ Based upon our review of such materials, the statements of international humanitarian law by such states, to the extent the matter was addressed, were generally consistent with the statements of such law by the United States, as reflected herein, with the exception that France remained silent on the application of IHL, contending instead that use of nuclear weapons in self-defense is permissible absent an express prohibition.³⁸

³¹ See Written Statement of the Government of the Russian Federation (June 19, 1995), submitted to the International Court of Justice, The Hague, The Netherlands, in connection with the request by the United Nations General Assembly for an Advisory Opinion on the Threat or Use of Nuclear Weapons; Transcript of the November 10, 1995 public sitting of the ICJ in the Hague at the Peace Palace, President Bedjaoui presiding, in the case of the Legality of the Threat or Use of Nuclear Weapons (Request for Advisory Opinion submitted by the General Assembly of the United States), Verbatim Record.

³² See Written Statement of the Government of the United Kingdom (June 16, 1995), submitted to the International Court of Justice, The Hague, The Netherlands, in connection with the request by the United Nations General Assembly for an Advisory Opinion on the Threat or Use of Nuclear Weapons; Transcript of the November 15, 1995 public sitting of the ICJ in the Hague at the Peace Palace, President Bedjaoui presiding, in the case of the Legality of the Threat or Use of Nuclear Weapons (Request for Advisory Opinion submitted by the General Assembly of the United States), Verbatim Record.

³³ See Written Statement of the Government of the French Republic (June 20, 1995), submitted to the International Court of Justice, The Hague, The Netherlands, in connection with the request by the United Nations General Assembly for an Advisory Opinion on the Threat or Use of Nuclear Weapons; Transcript of the November 1, 1995 public sitting of the ICJ in the Hague at the Peace Palace, President Bedjaoui presiding, in the case of the Legality of the Threat or Use of Nuclear Weapons (Request for Advisory Opinion submitted by the General Assembly of the United States), Verbatim Record; Transcript of the November 2, 1995 public sitting of the ICJ in the Hague at the Peace Palace, President Bedjaoui presiding, in the case of the Legality of the Threat or Use of Nuclear Weapons (Request for Advisory Opinion submitted by the General Assembly of the United States), Verbatim Record.

³⁴ See Written Statement of the Government of the Islamic Republic of Iran (June 19, 1995), submitted to the International Court of Justice, The Hague, The Netherlands, in connection with the request by the United Nations General Assembly for an Advisory Opinion on the Threat or Use of Nuclear Weapons; Transcript of the November 6, 1995 public sitting of the ICJ in the Hague at the Peace Palace, President Bedjaoui presiding, in the case of the Legality of the Threat or Use of Nuclear Weapons (Request for Advisory Opinion submitted by the General Assembly of the United States), Verbatim Record.

³⁵ See Written Statement of the Government of India (June 20, 1995), submitted to the International Court of Justice, The Hague, The Netherlands, in connection with the request by the United Nations General Assembly for an Advisory Opinion on the Threat or Use of Nuclear Weapons

³⁶ See Letter dated 18 May from the Permanent Representative of the Democratic People's Republic of Korea to the United Nations (May 18, 1995), submitted to the International Court of Justice, The Hague, The Netherlands, in connection with the request by the United Nations General Assembly for an Advisory Opinion on the Threat or Use of Nuclear Weapons

³⁷ There were actually two cases referred to the ICJ for an advisory opinion as to the lawfulness of the use and threat of use of nuclear weapons, one referred by the World Health Organization (“WHO”) in 1993 and the other by the General Assembly in 1995, with the ICJ ultimately finding that the WHO did not to have standing to assert such a claim, while proceeding to hear the case presented by the General Assembly. While legal arguments were presented to the ICJ on international law issues in both cases, we have focused on the papers submitted in connection with the General Assembly case, since those statements were more complete and substantive than those presented in connection with the WHO referral.

³⁸ See Transcript of the November 1, 1995 public sitting of the ICJ in the Hague at the Peace Palace, President Bedjaoui presiding, in the case of the Legality of the Threat or Use of Nuclear Weapons (Request for Advisory Opinion submitted by the General Assembly of the United States), Verbatim Record at 66 (stating that the use of nuclear weapons is “authorized in the event of the exercise of the inherent right of

Some of the legal requirements may come as a surprise even to leading public policy and nuclear weapons experts. The law governing the use and threat of use of nuclear weapons has been largely overlooked. We have noted over the years of our involvement in the issue that leading and insightful analyses of nuclear weapons issues by experts across the political spectrum typically do not include law in their analysis, failing even to mention international law, let alone consider it. A current example is the fact that the Obama Administration's wide-ranging efforts addressing nuclear weapons issues have been presented on the basis of policy and security considerations, with little or no acknowledgement of the requirements of international law.

Against this backdrop, the affirmation by states party to the NPT at the 2010 Review Conference in their "Conclusions and recommendations for follow-on actions" with respect to nuclear disarmament "the need for all States at all times to comply with applicable international law, including international humanitarian law"³⁹ was the inspiration for this article. That unambiguous commitment should herald in a new era in which the requirements of international humanitarian law define the creation, deployment, use and threat of use of nuclear weapons. In fact, it is our contention that this body of law renders the use and threat of use of nuclear weapons unlawful and compels immediate progress to obtain the elimination of the weapons.

Main Corpus of International Humanitarian Law

The ICJ in its Nuclear Weapons Advisory decision stated that this "body of legal prescriptions,"⁴⁰ the "laws and customs of war," are largely set forth in "one single complex system" known as "international humanitarian law," a body of customary rules—many of which have been codified in the "Hague Law" and the "Geneva Law."⁴¹

The Court noted that the Hague Law consists of codifications undertaken in The Hague (including the Conventions of 1899 and 1907) which that were based partly upon the St. Petersburg Declaration of 1868 and the results of the Brussels Conference of 1874.⁴² The ICJ noted that this Hague Law, particularly the Regulations Respecting the Laws and Customs of War on Land ("Hague Regulations"), "fixed the rights and duties of belligerents in their conduct of operations and limited the choice of methods of means of injuring the enemy in an international armed conflict."⁴³

The ICJ further stated that the Geneva Law, consisting of codifications undertaken in Geneva (the Conventions of 1864, 1906, 1929 and 1949), protect "the

individual or collective self-defence). See John Burroughs, Humanitarian Consequences, Humanitarian Law: An advance in banning use of nuclear weapons, NPT News in Review, 2010, available at <http://www.reachingcriticalwill.org/legal/npt/NIR2010/No21.pdf>

³⁹ Final Document at 19, I(A)(v).

⁴⁰ Nuclear Weapons Advisory Opinion ¶ 75, at 34, 35 I.L.M. at 827.

⁴¹ Nuclear Weapons Advisory Opinion ¶ 75, at 34, 35 I.L.M. at 827.

⁴² Nuclear Weapons Advisory Opinion ¶ 75, at 34, 35 I.L.M. at 827.

⁴³ Nuclear Weapons Advisory Opinion ¶ 75, at 34, 35 I.L.M. at 827.

victims of war” and aim “to provide safeguards for disabled armed forces personnel and persons not taking part in the hostilities.”⁴⁴ The ICJ noted that the more recent provisions of the Additional Protocols I and II of 1977 to the Geneva Conventions regulating the conduct of hostilities “give expression and attest to the unity and complexity” of international humanitarian law.⁴⁵

Applicability of the Rules of International Humanitarian Law to Nuclear Weapons

The United States recognizes that the use of nuclear weapons is subject to international humanitarian law, including the rules of distinction/discrimination, proportionality, and necessity, and the corollary requirement of controllability.⁴⁶

The 2007 *Naval Commander’s Handbook* states that the use of nuclear weapons “against enemy combatants and other military objectives” is subject to the following principles:

- (1) the right of the parties to the conflict to adopt means of injuring the enemy is not unlimited;
- (2) it is prohibited to launch attacks against the civilian population as such; and
- (3) distinction must be made at all times between combatants and civilians to the effect that the latter be spared as much as possible.⁴⁷

⁴⁴ Nuclear Weapons Advisory Opinion at ¶ 75, at 34, 35 I.L.M. at 827.

⁴⁵ *Id.*, citing Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (“Protocol I”), 12 December 1977, 1125 U.N.T.S. 1 available at <http://treaties.un.org/doc/Publication/UNTS/Volume%201125/volume-1125-I-17512-English.pdf>; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (“Protocol II”) 1125 U.N.T.S. 609 available at <http://treaties.un.org/doc/Publication/UNTS/Volume%201125/volume-1125-I-17513-English.pdf>. For related explanatory materials, see also M. BOTHE, K. PARTSCH & W. SOLF, *NEW RULES FOR VICTIMS OF ARMED CONFLICTS* (1982), pp. 312, 317; INTERNATIONAL COMMITTEE OF THE RED CROSS, *COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977* 662 (1987).

⁴⁶ See Conrad K. Harper, Michael J. Matheson, Bruce C. Rashkow, John H. McNeill, *Written Statement of the Government of the United States of America* (June 20, 1995), submitted to the International Court of Justice, (The Hague, The Netherlands), in connection with the Request by the United Nations General Assembly for an Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons at 2, 7–47 [hereinafter the “U.S. ICJ Memorandum/GA App.”], reprinted as *Written Observations on the Request by the General Assembly for an Advisory Opinion*, 7 CRIM. L.F. 401, 416 n.49 (1996). U.S. DEP’T OF THE NAVY, NWP 1-14M, *THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS* § 10.1 – 10.2.1 (2007) available at [http://www.usnwc.edu/getattachment/a9b8e92d-2c8d-4779-9925-0defea93325c/1-14M_\(Jul_2007\)_\(NWP\)](http://www.usnwc.edu/getattachment/a9b8e92d-2c8d-4779-9925-0defea93325c/1-14M_(Jul_2007)_(NWP)) [hereinafter “Naval Commander’s Handbook”] U.S. DEP’T OF THE AIR FORCE, *DOCTRINE DOC. 2-12, NUCLEAR OPERATIONS*, 8 (2009) available at <http://www.fas.org/irp/doddir/usaf/afdd2-12.pdf>. THE LAW OF LAND WARFARE, *supra* note 30, states that, in the absence of a customary rule of law or international convention restricting the employment of atomic weapons, the use of such weapons cannot be deemed unlawful, although the manual appears to recognize the subjugation of the use of such weapons to the principles of moderation and necessity. *Id.* at 18.

⁴⁷ U.S. DEP’T OF THE NAVY, NWP 1-14M, *THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS* § 10.2.1 (2007) available at [http://www.usnwc.edu/getattachment/a9b8e92d-2c8d-4779-9925-0defea93325c/1-14M_\(Jul_2007\)_\(NWP\)](http://www.usnwc.edu/getattachment/a9b8e92d-2c8d-4779-9925-0defea93325c/1-14M_(Jul_2007)_(NWP)).

The Air Force in its 2009 manual *Nuclear Operations* recognizes that the use of nuclear weapons is subject to the principles of the law of war generally.⁴⁸ The manual states, “Under international law, the use of a nuclear weapon is based on the same targeting rules applicable to the use of any other lawful weapon, i.e. the counterbalancing principles of military necessity, proportionality, distinction and unnecessary suffering.”⁴⁹

The Air Force in its 2006 manual *Targeting* states that the following questions are helpful in determining whether the use of a weapon complies with the applicable rules:

- Is this target a valid “military objective”?
- Will the use of a particular weapon used to strike a target cause unnecessary suffering?
- Does the military advantage to be gained from striking a target outweigh the anticipated incidental civilian loss of life and property if this target is struck?
- Have we distinguished between combatants and non-combatants; have we distinguished between military objectives and protected property or places?⁵⁰

In its memorandum to the ICJ in the Nuclear Weapons Advisory Case, the United States stated, “[T]he legality of use [of nuclear weapons] depends on the conformity of the particular use with the rules applicable to such weapons.”⁵¹ The memorandum goes on to say that this would depend on “the characteristics of the particular weapon used and its effects, the military requirements for the destruction of the target in question and the magnitude of the risk to civilians.”⁵²

The Army in an earlier manual *International Law Manual* stated that the provisions of international conventional and customary law that “may control the use of nuclear weapons” include:

⁴⁸ U.S. DEP’T OF THE AIR FORCE, DOCTRINE DOC. 2-12, NUCLEAR OPERATIONS, 8 (2009) *available at* www.fas.org/irp/doddir/usaf/afdd2-12.pdf.

⁴⁹ U.S. DEP’T OF THE AIR FORCE, DOCTRINE DOC. 2-12, NUCLEAR OPERATIONS, 8 (2009) *available at* www.fas.org/irp/doddir/usaf/afdd2-12.pdf.

⁵⁰ U.S. DEP’T OF THE AIR FORCE, DOCTRINE DOC. 2-1.9, TARGETING, 89-90 (2006) *available at* www.fas.org/irp/doddir/usaf/afdd2-1.9.pdf.

⁵¹ See U.S. ICJ Memorandum/GA App at 2, 8-14 (citing U.S. Army Field Manual 27-10, Change No. 1, THE LAW OF LAND WARFARE at 4 ¶ 40(a)). See also Conrad K. Harper, Michael J. Matheson, & Bruce C. Rashkow, *Written Statement of the Government of the United States of America* (June 10, 1994), submitted to the International Court of Justice, The Hague, The Netherlands, in connection with the Request by the World Health Organization for an Advisory Opinion on the Question of the Legality Under International Law and the World Health Organization Constitution of the Use of Nuclear Weapons by a State in War or Other Armed Conflict at 2, 16-21 (“U.S. ICJ Memorandum/WHO App.”). See also Conrad K. Harper, Michael J. Matheson, & Bruce C. Rashkow, *Written Statement of the Government of the United States of America* (June 10, 1994), submitted to the International Court of Justice, The Hague, The Netherlands, in connection with the Request by the World Health Organization for an Advisory Opinion on the Question of the Legality Under International Law and the World Health Organization Constitution of the Use of Nuclear Weapons by a State in War or Other Armed Conflict at 2, 16-21 (“U.S. ICJ Memorandum/WHO App.”).

⁵² *Id.*

(1) Article 23(a) of the Hague Regulations prohibiting poisons and poisoned weapons;

(2) the Geneva Protocol of 1925 which prohibits the use not only of poisonous and other gases but also of “analogous liquids, materials or devices;”

(3) Article 23(c) of the Hague Regulations which prohibits weapons calculated to cause unnecessary suffering; and

(4) the 1868 Declaration of St. Petersburg which lists as contrary to humanity those weapons which “needlessly aggravate the sufferings of disabled men or render their death inevitable.”⁵³

Summary of Main Rules Of International Humanitarian Law

Following is a summary of key rules of international humanitarian law applicable to nuclear and other weapons:

The *rule of distinction/discrimination* prohibits the use of a weapon that cannot discriminate in its effects between military targets and non-combatant persons and objects. It is unlawful to use weapons whose effects are incapable of being controlled and therefore cannot be directed against a military target. If the state cannot maintain such control over the weapon, it cannot ensure that such use will comply with the rule of discrimination – and may not lawfully use the weapon.

The *rule of proportionality* prohibits the use of a weapon whose potential collateral effects upon non-combatant persons or objects would likely be disproportionate to the value of the military advantage anticipated by the attack. The rule of proportionality requires that a state using a weapon be able to control the effects of the weapon. If the state cannot control such effects, it cannot ensure that the collateral effects of the attack will be proportional to the anticipated military advantage.

The *rule of necessity* provides that a State may only use such a level of force as is necessary to achieve the military objective of the particular strike. Any additional level of force is unlawful.

The *corollary rule of controllability* provides that a State may not use a weapon whose effects it cannot control because, in such circumstances, it would be unable to believe that the particular use of the weapon would comply with the rules of distinction, proportionality, or necessity.

⁵³ United States, Department of the Army, *International Law*, vol. II, 27-161-2, at 42, Pamp. 27-161-2 (Oct. 1962), quoted in ELLIOTT L. MEYROWITZ, PROHIBITION OF NUCLEAR WEAPONS: THE RELEVANCE OF INTERNATIONAL LAW 223 (Transnational Publishers, Inc. 1990). This manual appears to have been superseded, as it no longer shows up on lists of current manuals. See, e.g., _____. We are not aware of any reason to believe that the requirements of the Hague Regulations Article 23(a) and (c), the Geneva Protocol of 1925, or the 1868 Declaration of St. Petersburg, insofar as applicable to nuclear weapons, have changed in any way since the issuance of the Army’s manual *International Law*.

International law as to *reprisals* provides, at a minimum, that a State may not engage in even limited violations of the law of armed conflict, in response to an adversary's violation of such law, unless such acts of reprisal would meet requirements of necessity and proportionality and be solely intended to get the adversary to adhere to the law of armed conflict. The reprisal must be necessary to achieve that purpose and proportionate to the violation against which it is directed. These requirements of necessity and proportionality for a lawful reprisal are analogous to the requirements of necessity and proportionality (discussed immediately below) for the lawful exercise of the right of self-defense.

A State's right of *self-defense* is subject to requirements of necessity and proportionality under customary international law and the Charter of the United Nations. A State's use of force in the exercise of self-defense is also subject to the requirements of international humanitarian law, including the requirements of distinction, proportionality and necessity, and the corollary requirement of controllability.

International law as to *individual and command liability* provides that military, government, and even private industrial personnel are subject to criminal conviction for violation of the law of armed conflict if they knowingly, recklessly, or even grossly negligently participate in or have supervisory responsibility over violations of the law of armed conflict, with such potential criminal liability extending not only to what the individual or commander knew but also to what he or she "should have known" concerning the violation of law.

Discussion Of Such Rules

Rule of Distinction/Discrimination

The rule of distinction/discrimination⁵⁴ prohibits the use of a weapon that cannot discriminate in its effects between military and civilian targets. This is a rule designed to protect civilian persons and objects. The law recognizes that the use of a particular weapon against a military target may cause unintended collateral or incidental damage to civilian persons and objects and permits such damage, subject to compliance with the other applicable rules of law, including the principle of proportionality. However, the weapon must have been intended for—and capable of being controlled and directed against—a military target, and the civilian damage must have been unintended and collateral or incidental.

Thus, if the weapon or its effects were not susceptible of being controlled and directed against a military target in the first place, the resultant damage to civilian persons and objects would not be considered unintended, collateral or incidental—and the

⁵⁴ The terms "distinction" and "discrimination" are considered synonymous by the service manuals. See e.g. U.S. DEP'T OF THE AIR FORCE, THE MILITARY COMMANDER AND THE LAW, 630 (2009) available at www.afjag.af.mil/shared/media/document/AFD-091026-025.pdf ("Distinction (also referred to as discrimination).").

use would be prohibited. Similarly, if the very purpose of the strike were to put pressure on the adversary through attacks on its population (the classic Cold War deterrence theory of “mutual assured destruction” or “MAD”), the strike would be unlawful.

This rule of distinction is recognized by the United States. The Army in its 2010 *Law of War Deskbook* describes distinction as “the grandfather of all principles,” stating that the rule requires that “[p]arties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.”⁵⁵

The Army’s *Operational Law Handbook* defines “indiscriminate” as “not directed against a military objective; employs a method or means of delivery that cannot be directed at a specific military objective; or may be expected to cause incidental loss of civilian life or injury to civilian objects (including the environment), which would be excessive in relation to the concrete and direct military advantage gained.”⁵⁶

The Army in its 2010 *Operational Law Handbook* states, “[D]istinction requires parties to a conflict to engage only in military operations, the *effects* of which distinguish between the civilian population (or individual civilians not taking part in the hostilities), and combatant forces, directing the application of force solely against the latter.”⁵⁷ The *Handbook* is explicit that the requirement of distinction applies to the *effects* of the weapon being used. This becomes important when we consider the radiation effects of nuclear weapons.

The Navy in its 2007 *Naval Commanders Handbook* states, “[I]t is a fundamental tenet of the law of armed conflict that the right of nations engaged in armed conflict to choose methods or means of warfare is not unlimited.”⁵⁸ The *Handbook* states, “Weapons, which by their nature are incapable of being directed specifically against military objectives, and therefore put civilians and noncombatants at equivalent risk, are forbidden due to their indiscriminate effect.”⁵⁹

⁵⁵ INT’L & OPERATIONAL LAW DEP’T, U.S. DEP’T OF THE ARMY, LAW OF WAR DESKBOOK, 141 (2010) available at www.loc.gov/rr/frd/Military_Law/pdf/LOW-Deskbook.pdf.

⁵⁶ INT’L & OPERATIONAL LAW DEP’T, U.S. DEP’T OF THE ARMY, OPERATIONAL LAW HANDBOOK, 350, fn. 81 (2010) (Emphasis supplied), available at [www.jagcnet.army.mil/8525751D0057F1B6/0/9AA89AFB204D01BE8525776100451636/\\$file/Operational%20Law%20Handbook%20%282010%29.pdf](http://www.jagcnet.army.mil/8525751D0057F1B6/0/9AA89AFB204D01BE8525776100451636/$file/Operational%20Law%20Handbook%20%282010%29.pdf).

⁵⁷ INT’L & OPERATIONAL LAW DEP’T, U.S. DEP’T OF THE ARMY, OPERATIONAL LAW HANDBOOK, 12 (2010) (Emphasis supplied), available at [www.jagcnet.army.mil/8525751D0057F1B6/0/9AA89AFB204D01BE8525776100451636/\\$file/Operational%20Law%20Handbook%20%282010%29.pdf](http://www.jagcnet.army.mil/8525751D0057F1B6/0/9AA89AFB204D01BE8525776100451636/$file/Operational%20Law%20Handbook%20%282010%29.pdf).

⁵⁸ U.S. DEP’T OF THE NAVY, NWP 1-14M, THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS § 9.1 (2007) available at [http://www.usnwc.edu/getattachment/a9b8e92d-2c8d-4779-9925-0defea93325c/1-14M_\(Jul_2007\)_\(NWP\)](http://www.usnwc.edu/getattachment/a9b8e92d-2c8d-4779-9925-0defea93325c/1-14M_(Jul_2007)_(NWP))

⁵⁹ U.S. DEP’T OF THE NAVY, NWP 1-14M, THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS § 9.1 (2007) available at [http://www.usnwc.edu/getattachment/a9b8e92d-2c8d-4779-9925-0defea93325c/1-14M_\(Jul_2007\)_\(NWP\)](http://www.usnwc.edu/getattachment/a9b8e92d-2c8d-4779-9925-0defea93325c/1-14M_(Jul_2007)_(NWP))

The *Handbook* states further, “[T]he principle of distinction is concerned with distinguishing combatants from civilians and military objects from civilian objects so as to minimize damage to civilians and civilian objects.”⁶⁰ Commanders have two duties under the principle of distinction: They must “distinguish their forces from the civilian population” and “distinguish valid military objectives from civilians or civilian objects before attacking.”⁶¹

Noting that the rule of distinction encompasses the *effects* of the weapons being used, the *Naval Commander’s Handbook* highlights three types of attacks that the rule outlaws:

- Attacks that are not directed at a specific military objective.
- Attacks that employ a method or means of combat that cannot be directed at a specific military objective.
- Attacks that employ a method or means of combat, *the effects of which cannot be limited as required by the law of armed conflict.*⁶²

The Air Force in its 2009 manual *The Military Commander and the Law* similarly states that the principle of distinction “imposes a requirement to distinguish between military objectives and civilian objects...an attacker must not intentionally attack civilians or employ methods or means (weapons or tactics) that would cause excessive civilian casualties.”⁶³ The rule of distinction “prohibits indiscriminate attacks.”⁶⁴

Rule of Proportionality

The rule of proportionality prohibits the use of a weapon if its probable effects upon non-combatant persons or objects would likely be disproportionate to the value of the anticipated military objective.

The Air Force in its manual *The Military Commander and the Law* describes the rule of proportionality as involving a balancing test that “damages and casualties must be

⁶⁰ U.S. DEP’T OF THE NAVY, NWP 1-14M, THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS § 5.3.2 (2007) *available at* [http://www.usnwc.edu/getattachment/a9b8e92d-2c8d-4779-9925-0defea93325c/1-14M_\(Jul_2007\)_\(NWP\)](http://www.usnwc.edu/getattachment/a9b8e92d-2c8d-4779-9925-0defea93325c/1-14M_(Jul_2007)_(NWP)). Combatants are “persons engaged in hostilities during an armed conflict”. *Id.* at 5.4. Noncombatants “are those members of the armed forces who do not take direct part in hostilities because of their status as medical personnel and chaplains.” *Id.* “A civilian is a person who is not a combatant or noncombatant.” *Id.*

⁶¹ U.S. DEP’T OF THE NAVY, NWP 1-14M, THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS § 5.3.2 (2007) *available at* [http://www.usnwc.edu/getattachment/a9b8e92d-2c8d-4779-9925-0defea93325c/1-14M_\(Jul_2007\)_\(NWP\)](http://www.usnwc.edu/getattachment/a9b8e92d-2c8d-4779-9925-0defea93325c/1-14M_(Jul_2007)_(NWP))

⁶² U.S. DEP’T OF THE NAVY, NWP 1-14M, THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS § 5.3.2 (2007) (*Emphasis supplied*), *available at* [http://www.usnwc.edu/getattachment/a9b8e92d-2c8d-4779-9925-0defea93325c/1-14M_\(Jul_2007\)_\(NWP\)](http://www.usnwc.edu/getattachment/a9b8e92d-2c8d-4779-9925-0defea93325c/1-14M_(Jul_2007)_(NWP))

⁶³ U.S. DEP’T OF THE AIR FORCE, THE MILITARY COMMANDER AND THE LAW, 630 (2009) *available at* www.afjag.af.mil/shared/media/document/AFD-091026-025.pdf

⁶⁴ U.S. DEP’T OF THE AIR FORCE, DOCTRINE DOC. 2-1.9, TARGETING, 90 (2006) *available at* www.fas.org/irp/doddir/usaf/afdd2-1.9.pdf.

consistent with mission accomplishment,” and that “civilian losses must be proportionate to the military advantages sought.”⁶⁵

The manual further states, “Those who plan military operations must take into consideration the extent of civilian destruction and probable casualties that will result and, to the extent consistent with the necessities of the military situation, seek to avoid or minimize such casualties and destruction”.⁶⁶

The Air Force in its 2009 manual *Air Force Operations and the Law* states that the rule of proportionality “may be viewed as a fulcrum for balancing military necessity and unnecessary suffering.”⁶⁷

Echoing the language in the Additional Protocol I to the 1949 Geneva Convention, the Air Force in its 2006 manual *Targeting* states that proportionality “requires [that] the anticipated loss of civilian life and damage to civilian property incidental to attack is not excessive in relation to the concrete and direct military advantage expected from striking the target.”⁶⁸

The Navy in its 2007 *The Naval Commander’s Handbook* states, as to the requirement of proportionality, that a commander is required “to conduct a balancing test to determine if the incidental injury, including death to civilians and damage to civilian objects, is excessive in relation to the concrete and direct military advantage expected to be gained.”⁶⁹

The Naval Commander’s Handbook further states that weapons that by their design cause unnecessary suffering or superfluous injury are “prohibited because the degree of pain or injury, or the certainty of death they produce is needlessly or clearly disproportionate to the military advantage to be gained by their use.”⁷⁰

⁶⁵ U.S. DEP’T OF THE AIR FORCE, THE MILITARY COMMANDER AND THE LAW, 631 (2009) available at www.afjag.af.mil/shared/media/document/AFD-091026-025.pdf

⁶⁶ U.S. DEP’T OF THE AIR FORCE, THE MILITARY COMMANDER AND THE LAW, 631 (2009) available at www.afjag.af.mil/shared/media/document/AFD-091026-025.pdf

⁶⁶ U.S. DEP’T OF THE AIR FORCE, THE MILITARY COMMANDER AND THE LAW, 631 (2009) available at www.afjag.af.mil/shared/media/document/AFD-091026-025.pdf

⁶⁷ U.S. DEP’T OF THE AIR FORCE, AIR FORCE OPERATIONS AND THE LAW, 19 (2009) available at www.afjag.af.mil/shared/media/document/AFD-100510-059.pdf.

⁶⁸ U.S. DEP’T OF THE AIR FORCE, DOCTRINE DOC. 2-1.9, TARGETING, 89 (2006) available at www.fas.org/irp/doddir/usaf/afdd2-1.9.pdf. See also INT’L & OPERATIONAL LAW DEP’T, U.S. DEP’T OF THE ARMY, LAW OF WAR DESKBOOK, 142 (2010) available at http://www.loc.gov/r/r/frd/Military_Law/pdf/LOW-Deskbook-2010.pdf

⁶⁹ U.S. DEP’T OF THE NAVY, NWP 1-14M, THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS § 5.3.3 (2007) available at [http://www.usnwc.edu/getattachment/a9b8e92d-2c8d-4779-9925-0defea93325c/1-14M_\(Jul_2007\)_\(NWP\)](http://www.usnwc.edu/getattachment/a9b8e92d-2c8d-4779-9925-0defea93325c/1-14M_(Jul_2007)_(NWP)). See also JOINT CHIEFS OF STAFF, JP 3-60, JOINT TARGETING (2007) (“The principle of proportionality requires that commanders weigh the anticipated loss of civilian life and damage to civilian property reasonably expected to result from military operations with the advantages expected to be gained.”).

⁷⁰ U.S. DEP’T OF THE NAVY, NWP 1-14M, THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS § 9.1.1 (2007) available at [http://www.usnwc.edu/getattachment/a9b8e92d-2c8d-4779-9925-0defea93325c/1-14M_\(Jul_2007\)_\(NWP\)](http://www.usnwc.edu/getattachment/a9b8e92d-2c8d-4779-9925-0defea93325c/1-14M_(Jul_2007)_(NWP)).

In an observation that is helpful in distinguishing the focus of various interrelated principles, the *Naval Commander's Handbook* states:

The principle of proportionality is directly linked to the principle of distinction. While distinction is concerned with focusing the scope and means of attack so as to cause the least amount of damage to protected persons and property, proportionality is concerned with weighing the military advantage one expects to gain against the unavoidable and incidental loss to civilians and civilian property that will result from the attack.⁷¹

The U.S. in its memorandum to the ICJ in the Nuclear Weapons Advisory Case defined the proportionality requirement in terms of the likely effects and associated risks:⁷²

Whether an attack with nuclear weapons would be disproportionate depends entirely on the circumstances, including the nature of the enemy threat, the importance of destroying the objective, the character, size and likely effects of the device, and the magnitude of the risk to civilians. Nuclear weapons are not inherently disproportionate.

Rule of Necessity

The rule of necessity provides that, in conducting a military operation, a State, even as against its adversary's forces and property, may use only such a level of force as is "necessary" or "imperatively necessary" to achieve its military objective, and that any additional level of force is prohibited as unlawful. The State must have an explicit military objective justifying each particular use of force in armed conflict and there must be a reasonable connection between that objective and the use of the particular force in question. If a military operation cannot satisfy this requirement, the State must use a lower level of force or refrain from the operation altogether.

This is a rule of customary international law memorialized in numerous conventions. Violations of this rule served as the basis of convictions at Nuremberg. It is a rule of reason, requiring that a judgment be made as much in advance as possible by appropriately responsible decision-makers in light of the reasonably available facts. The State, in planning its military operations, is required to exercise all reasonable precautions to assure that the level of force to be used is within the scope of this rule. The protection of the rule runs to combatant as well as non-combatant persons and objects.

⁷¹ U.S. DEP'T OF THE NAVY, NWP 1-14M, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS § 5.3.3 (2007) available at [http://www.usnwc.edu/getattachment/a9b8e92d-2c8d-4779-9925-0defea93325c/1-14M_\(Jul_2007\)_\(NWP\)](http://www.usnwc.edu/getattachment/a9b8e92d-2c8d-4779-9925-0defea93325c/1-14M_(Jul_2007)_(NWP))

⁷² U.S. ICJ Memorandum/GA App. at 23 (citing the Army's *The Law of Land Warfare* at 5).

The rule precludes the use of a particular weapon if a less destructive weapon could reasonably be expected to achieve the objective, and outlaws the use of a weapon not capable of being regulated or not in fact regulated by the user.

The United States recognizes this rule. The Air Force in its 2009 manual *The Military Commander and the Law*, characterizes the limitations of military necessity both as customary international law and as ratified in the Hague Convention, which forbids a belligerent “to destroy or seize the enemy’s property unless such destruction or seizure be imperatively demanded by the necessities of war.”⁷³ The manual quotes the Hague Convention’s Preamble:

Military necessity does not authorize all acts in war that are not expressly prohibited. Codification of the law of war into specific prohibitions to anticipate every situation is neither possible nor desirable. As a result, commanders and others responsible for making decisions must make those decisions in a manner consistent with the spirit and intent of the law of war.⁷⁴

The Air Force in its manual *Air Force Operations and the Law* further states:

The principle of avoiding the employment of arms, projectiles, or material of a nature to cause unnecessary suffering, also referred to as superfluous injury, is codified in Article 23 of the Annex to Hague IV, which especially forbids employment of “arms, projectiles or material calculated to cause unnecessary suffering...” and the destruction or seizure of “the enemy’s property, unless such destruction or seizure be imperatively demanded by the necessities of war.”

Additional Protocol I, in article 35, states in paragraph 2: “It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.”⁷⁵

The manual emphasizes that the rule of necessity involves a balancing test:

In determining whether a means or method of warfare causes unnecessary suffering, a balancing test is applied between lawful force dictated by military necessity to achieve a military objective and the injury or damage that may be

⁷³ U.S. DEP’T OF THE AIR FORCE, *THE MILITARY COMMANDER AND THE LAW*, 14 (2009) available at www.afjag.af.mil/shared/media/document/AFD-091026-025.pdf citing Convention (IV) Respecting the Laws and Customs of War and its Annex: Regulations Concerning the Laws and Customs of War on Land art. 23, para. (g) 18 Oct. 1907.

⁷⁴ U.S. DEP’T OF THE AIR FORCE, *THE MILITARY COMMANDER AND THE LAW*, 14 (2009) available at www.afjag.af.mil/shared/media/document/AFD-091026-025.pdf citing Convention (IV) Respecting the Laws and Customs of War and its Annex: Regulations Concerning the Laws and Customs of War on Land art. 23, para. (g) 18 Oct. 1907.

⁷⁵ See also U.S. DEP’T OF THE AIR FORCE, *AIR FORCE OPERATIONS AND THE LAW*, 15 (2009) available at www.afjag.af.mil/shared/media/document/AFD-100510-059.pdf. See also U.S. DEP’T OF THE ARMY, *OPERATIONAL LAW HANDBOOK*, 12 (2010) available at [www.jagcnet.army.mil/8525751D0057F1B6/0/9AA89AFB204D01BE8525776100451636/\\$file/Operational%20Law%20Handbook%20%282010%29.pdf](http://www.jagcnet.army.mil/8525751D0057F1B6/0/9AA89AFB204D01BE8525776100451636/$file/Operational%20Law%20Handbook%20%282010%29.pdf).

considered superfluous to achievement of the stated or intended objective. Unnecessary suffering is used in an objective rather than subjective sense. That is, the measurement is not that of the victim affected by the means, but rather in the sense of the design of a particular weapon or in the employment of weapons.⁷⁶

The Air Force in its earlier *Manual on International Law*, in discussing the importance of Hague IV and the Hague Regulations, stated, quoted the International Military Tribunal at Nuremberg: "[B]y 1939, these rules laid down in the Convention were recognized by all civilized nations, and were regarded as being declaratory of the Laws and Customs of War".⁷⁷ The manual further noted that "all of the major war criminals, including Herman Goering, the Air Minister, were convicted, among other crimes of the devastation of towns not justified by military necessity in violation of the law of war."⁷⁸

The Army's 2010 *Operational Law Handbook* states that "[t]he principle of military necessity is explicitly codified in Article 23, paragraph (g) of the Annex to Hague IV, which forbids a belligerent 'to destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war.'"⁷⁹

The Naval Commander's Handbook states the law of war's purpose "is to ensure that the violence of hostilities is directed toward the enemy's war efforts and is not used to cause unnecessary human misery and physical destruction."⁸⁰ The *Handbook* states, "The principle of military necessity recognizes that force resulting in death and destruction will have to be applied to achieve military objectives, but its goal is to limit suffering and destruction to that which is necessary to achieve a valid military objective."⁸¹

The Naval Commander's Handbook further states that the rule of necessity "prohibits the use of any kind or degree of force not required for the partial or complete submission of the enemy with a minimum expenditure of time, life and physical

⁷⁶ U.S. DEP'T OF THE AIR FORCE, AIR FORCE OPERATIONS AND THE LAW, 15-16 (2009) available at www.afjag.af.mil/shared/media/document/AFD-100510-059.pdf.

⁷⁷ THE UNITED STATES DEPARTMENT OF THE AIR FORCE, INTERNATIONAL LAW—THE CONDUCT OF ARMED CONFLICT AND AIR OPERATIONS at 5.1 (Air Force Pamphlet 110-31, 19 November 1976). This manual no longer appears to be in effect. See _____. Its point as to the Nuremberg Court's enforcement of the rule of necessity remains compelling.

⁷⁸ *Id.* at 5-6.

⁷⁹ U.S. DEP'T OF THE ARMY, OPERATIONAL LAW HANDBOOK, 10 (2010) available at [www.jagcnet.army.mil/8525751D0057F1B6/0/9AA89AFB204D01BE8525776100451636/\\$file/Operational%20Law%20Handbook%20%282010%29.pdf](http://www.jagcnet.army.mil/8525751D0057F1B6/0/9AA89AFB204D01BE8525776100451636/$file/Operational%20Law%20Handbook%20%282010%29.pdf).

⁸⁰ U.S. DEP'T OF THE NAVY, NWP 1-14M, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS § 5.3.1 (2007) available at [http://www.usnwc.edu/getattachment/a9b8e92d-2c8d-4779-9925-0defea93325c/1-14M_\(Jul_2007\)_\(NWP\)](http://www.usnwc.edu/getattachment/a9b8e92d-2c8d-4779-9925-0defea93325c/1-14M_(Jul_2007)_(NWP)).

⁸¹ U.S. DEP'T OF THE NAVY, NWP 1-14M, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS § 5.3.1 (2007) available at [http://www.usnwc.edu/getattachment/a9b8e92d-2c8d-4779-9925-0defea93325c/1-14M_\(Jul_2007\)_\(NWP\)](http://www.usnwc.edu/getattachment/a9b8e92d-2c8d-4779-9925-0defea93325c/1-14M_(Jul_2007)_(NWP)).

resources.”⁸² The *Handbook* states, “While the principle does recognize that some amount of collateral damage and incidental injury to civilians and civilian objects may occur in an attack upon a legitimate military objective, it does not excuse the wanton destruction of life and property disproportionate to the military advantage to be gained from the attack.”⁸³

The Naval Commander’s Handbook further states that weapons that by their design cause unnecessary suffering or superfluous injury are “prohibited because the degree of pain or injury, or the certainty of death they produce is needlessly or clearly disproportionate to the military advantage to be gained by their use.”⁸⁴

In its presentation to the ICJ in the Nuclear Weapons Advisory Case, the United States argued a more restrictive scope of the rule of necessity:

[The prohibition against unnecessary suffering] was intended to preclude weapons designed to increase the injury or suffering of the persons attacked beyond that necessary to accomplish the military objective. It does not prohibit weapons that may cause great injury or suffering if the use of the weapon is necessary to accomplish the military mission. For example, it does not prohibit the use of anti-tank munitions which must penetrate armor by kinetic-energy or incendiary effects, even though this may well cause severe and painful burn injuries to the tank crew. By the same token, it does not prohibit the use of nuclear weapons, even though such weapons can produce severe and painful injuries.⁸⁵

John McNeill, one of the lawyers for the United States before the ICJ, stated the point specifically in oral argument, “The unnecessary suffering principle prohibits the use of weapons designed specifically to increase the suffering of persons attacked beyond that necessary to accomplish a particular military objective.”⁸⁶

⁸² U.S. DEP’T OF THE NAVY, NWP 1-14M, THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS § 5.3.1 (2007) available at [http://www.usnwc.edu/getattachment/a9b8e92d-2c8d-4779-9925-0defea93325c/1-14M_\(Jul_2007\)_\(NWP\)](http://www.usnwc.edu/getattachment/a9b8e92d-2c8d-4779-9925-0defea93325c/1-14M_(Jul_2007)_(NWP)). See also MCDUGAL & FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER (1961) 525; *Statement of General Eisenhower*, Historical Research Center, Maxwell Air Force Base, AL, File 622.610-2, Folder 2, 1944–45, reprinted in SCHAFFER, WINGS OF JUDGMENT: AMERICAN BOMBING IN WORLD WAR II, at 50 (1985); RICHARDSON, MONTE CASSINO 158 (1984).

⁸³ U.S. DEP’T OF THE NAVY, NWP 1-14M, THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS § 6.2.6.4.2 (2007) available at [http://www.usnwc.edu/getattachment/a9b8e92d-2c8d-4779-9925-0defea93325c/1-14M_\(Jul_2007\)_\(NWP\)](http://www.usnwc.edu/getattachment/a9b8e92d-2c8d-4779-9925-0defea93325c/1-14M_(Jul_2007)_(NWP)).

⁸⁴ U.S. DEP’T OF THE NAVY, NWP 1-14M, THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS § 9.1.1 (2007) available at [http://www.usnwc.edu/getattachment/a9b8e92d-2c8d-4779-9925-0defea93325c/1-14M_\(Jul_2007\)_\(NWP\)](http://www.usnwc.edu/getattachment/a9b8e92d-2c8d-4779-9925-0defea93325c/1-14M_(Jul_2007)_(NWP)).

⁸⁵ U.S. ICJ Memorandum/GA App. at 28–29 (citing the Army’s THE LAW OF LAND WARFARE, *supra* note 30, at 18).

⁸⁶ ICJ Hearing, November 15, 1995, at 91.

Corollary Requirement of Controllability

The United States has recognized that the rules of distinction, proportionality, and necessity prohibit the use of weapons whose effects cannot be controlled by the user.

Uncontrollability under Rule of Distinction/Discrimination

The Joint Chiefs in their manual *Joint Targeting* state, “Attackers are required to only use those means and methods of attack that are discriminate in effect and can be controlled, as well as take precautions to minimize collateral injury to civilians and protected objects or locations.”⁸⁷ The manual states, “To that end, the principle of distinction (discrimination) requires both attacker and defender to distinguish between combatants and noncombatants, as well as between military objectives and protected property, locations, or objects.”⁸⁸

The Air Force in its manual *The Military Commander and the Law* gives “Weapons incapable of being controlled” as examples of “indiscriminate weapons.”⁸⁹

The *Naval Commander’s Handbook* defines the rule of distinction as prohibiting the use of a weapon “that cannot be directed at a specific military objective” and whose effects “cannot be limited as required by the law of armed conflict.”⁹⁰ It states, “Weapons, which by their nature are incapable of being directed specifically against military objectives, and therefore that put civilians and noncombatant at equal risk, are forbidden due to their indiscriminate effects.”⁹¹

The manual highlights three types of attacks that are outlawed by the principle of discrimination: (1) “attacks that are not directed at a specific military objective;” (2) “attacks that employ a method or means of combat that cannot be directed at a specific military objective;” and (3) “attacks that employ a method or means of combat, the effects of which cannot be limited as required by the law of armed conflict.”⁹²

What is required is that the *effects* of the weapon be capable of being directed. *The Naval Commander’s Handbook* states:

⁸⁷ THE JOINT CHIEFS OF STAFF, JP 3-60, JOINT TARGETING § E-2 (2007).

⁸⁸ THE JOINT CHIEFS OF STAFF, JP 3-60, JOINT TARGETING § E-2 (2007).

⁸⁹ U.S. DEP’T OF THE AIR FORCE, THE MILITARY COMMANDER AND THE LAW, 632 (2009) *available at* www.afjag.af.mil/shared/media/document/AFD-091026-025.pdf.

⁹⁰ U.S. DEP’T OF THE NAVY, NWP 1-14M, THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS § 5.3.2 (2007) *available at* [http://www.usnwc.edu/getattachment/a9b8e92d-2c8d-4779-9925-0defea93325c/1-14M_\(Jul_2007\)_\(NWP\)](http://www.usnwc.edu/getattachment/a9b8e92d-2c8d-4779-9925-0defea93325c/1-14M_(Jul_2007)_(NWP)).

⁹¹ U.S. DEP’T OF THE NAVY, NWP 1-14M, THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS § 9.1 (2007) *available at* [http://www.usnwc.edu/getattachment/a9b8e92d-2c8d-4779-9925-0defea93325c/1-14M_\(Jul_2007\)_\(NWP\)](http://www.usnwc.edu/getattachment/a9b8e92d-2c8d-4779-9925-0defea93325c/1-14M_(Jul_2007)_(NWP)).

⁹² U.S. DEP’T OF THE NAVY, NWP 1-14M, THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS § 5.3.2 (2007) *available at* [http://www.usnwc.edu/getattachment/a9b8e92d-2c8d-4779-9925-0defea93325c/1-14M_\(Jul_2007\)_\(NWP\)](http://www.usnwc.edu/getattachment/a9b8e92d-2c8d-4779-9925-0defea93325c/1-14M_(Jul_2007)_(NWP)).

Weapons that are incapable of being directed at a military objective are forbidden as being indiscriminate in their effect. Drifting armed contact mines and long-range unguided missiles (such as the German V-1 and V-2 rockets of World War II) fall into this category. A weapon is not indiscriminate simply because it may cause incidental or collateral civilian casualties, provided such casualties are not foreseeably excessive in light of the anticipated military advantage to be gained. An artillery round that is capable of being directed with a reasonable degree of accuracy at a military target is not an indiscriminate weapon simply because it may miss its mark or inflict collateral damage. Conversely, uncontrolled balloon-borne bombs, such as those released by the Japanese against the west coast of the United States and Canada in World War II, lack that capability of direction and are, therefore, unlawful.⁹³

The Army in its 2010 *Operational Law Handbook* sets forth a similar rule, highlighting that effects of military operations that cannot be controlled violate the rule of distinction: “Distinction requires parties to a conflict to engage only in military operations the effects of which distinguish between the civilian population (or individual civilians not taking part in the hostilities), and combatant forces, directing the application of force solely against the latter.”⁹⁴

The Air Force in its 2009 manual *Air Force Operations and the Law* highlights as an example of an indiscriminate use of nuclear weapons the situation where the attacking nation employs them to destroy a satellite, noting that such use “would cause indiscriminate damage to all satellites and would likely violate the law of armed conflict principle of distinction.”⁹⁵

The Air Force in its 2009 manual *The Military Commander and the Law* the Air similarly recognizes that indiscriminate weapons include “biological and bacteriological weapons,” “weapons incapable of being controlled,” and “chemical weapons.”⁹⁶

The requirement of controllability was codified with respect to indiscriminate attacks in the 1977 Protocol I to the Geneva Conventions. Article 51 (“Protection of the Civilian Population”) as follows:⁹⁷

Indiscriminate attacks are prohibited. Indiscriminate attacks are:

⁹³ U.S. DEP’T OF THE NAVY, NWP 1-14M, THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS § 9.1.2 (2007) available at [http://www.usnwc.edu/getattachment/a9b8e92d-2c8d-4779-9925-0defea93325c/1-14M_\(Jul_2007\)_\(NWP\)](http://www.usnwc.edu/getattachment/a9b8e92d-2c8d-4779-9925-0defea93325c/1-14M_(Jul_2007)_(NWP)).

⁹⁴ U.S. DEP’T OF THE ARMY, OPERATIONAL LAW HANDBOOK, 12 (2010) (emphasis supplied).

⁹⁵ U.S. DEP’T OF THE AIR FORCE, AIR FORCE OPERATIONS AND THE LAW, 89 (2009) available at www.afjag.af.mil/shared/media/document/AFD-100510-059.pdf.

⁹⁶ U.S. DEP’T OF THE AIR FORCE, THE MILITARY COMMANDER AND THE LAW, 632 (2009) available at www.afjag.af.mil/shared/media/document/AFD-091026-025.pdf

⁹⁷ Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflict (Protocol I), opened for signature Dec. 12, 1977, 1125 U.N.T.S. 3, 16 I.L.M. 1391.

- (a) those which are not directed at a specific military objective;
- (b) those which employ a method or means of combat which cannot be directed at a specific military objective;
- (c) those which employ a method or means of combat the effects of which cannot be limited as required by the Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.

Uncontrollability under Rule of Necessity

The *Naval Commander's Handbook* states that the rule of necessity, in combination with the rule of distinction, prohibits:

attacks that employ a method or means of combat that cannot be directed at a specific military objective (e.g., declaring an entire city a single military objective and attacking it by bombardment when there are actually several distinct military objectives throughout the city that could be targeted separately), or attacks that employ a method or means of combat, the effects of which cannot be limited as required by the law of armed conflict (e.g., bombing an entire large city when the object of attack is a small enemy garrison in the city).⁹⁸

The *Handbook*, in discussing the requirements of necessity and distinction, reiterates that a “method or means of combat that cannot be directed at a specific military objective” is unlawful.⁹⁹

The Air Force in its manual *Air Force Operations and the Law* states that military necessity acknowledges that attacks can only be made against targets that are valid military objectives—“attacks may not be indiscriminate.”¹⁰⁰

Uncontrollability under Rule of Proportionality

So also, a nuclear weapons strike cannot comply with the requirement of proportionality if the potential effects are not subject to control and limitation. Without such control, the user cannot have a reasonable basis to believe that it can limit the effects to those that are proportional to the military value of the target.

⁹⁸ U.S. DEP'T OF THE NAVY, NWP 1-14M, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS § 5.3.2 (2007) *available at* [http://www.usnwc.edu/getattachment/a9b8e92d-2c8d-4779-9925-0defea93325c/1-14M_\(Jul_2007\)_\(NWP\)](http://www.usnwc.edu/getattachment/a9b8e92d-2c8d-4779-9925-0defea93325c/1-14M_(Jul_2007)_(NWP))

⁹⁹ U.S. DEP'T OF THE NAVY, NWP 1-14M, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS § 5.3.2 (2007) *available at* [http://www.usnwc.edu/getattachment/a9b8e92d-2c8d-4779-9925-0defea93325c/1-14M_\(Jul_2007\)_\(NWP\)](http://www.usnwc.edu/getattachment/a9b8e92d-2c8d-4779-9925-0defea93325c/1-14M_(Jul_2007)_(NWP)).

¹⁰⁰ U.S. DEP'T OF THE AIR FORCE, AIR FORCE OPERATIONS AND THE LAW, 248 (2009) *available at* www.afjag.af.mil/shared/media/document/AFD-100510-059.pdf.

Reprisals

May a State respond with an unlawful use of force to an adversary's unlawful use of force?—That is the question posed by the notion of reprisals.

The United States recognizes that, to be lawful, at a minimum reprisals must be proportional to the prior unlawful act and must be limited to that necessary to get the adversary to comply with the law of armed conflict.

The Navy in its 2007 *Naval Commander's Handbook* defines reprisals:

A belligerent reprisal is an enforcement measure under the law of armed conflict consisting of an act that would otherwise be unlawful but which is justified as a response to the previous unlawful acts of an enemy. The sole purpose of a reprisal is to induce the enemy to cease its illegal activity and to comply with the law of armed conflict in the future. Reprisals may be taken against enemy armed forces, enemy civilians other than those in occupied territory, and enemy property.¹⁰¹

The Navy in its *Handbook* emphasizes that a reprisal, *inter alia*, “must only be used as a last resort when other enforcement measures have failed or would be of no avail,”¹⁰² “must be proportional to the original violation,”¹⁰³ and “must be to cause the enemy to cease its unlawful activity.”¹⁰⁴ The *Handbook* states that reprisals “must respond to illegal acts of warfare”¹⁰⁵ and that “anticipatory reprisal is not authorized.”¹⁰⁶

The Army in its 2010 *Law of War Deskbook* defines a reprisal “as an otherwise illegal act done in response to a prior illegal act by the enemy.”¹⁰⁷ The *Deskbook* states

¹⁰¹ U.S. DEP'T OF THE NAVY, NWP 1-14M, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS § 6.2.4 (2007) available at [http://www.usnwc.edu/getattachment/a9b8e92d-2c8d-4779-9925-0defea93325c/1-14M_\(Jul_2007\)_\(NWP\)](http://www.usnwc.edu/getattachment/a9b8e92d-2c8d-4779-9925-0defea93325c/1-14M_(Jul_2007)_(NWP)).

¹⁰² U.S. DEP'T OF THE NAVY, NWP 1-14M, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS § 6.2.4.1 (2007) available at [http://www.usnwc.edu/getattachment/a9b8e92d-2c8d-4779-9925-0defea93325c/1-14M_\(Jul_2007\)_\(NWP\)](http://www.usnwc.edu/getattachment/a9b8e92d-2c8d-4779-9925-0defea93325c/1-14M_(Jul_2007)_(NWP)).

¹⁰³ U.S. DEP'T OF THE NAVY, NWP 1-14M, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS § 6.2.4.1 (2007) available at [http://www.usnwc.edu/getattachment/a9b8e92d-2c8d-4779-9925-0defea93325c/1-14M_\(Jul_2007\)_\(NWP\)](http://www.usnwc.edu/getattachment/a9b8e92d-2c8d-4779-9925-0defea93325c/1-14M_(Jul_2007)_(NWP)).

¹⁰⁴ U.S. DEP'T OF THE NAVY, NWP 1-14M, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS § 6.2.4.1 (2007) available at [http://www.usnwc.edu/getattachment/a9b8e92d-2c8d-4779-9925-0defea93325c/1-14M_\(Jul_2007\)_\(NWP\)](http://www.usnwc.edu/getattachment/a9b8e92d-2c8d-4779-9925-0defea93325c/1-14M_(Jul_2007)_(NWP)).

¹⁰⁵ U.S. DEP'T OF THE NAVY, NWP 1-14M, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS § 6.2.4.1 (2007) available at [http://www.usnwc.edu/getattachment/a9b8e92d-2c8d-4779-9925-0defea93325c/1-14M_\(Jul_2007\)_\(NWP\)](http://www.usnwc.edu/getattachment/a9b8e92d-2c8d-4779-9925-0defea93325c/1-14M_(Jul_2007)_(NWP)).

¹⁰⁶ U.S. DEP'T OF THE NAVY, NWP 1-14M, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS § 6.2.4.1 (2007) available at [http://www.usnwc.edu/getattachment/a9b8e92d-2c8d-4779-9925-0defea93325c/1-14M_\(Jul_2007\)_\(NWP\)](http://www.usnwc.edu/getattachment/a9b8e92d-2c8d-4779-9925-0defea93325c/1-14M_(Jul_2007)_(NWP)).

¹⁰⁷ INT'L & OPERATIONAL LAW DEP'T, U.S. DEP'T OF THE ARMY, LAW OF WAR DESKBOOK, 159 (2010) available at http://www.loc.gov/tr/frd/Military_Law/pdf/operational-law-handbook_2010.pdf.

that the “purpose of a reprisal is to get the enemy to adhere to the law of war.”¹⁰⁸ It states that reprisals are authorized if they are:

- a. Timely;
- b. Responsive to that enemy’s act that violated the law of war;
- c. Follow an unsatisfied demand to cease and desist; and
- d. Proportionate to the previous illegal act.¹⁰⁹

The Army in its 2010 *Operational Law Handbook* states, “Reprisals are conduct which otherwise would be unlawful, resorted to by one belligerent against enemy personnel or property in response to acts of warfare committed by the other belligerent in violation of the LOW, for the sole purpose of enforcing future compliance with the LOW.”¹¹⁰ The manual stated that reprisals are authorized if they are timely, responsive to that enemy’s act that violated the law of war, follow an unsatisfied demand to cease and desist, and proportionate to the previous illegal act.¹¹¹

The Air Force in its manual *Air Force Operations and the Law* states, “Reprisals are not intended to be a form of retaliation, but rather a means of inducing an enemy to cease violating the law of armed conflict.”¹¹²

In discussing the *tu quoque* defense,¹¹³ the manual analogizes it to the reprisal doctrine in that “this defense argues that breaches of the law of armed conflict by the enemy legitimize similar breaches by an opposing belligerent in response to, or in retaliation for, such violations.”¹¹⁴

Referencing the Nazi’s employment of this argument in the *High Command* case, the manual *Air Force Operations and the Law* states that this line of defense was rejected and “that under general principles of law, an accused can not exculpate himself from a crime by showing another has committed a similar crime.”¹¹⁵ The manual cites Prosecutor v. Kupreskic et al. for the proposition that “there was no

¹⁰⁸ INT’L & OPERATIONAL LAW DEP’T, U.S. DEP’T OF THE ARMY, LAW OF WAR DESKBOOK, 159 (2010) available at http://www.loc.gov/tr/frd/Military_Law/pdf/operational-law-handbook_2010.pdf.

¹⁰⁹ INT’L & OPERATIONAL LAW DEP’T, U.S. DEP’T OF THE ARMY, LAW OF WAR DESKBOOK, 160 (2010) available at http://www.loc.gov/tr/frd/Military_Law/pdf/operational-law-handbook_2010.pdf.

¹¹⁰ INT’L & OPERATIONAL LAW DEP’T, U.S. DEP’T OF THE ARMY, LAW OF WAR DESKBOOK, 24 (2010) available at http://www.loc.gov/tr/frd/Military_Law/pdf/operational-law-handbook_2010.pdf.

¹¹¹ INT’L & OPERATIONAL LAW DEP’T, U.S. DEP’T OF THE ARMY, LAW OF WAR DESKBOOK, 24 (2010) available at http://www.loc.gov/tr/frd/Military_Law/pdf/operational-law-handbook_2010.pdf.

¹¹² U.S. DEP’T OF THE AIR FORCE, AIR FORCE OPERATIONS AND THE LAW, 44 (2009) available at www.afjag.af.mil/shared/media/document/AFD-100510-059.pdf.

¹¹³ “Latin for ‘you, too’ this defense puts forth the argument that breaches of the law of armed conflict by the enemy justify similar breaches by an opposing belligerent.” U.S. DEP’T OF THE AIR FORCE, AIR FORCE OPERATIONS AND THE LAW, 59 (2009) available at www.afjag.af.mil/shared/media/document/AFD-100510-059.pdf.

¹¹⁴ U.S. DEP’T OF THE AIR FORCE, AIR FORCE OPERATIONS AND THE LAW, 59 (2009) available at www.afjag.af.mil/shared/media/document/AFD-100510-059.pdf.

¹¹⁵ U.S. DEP’T OF THE AIR FORCE, AIR FORCE OPERATIONS AND THE LAW, 59 (2009) available at www.afjag.af.mil/shared/media/document/AFD-100510-059.pdf citing United States v. von Leeb, XII UN LAW REPORTS 64.

support either in State practice or in the opinions of publicists for the *tu quoque* defense.”¹¹⁶

The U.S. has generally recognized that the doctrine of reprisals is a dangerous one subject to abuse and likely to be counterproductive, to the extent that the U.S., as a matter of policy is very cautious about reprisals and reluctant to engage in them.

The Air Force in its former *Manual on International Law* stated that “most attempted uses of reprisals” in past conflicts were unjustified, either because they were undertaken for an improper reason or were disproportionate.¹¹⁷ The manual noted that reprisal “will usually have an adverse impact on the attitudes of governments not participating in the conflict” and “may only strengthen enemy morale and will to resist.”¹¹⁸

The Navy in an earlier edition of its *Naval Commander’s Handbook* similarly stated, “Many attempted uses of reprisals in past conflicts have been unjustified either because the reprisals were not undertaken to deter violations by an adversary or were disproportionate to the preceding unlawful conduct.”¹¹⁹

That Navy *Handbook* further stated, “Although reprisal is lawful when [the stated prerequisites] are met, there is always the risk that it will trigger retaliatory escalation (counter-reprisals) by the enemy. The United States has historically been reluctant to resort to reprisal for just this reason.”¹²⁰

The Air Force in its former *Commander’s Handbook* similarly stated, “In most twentieth century conflicts, the United States has, as a matter of national policy, chosen not to carry out reprisals against the enemy, both because of the potential for escalation and because it is generally in our national interest to follow the law even if the enemy does not.”¹²¹

The *Handbook* stated that “as a practical matter, reprisals are often subject to abuse and merely result in escalation of a conflict.”¹²²

War Crimes

The Army’s *Law of Land Warfare* defines the term “war crime” as “the technical expression for a violation of the law of war by any person or persons, military or

¹¹⁶ U.S. DEP’T OF THE AIR FORCE, AIR FORCE OPERATIONS AND THE LAW, 59 (2009) available at www.afjag.af.mil/shared/media/document/AFD-100510-059.pdf

¹¹⁷ THE AIR FORCE MANUAL ON INTERNATIONAL LAW at. at 10-5.

¹¹⁸ THE AIR FORCE MANUAL ON INTERNATIONAL LAW at 10-5.

¹¹⁹ THE NAVAL/MARINE COMMANDER’S HANDBOOK at 6-25 n.46.

¹²⁰ THE NAVAL/MARINE COMMANDER’S HANDBOOK at 6-25 (citations omitted).

¹²¹ THE AIR FORCE COMMANDER’S HANDBOOK at 8-1.

¹²² THE AIR FORCE COMMANDER’S HANDBOOK at 8-1.

civilian,” and states that “[e]very violation of the law of war is a war crime.”¹²³ The manual that’s that war crimes under international law are made up of:

- a. Crimes against peace;
- b. Crimes against humanity; and
- c. War crimes.¹²⁴

The Air Force in its 2009 manual *Air Force Operations and the Law* describes the broad scope of war crimes:

A war crime is an act or omission that contravenes an obligation under international law relating to the conduct of armed conflict. The LOAC encompasses all international law applicable to the conduct of hostilities that is binding on a country or its citizens, including treaties and int’l agreements to which that country is a party, as well as [customary international law].¹²⁵

The Air Force manual quotes the Nuremberg Charter’s definition of “war crimes:”

[V]iolations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill treatment, or deportation to slave labor or for any other purpose, of civilian population of or in occupied territory, murder or ill treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.¹²⁶

The Air Force manual further notes the definition of “crimes against the peace” set forth in the Charter of the International Military Tribunal at Nuremberg (“the Nuremberg Charter”) as follows:

planning, preparation, initiation, or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.¹²⁷

The manual further notes that the Nuremberg Charter’s definition of “crimes against humanity”

A collective category of inhumane acts committed against any (internal or alien) civilian population before or during the war.¹²⁸

¹²³ THE LAW OF LAND WARFARE, *supra* note 3, at 178.

¹²⁴ THE LAW OF LAND WARFARE at 178.

¹²⁵ U.S. DEP’T OF THE AIR FORCE, AIR FORCE OPERATIONS AND THE LAW, 37 (2009) available at www.afjag.af.mil/shared/media/document/AFD-100510-059.pdf.

¹²⁶ U.S. DEP’T OF THE AIR FORCE, AIR FORCE OPERATIONS AND THE LAW, 38 (2009) available at www.afjag.af.mil/shared/media/document/AFD-100510-059.pdf.

¹²⁷ U.S. DEP’T OF THE AIR FORCE, AIR FORCE OPERATIONS AND THE LAW, 38 (2009) available at www.afjag.af.mil/shared/media/document/AFD-100510-059.pdf.

¹²⁸ U.S. DEP’T OF THE AIR FORCE, AIR FORCE OPERATIONS AND THE LAW, 38 (2009) available at www.afjag.af.mil/shared/media/document/AFD-100510-059.pdf. The Rome Statute defines the following

The Nuremberg Charter further defined “crimes against humanity” as follows:

murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.¹²⁹

The Naval Commander’s Handbook states that violations of the laws of armed conflict are war crimes, and that “[s]tates are obligated under international law to punish their own nationals, whether members of the armed services or civilians, who commit war crimes.”¹³⁰

The Navy in an earlier edition of the *Navy Commander’s Handbook*, noting that there is “certain difficulty in distinguishing war crimes from crimes against humanity,” summarized judgments of various tribunals that have tried individuals for crimes against humanity as follows:

1. Certain acts constitute both war crimes and crimes against humanity and may be tried under either charge.
2. Generally, crimes against humanity are offenses against the human rights of individuals, carried on in a widespread and systematic manner. Thus, isolated offenses have not been considered as crimes against humanity, and courts have usually insisted upon proof that the acts alleged to be crimes against humanity resulted from systematic governmental action.
3. The possible victims of crimes against humanity constitute a wider class than those who are capable of being made the objects of war crimes and may include the nationals of the enemy state committing the offense as well as stateless persons.
4. Acts constituting crimes against humanity must be committed in execution of, or in connection with, crimes against peace, or war crimes.¹³¹

Individual Responsibility For War Crimes

Both the State and individuals associated with it, generally its governmental, military and industrial leadership and in some instances working personnel, are subject to criminal liability for commission of war crimes. As the Nuremberg proceedings exemplified, individuals, not States, are potentially put in prison or executed.¹³² States

as a crime against humanity (Article 7): murder, extermination, and other inhumane acts of a similar character, when committed as part of a widespread or systematic attack directed against any civilian population. Rome Statute of the International Criminal Court, art. 7., July 17, 1998, 2187 U.N.T.S. 3 available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en. This is the modern version of the crime against humanity prosecuted at Nuremberg. Crimes against humanity can be committed in time of peace as well as time of war.

¹²⁹ THE NAVAL COMMANDER’S HANDBOOK at 6-27 n.49 (quoting Charter of the International Military Tribunal at Nuremberg, U.S. Naval War College, INTERNATIONAL LAW DOCUMENTS 1944-45, at 254 (1945); Air Force Pamphlet 110-20, at 3-183).

¹³⁰ U.S. DEP’T OF THE NAVY, NWP 1-14M, THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS § 6.2.6 (2007) available at [http://www.usnwc.edu/getattachment/a9b8e92d-2c8d-4779-9925-0defea93325c/1-14M_\(Jul_2007\)_\(NWP\)](http://www.usnwc.edu/getattachment/a9b8e92d-2c8d-4779-9925-0defea93325c/1-14M_(Jul_2007)_(NWP)).

¹³¹ *Id.* at 6-28, 6-28 n.49.

¹³² IAN BROWNIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 150-171 (1963), Matthew Lippman, *Crimes Against Humanity*, 17 B.C. THIRD WORLD L.J. 171 (1997) (International Law and Human Rights Edition); Mark Allan Gray, *The International Crime of Ecocide*, 26 CAL. W. INT’L L.J. 215, 265

can, and historically have been, subject to damages and reparations, but, in contemporary international law, the focus of war crimes trials is on the responsible individuals.¹³³ Individual responsibility includes an individual's responsibility for his or her own actions and a commander's responsibility for the actions under the individual's command.

Individual Responsibility for One's Own Actions

The U.S. recognizes the personal responsibility of individual military personnel for violations of the law of armed conflict – and that this responsibility extends to governmental officials, including Heads of State.

The Navy states in its 2007 *Naval Commander's Handbook*:

All members of the naval service have a duty to comply with the law of armed conflict and, to the utmost of their ability and authority, to prevent violations by others. They also have an affirmative obligation to report promptly violations of which they become aware.¹³⁴

The Air Force in its 2009 manual *Air Force Operations and the Law* emphasizes the responsibility of governmental as well as military personnel and the legal insufficiency of a defense of superior orders to exculpate an individual from responsibility for violations of international law:

Any person who commits an act which constitutes a crime under international law is responsible for such crime and may be punished. The fact that the law of the perpetrator's country does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law. Moreover, the fact that a person who committed an act which constitutes a crime under international law acted as a Head of State or other governmental official does not relieve him or her from responsibility under international law. Finally, the fact that a person acted pursuant to the order of his or her government or of a superior does not relieve him or her from responsibility for acts that violate international law.¹³⁵

(1996), citing Geof Gilbert, *The Criminal Responsibility of States*, 39 INT'L & COMP. L.Q. 345, 357, 366 (1990), and Report of the Commission to the General Assembly on the work of its forty-sixth session, U.N. GAOR, 49th Sess., Supp. No. 10, U.N. Doc. A/49/10 (1994), at 348–49.

¹³³ See generally IAN BROWNIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 133–149 (1963); TELFORD TAYLOR, *NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY* 82–88 (Quadrangle 1970).

¹³⁴ U.S. DEP'T OF THE NAVY, *NWP 1-14M, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS* § 6.1.4 (2007) available at [http://www.usnwc.edu/getattachment/a9b8e92d-2c8d-4779-9925-0defea93325c/1-14M_\(Jul_2007\)_\(NWP\)](http://www.usnwc.edu/getattachment/a9b8e92d-2c8d-4779-9925-0defea93325c/1-14M_(Jul_2007)_(NWP)).

¹³⁵ U.S. DEP'T OF THE AIR FORCE, *AIR FORCE OPERATIONS AND THE LAW*, 51 (2009) available at www.afjag.af.mil/shared/media/document/AFD-100510-059.pdf (citations omitted).

The Air Force in its earlier *Manual on International Law* stated that *mens rea* or a guilty mind, at the level of purposeful behavior or intention or at least gross negligence, is required for individual, as opposed to State, criminal responsibility.¹³⁶ The manual quoted Spaight's statement of the rule:

In international law, as in municipal law intention to break the law—*mens rea* or negligence so gross as to be the equivalent of criminal intent is the essence of the offense. A bombing pilot cannot be arraigned for an error of judgment ... it must be one which he or his superiors either knew to be wrong, or which was, in se, so palpably and unmistakably a wrongful act that only gross negligence or deliberate blindness could explain their being unaware of its wrongness.^{137 138}

The Army states in its *Law of War Deskbook*:

It is a grave breach of AP I to launch an attack that a commander knows will cause excessive incidental damage in relation to the military advantage gained. The requirement is for a commander to act reasonably.¹³⁹

Command Responsibility

As to command liability, a commander is responsible to maintain and prevent violations of the law of war by subordinates and can be liable based on such violations.

The Air Force manual *Operations and the Law* states, "Under the doctrine of command responsibility, commanders may be held liable for the criminal acts of their subordinates or other persons subject to their control, even if the commander did not personally participate in the underlying offenses"¹⁴⁰

Command responsibility extends to information that the commander should have known. The Air Force manual states that the commander is responsible if he "knew, had reason to know, or should have known, that a subordinate was about to commit such acts or had done so and who failed to take the necessary and reasonable measures to prevent

¹³⁶ THE UNITED STATES DEPARTMENT OF THE AIR FORCE, INTERNATIONAL LAW—THE CONDUCT OF ARMED CONFLICT AND AIR OPERATIONS at 15-3; 15-8 n.13 (Air Force Pamphlet 110-31, 19 November 1976) *citing* SPAIGHT, AIR POWER AND WAR RIGHTS 57, 58 (1947).

¹³⁷ THE UNITED STATES DEPARTMENT OF THE AIR FORCE, INTERNATIONAL LAW—THE CONDUCT OF ARMED CONFLICT AND AIR OPERATIONS at 15-8 n.13 (Air Force Pamphlet 110-31, 19 November 1976) (citing SPAIGHT, AIR POWER AND WAR RIGHTS 57, 58 (1947)). This manual appears to no longer be in effect. See _____. Although the more recent manuals do not appear to have covered this issue of *mens rea*, we are not aware of any reason to believe that the law in this area has changed.

¹³⁸ *Id.* at 15-3; 15-8 n.13 (citing SPAIGHT, AIR POWER AND WAR RIGHTS 57, 58 (1947)).

¹³⁹ U.S. DEP'T OF THE ARMY, LAW OF WAR DESKBOOK, 142 (2010)

¹⁴⁰ U.S. DEP'T OF THE AIR FORCE, AIR FORCE OPERATIONS AND THE LAW, 52 (2009) *available at* www.afjag.af.mil/shared/media/document/AFD-100510-059.pdf.

such acts or to punish the perpetrators thereof.”¹⁴¹ This has obvious implications with respect to contemporary knowledge as to the effects of nuclear weapons.

The Air Force manual adds, “Responsibility may also arise if the commander has actual knowledge, or should have known, on the basis of reports received by him or through other means that troops or persons subject to the commander’s control are about to commit or have committed a war crime, and he or she fails to take the necessary and reasonable steps to ensure compliance with the law of armed conflict or to punish violators thereof.”¹⁴²

The Naval Commander’s Handbook emphasizes this same demanding “should have known” standard, emphasizing that a commander “cannot delegate his accountability for the conduct of the forces he commands.”¹⁴³

Under the law of armed conflict, a commander may be held criminally responsible for ordering the commission of a war crime as well as be held responsible for the acts of subordinates when the commander knew, or should have known, that subordinates under his control were going to commit or had committed violations of the law of armed conflict and he failed to exercise properly his command authority or failed otherwise to take reasonable measures to discover and correct violations that may occur.¹⁴⁴

The Naval Commander’s Handbook explains that receipt of an unlawful order does not immunize a commander from responsibility for a war crime: “Under both international and U.S. law, an order to commit an obviously criminal act, such as wanton killing or torture of a prisoner, is an *unlawful* order and will not relieve a subordinate of his responsibility to comply with the law of armed conflict.”¹⁴⁵ The *Handbook* states, “Only if the unlawfulness of an order is not known by the individual, and he could not reasonably be expected under the circumstances to recognize the order is unlawful, will the defense of obedience to an order protect a subordinate from the consequences of violating the law of armed conflict.”¹⁴⁶

¹⁴¹ U.S. DEP’T OF THE AIR FORCE, AIR FORCE OPERATIONS AND THE LAW, 52, FN 177 (2009) available at www.afjag.af.mil/shared/media/document/AFD-100510-059.pdf citing Military Commissions Act, 10 U.S.C. § 950q (2006).

¹⁴² U.S. DEP’T OF THE AIR FORCE, AIR FORCE OPERATIONS AND THE LAW, 53-54 (2009) available at www.afjag.af.mil/shared/media/document/AFD-100510-059.pdf citing *United States v. List*, XI TRIALS OF WAR CRIMINALS 757-1319.

¹⁴³ U.S. DEP’T OF THE NAVY, NWP 1-14M, THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS § 6.1.3 (2007) available at [http://www.usnwc.edu/getattachment/a9b8e92d-2c8d-4779-9925-0defea93325c/1-14M_\(Jul_2007\)_\(NWP\)](http://www.usnwc.edu/getattachment/a9b8e92d-2c8d-4779-9925-0defea93325c/1-14M_(Jul_2007)_(NWP)).

¹⁴⁴ U.S. DEP’T OF THE NAVY, NWP 1-14M, THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS § 6.1.3 (2007) available at [http://www.usnwc.edu/getattachment/a9b8e92d-2c8d-4779-9925-0defea93325c/1-14M_\(Jul_2007\)_\(NWP\)](http://www.usnwc.edu/getattachment/a9b8e92d-2c8d-4779-9925-0defea93325c/1-14M_(Jul_2007)_(NWP)).

¹⁴⁵ U.S. DEP’T OF THE NAVY, NWP 1-14M, THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS § 6.1.4 (2007) available at [http://www.usnwc.edu/getattachment/a9b8e92d-2c8d-4779-9925-0defea93325c/1-14M_\(Jul_2007\)_\(NWP\)](http://www.usnwc.edu/getattachment/a9b8e92d-2c8d-4779-9925-0defea93325c/1-14M_(Jul_2007)_(NWP)).

¹⁴⁶ U.S. DEP’T OF THE NAVY, NWP 1-14M, THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS § 6.1.4 (2007) available at [http://www.usnwc.edu/getattachment/a9b8e92d-2c8d-4779-9925-0defea93325c/1-14M_\(Jul_2007\)_\(NWP\)](http://www.usnwc.edu/getattachment/a9b8e92d-2c8d-4779-9925-0defea93325c/1-14M_(Jul_2007)_(NWP)).

The Naval Commander's Handbook states that the 1949 Geneva Conventions “place duties on States to search for persons alleged to have committed grave breaches, bring them to trial, and punish them if guilty.”¹⁴⁷ The *Handbook* notes that “[w]ar crimes trials numbered in the thousands were held after World War II.”¹⁴⁸

The Army recognizes a similar rule with regards to subordinate liability. It states in its 2010 *Operational Law Handbook* that “commanders are legally responsible for war crimes committed by their subordinates when any of three circumstances applies:”

- a. The commander ordered the commission of the act;
- b. The commander knew of the act, either before or during its commission, and did nothing to prevent or stop it; or
- c. The commander should have known, “through reports received by him or through other means, that troops or other persons subject to his control [were] about to commit or [had] committed a war crime and he fail[ed] to take the necessary and reasonable steps to insure compliance with the LOW or to punish violators thereof.”¹⁴⁹

The Air Force in its earlier *Manual on International Law* notes that the prosecutions for crimes against peace and against humanity following World War II were primarily against the principal political, military and industrial leaders responsible for the initiation of the war and related inhumane policies.¹⁵⁰ The manual states, “[A] soldier who merely performs his military duty cannot be said to have waged the war ... [O]nly the government, and those authorities who carry out governmental functions and are instrumental in formulating policy, wage the war.”¹⁵¹

Another former Air Force Manual, the *Commander's Handbook*, states that the two International Military Tribunals following World War II punished “former cabinet ministers, and others of similar rank” in the Axis powers for planning and waging aggressive war.¹⁵²

¹⁴⁷ U.S. DEP’T OF THE NAVY, NWP 1-14M, THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS § 6.2.6 (2007) available at [http://www.usnwc.edu/getattachment/a9b8e92d-2c8d-4779-9925-0defea93325c/1-14M_\(Jul_2007\)_ \(NWP\)](http://www.usnwc.edu/getattachment/a9b8e92d-2c8d-4779-9925-0defea93325c/1-14M_(Jul_2007)_ (NWP)).

¹⁴⁸ U.S. DEP’T OF THE NAVY, NWP 1-14M, THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS § 6.2.6.1 (2007) available at [http://www.usnwc.edu/getattachment/a9b8e92d-2c8d-4779-9925-0defea93325c/1-14M_\(Jul_2007\)_ \(NWP\)](http://www.usnwc.edu/getattachment/a9b8e92d-2c8d-4779-9925-0defea93325c/1-14M_(Jul_2007)_ (NWP)).

¹⁴⁹ INT’L & OPERATIONAL LAW DEP’T, U.S. DEP’T OF THE ARMY, OPERATIONAL LAW HANDBOOK, 305 (2010) available at [www.jagcnet.army.mil/8525751D0057F1B6/0/9AA89AFB204D01BE8525776100451636/\\$file/Operational%20Law%20Handbook%20%282010%29.pdf](http://www.jagcnet.army.mil/8525751D0057F1B6/0/9AA89AFB204D01BE8525776100451636/$file/Operational%20Law%20Handbook%20%282010%29.pdf)

¹⁵⁰ See THE UNITED STATES DEPARTMENT OF THE AIR FORCE, INTERNATIONAL LAW—THE CONDUCT OF ARMED CONFLICT AND AIR OPERATIONS at 15-5 (Air Force Pamphlet 110-31, 19 November 1976).

¹⁵¹ THE NAVAL/MARINE COMMANDER’S HANDBOOK at 15-9 n.23 (citing *Prosecution Statement, International Military Tribunal Far East, April 1948*, 11 WHITEMAN, DIGEST OF INTERNATIONAL LAW, at 993–994 (1968)).

¹⁵² THE AIR FORCE COMMANDER’S HANDBOOK at 1-2.

Purposes of International Humanitarian Law

The question invariably arises as to whether international humanitarian law is a serious body of law that is more than merely aspirational and can be expected to be observed. The fact of the numerous war crimes trials, including particularly the Nuremberg trials, which have entered into the modern consciousness, would seem an adequate answer to this question.

However, it is significant – and interesting – to note that the United States in its military manuals broadly acknowledges the propitious purposes of this body of law, both in terms of enhancing a State’s application of its combat operations without unnecessary expenditures of force and in terms of fulfilling what has long been regarded as a fundamental purpose of war, restoring a favorable peace. The U.S. also recognizes the basic humanitarian objective of this body of law designed to protect one’s own military personnel and objects and to limit the effects of military operations.

Thus, the Army in its 2010 *Operational Law Handbook* states:

- A. The fundamental purposes of the LOW are humanitarian and functional in nature. The humanitarian purposes include:
 - Protecting both combatants and noncombatants from unnecessary suffering;
 - Safeguarding persons who fall into the hands of the enemy; and
 - Facilitating the restoration of peace.
- B. The functional purposes include:
 - Ensuring good order and discipline;
 - Fighting in a disciplined manner consistent with national values; and
 - Maintaining domestic and international public support.¹⁵³

The Air Force in its 2009 manual *The Military Commander and the Law* notes the following purposes to this body of law:

- Limit the effects of the conflict (reduce damages and casualties)
- Protect combatants and noncombatants from unnecessary suffering
- Safeguard fundamental rights of combatants and noncombatants
- Prevent the conflict from becoming worse
- Make it easier to restore peace when the conflict is over.¹⁵⁴

¹⁵³ INT’L & OPERATIONAL LAW DEP’T, U.S. DEP’T OF THE ARMY, LAW OF WAR DESKBOOK, 10 (2010) available at http://www.loc.gov/rr/frd/Military_Law/pdf/LOW-Deskbook-2010.pdf

¹⁵⁴ U.S. DEP’T OF THE AIR FORCE, THE MILITARY COMMANDER AND THE LAW, 628 (2009) available at www.afjag.af.mil/shared/media/document/AFD-091026-025.pdf [hereinafter “Military Commander and the Law”].

The Army in its 2010 *Law of War Deskbook* emphasizes the serious nature of this body of law, making it clear that it goes beyond the aspirational:

A. Law exists to either prevent conduct or control conduct. These characteristics permeate the law of war, as exemplified by its two prongs: *Jus ad Bellum* serves to regulate the conduct of going to war, while *Jus in Bello* serves to regulate or control conduct within war.

B. Validity. Although critics of the regulation of warfare cite historic examples of violations of evolving laws of war, history provides the greatest evidence of the validity of this body of law.

1. History shows that in the vast majority of instances, the law of war works. Despite the fact that the rules are often violated or ignored, it is clear that mankind is better off with than without them. Mankind has always sought to limit the effect of conflict on combatants and has come to regard war not as a state of anarchy justifying infliction of unlimited suffering, but as an unfortunate reality which must be governed by some rule of law. This point is illustrated in Article 22 of the Hague Regulations: “the right of belligerents to adopt means of injuring the enemy is not unlimited.” This rule does not lose its binding force in a case of necessity.

2. Regulating the conduct of warfare is ironically essential to the preservation of a civilized world. General MacArthur exemplified this notion when he confirmed the death sentence for Japanese General Yamashita, writing: “The soldier, be he friend or foe, is charged with the protection of the weak and unarmed. It is the very essence and reason of his being. When he violates this sacred trust, he not only profanes his entire cult but threatens the fabric of international society.”¹⁵⁵

The Navy in its 1999 *Annotated Supplement to the Naval Commander’s Handbook* similarly emphasizes the self-serving nature of this body of law to the United States and other States in combat:

As long as war occurs, the law of armed conflict remains an essential body of international law. During such strife, the law of armed conflict provides common ground of rationality between enemies. This body of law corresponds to the mutual interests of belligerents during conflict and constitutes a bridge for a new understanding after the end of the conflict. The law of armed conflict is intended to preclude purposeless, unnecessary destruction of life and property and to ensure that violence is used only to defeat the enemy’s military forces. The law of armed conflict inhibits warfare from needlessly affecting persons or things of little military value. By preventing needless cruelty, the bitterness and hatred

¹⁵⁵ INT’L & OPERATIONAL LAW DEP’T, U.S. DEP’T OF THE ARMY, LAW OF WAR DESKBOOK, 6 (2010) available at www.loc.gov/rr/frd/Military_Law/pdf/LOW-Deskbook.pdf.

arising from armed conflict is lessened, and thus it is easier to restore an enduring peace. The legal and military experts who attempted to codify the laws of war more than a hundred years ago reflected this when they declared that the final object of an armed conflict is the “re-establishment of good relations and a more solid and lasting peace between the belligerent States.” Final Protocol of the Brussels Conference of 27 August 1874, Schindler & Toman.¹⁵⁶

The Air Force in its earlier *Manual on International Law* quotes the Chairman of the Joint Chiefs of Staff:

The Armed Forces of the United States have benefited from, and highly value, the humanitarianism encompassed by the laws of war. Many are alive today only because of the mutual restraint imposed by these rules, notwithstanding the fact that the rules have been applied imperfectly.¹⁵⁷

The severe limits implicit in these concepts as to the nature of war and the purpose of the law of armed conflict were portrayed most forcefully by the United States Military Tribunal in the *Krupp* trial:

It is an essence of war that one or the other side must lose and the experienced generals and statesmen knew this when they drafted the rules and customs of land warfare. In short, these rules and customs of warfare are designed specifically for all phases of war. They comprise the law for such emergency. To claim that they can be wantonly—and at the sole discretion of any one belligerent—disregarded when he considers his own situation to be critical, means nothing more or less than to abrogate the laws and customs of war entirely.¹⁵⁸

Emphasizing the broad scope of international law, The Air Force in its earlier *Manual on International Law* adopts language of Whiteman to the effect that international law is evidenced by the “general norms of civilization.”¹⁵⁹

Result of Application Of International Humanitarian Law To the Use of Nuclear Weapons

What is the result of the application of these rules of international humanitarian law to nuclear weapons?

The ICJ in its 1996 Nuclear Weapons Advisory Opinion provided a broad framework for the application of the rules of international humanitarian law to nuclear weapons, but left certain questions open. The Court basically said that the use of nuclear weapons is subject to international humanitarian law and would generally be unlawful

¹⁵⁶ U.S. DEP’T OF THE NAVY, ANNOTATED SUPPLEMENT TO THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATION, 292 n.5 (1999) available at <https://www.usnwc.edu/Research---Gaming/International-Law/RightsideLinks/Studies-Series/documents/Naval-War-College-vol-73.aspx>

¹⁵⁷ THE AIR FORCE MANUAL ON INTERNATIONAL LAW at 1-9 (citing Address by General George S. Brown, Chairman of the Joint Chiefs of Staff, DOD News Release No. 479-74 (10 Oct 1974)).

¹⁵⁸ *The Krupp Trial* (Trial of Alfred Felix Alwyn Krupp Von Bohlen und Halbach and Eleven Others), 10 LRTWC 139 (1949), quoted in UNITED STATES DEPARTMENT OF THE NAVY ANNOTATED SUPPLEMENT TO THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS at 5-6 (Naval Warfare Publication 9, 1987).

¹⁵⁹ THE UNITED STATES DEPARTMENT OF THE AIR FORCE, INTERNATIONAL LAW—THE CONDUCT OF ARMED CONFLICT AND AIR OPERATIONS AT 1-3 (Air Force Pamphlet 110-31, 19 November 1976 quoting 1 WHITEMAN, DIGEST OF INTERNATIONAL LAW 1-2).

under such law, but found itself unable to decide whether the use of low yield nuclear weapons and the use of nuclear weapons in extreme circumstances of self-defense could or could not potentially comply with such law. The Court did not decide such matters either way, but rather concluded that it did not have sufficient facts or law to decide them.

We will review the ICJ's treatment of these matters. We will then provide our analysis as to application of international humanitarian law to the use of nuclear weapons, including with reference to the issues the ICJ did not reach, the lawfulness or not of the use of low yield nuclear weapons and the use of nuclear weapons in extreme circumstances of self-defense.

The ICJ's Statement of the Law

The ICJ described the scope of humanitarian law, emphasizing its wide scope:

78. The cardinal principles contained in the texts constituting the fabric of humanitarian law are the following. The first is aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants; States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets. According to the second principle, it is prohibited to cause unnecessary suffering to combatants: it is accordingly prohibited to use weapons causing them such harm or uselessly aggravating their suffering. In application of that second principle, States do not have unlimited freedom of choice of means in the weapons they use.

The Court would likewise refer, in relation to these principles, to the Martens Clause, which was first included in the Hague Convention II with Respect to the Laws and Customs of War on Land of 1899 and which has proved to be an effective means of addressing the rapid evolution of military technology. A modern version of that clause is to be found in Article 1, paragraph 2, of Additional Protocol I of 1977, which reads as follows:

"In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience."

In conformity with the aforementioned principles, humanitarian law, at a very early stage, prohibited certain types of weapons either because of their indiscriminate effect on combatants and civilians or because of the unnecessary suffering caused to combatants, that is to say, a harm greater than that unavoidable to achieve legitimate military objectives. If an envisaged use of weapons would not meet the requirements of humanitarian law, a threat to engage in such use would also be contrary to that law.¹⁶⁰

The ICJ went on to find the use of nuclear weapons "scarcely reconcilable" with international humanitarian law:

95 ... [T]he principles and rules of law applicable in armed conflict—at the heart of which is the overriding consideration of humanity—make the conduct of armed hostilities subject to a number of strict requirements. Thus, methods and means of warfare, which would preclude any distinction between civilian and military targets, or which would result in unnecessary suffering to combatants, are prohibited. In view of the unique characteristics of nuclear weapons, to which the Court has referred above, the use of such weapons in fact seems scarcely reconcilable with respect for such requirements.¹⁶¹

The ICJ further stated:

"A threat or use of nuclear weapons should ... be compatible with the requirements of the international law applicable in armed

¹⁶⁰ Nuclear Weapons Advisory Opinion ¶ 95, at 35, 35 I.L.M. at 829.

¹⁶¹ Nuclear Weapons Advisory Opinion ¶ 95, at 32, 35 I.L.M. at 829.

conflict, particularly those of the principles and rules of international humanitarian law, as well as with specific obligations under treaties and other undertakings which expressly deal with nuclear weapons.”¹⁶²

The Court concluded 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,” but that “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.”¹⁶³ The Court stated:

97. Accordingly, in view of the present state of international law viewed as a whole, as examined above by the Court, and of the elements of fact at its disposal, the Court is led to observe that it cannot reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a State in an extreme circumstance of self-defense, in which its very survival would be at stake.¹⁶⁴

The facts that the Court found to be missing ostensibly had to do with the likely effects of the use of low-yield tactical nuclear weapons and the risk of escalation. The Court first noted the view expressed by the United Kingdom in its written submission to the Court, and the United States in its oral argument:

91. ... The reality ... is that nuclear weapons might be used in a wide variety of circumstances with very different results in terms of likely civilian casualties. In some cases, such as the use of a low yield nuclear weapon against warships on the High Seas 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 weapons against a military objective would inevitably cause very great collateral civilian casualties.¹⁶⁵

The Court then noted the contrasting view of other States:

92. ... [R]ecourse to nuclear weapons could never be compatible with the principles and rules of humanitarian law and is therefore prohibited. In the event of their use, nuclear weapons would in all circumstances be unable to draw any distinction between the civilian population and combatants, or between civilian objects and military objectives, and their effects, largely uncontrollable, could not be restricted, either in time or in space, to lawful military targets. Such weapons would kill and destroy in a necessarily indiscriminate manner, on account of the blast, heat and radiation occasioned by the nuclear explosion and the effects induced; and the number of casualties which would ensue would be enormous. The use of nuclear weapons would therefore be prohibited in any circumstance, notwithstanding the absence of any explicit conventional prohibition.¹⁶⁶

While concluding that it was unable to resolve these polar factual positions, the Court noted that the proponents of legality had failed to substantiate their position as to the possibility of limited use, without escalation, of low level nuclear weapons or even of the potential utility of such use if it were possible:

95. ... [N]one of the States advocating the legality of the use of nuclear weapons under certain circumstances, including the “clean” use of smaller, low yield tactical nuclear weapons, has indicated what, supposing such limited use were feasible, would be the precise circumstances justifying such use; nor

¹⁶² U.S. ICJ Memorandum/GA App ¶ 105(2)(D) at 44.

¹⁶³ Nuclear Weapons Advisory Opinion ¶ 105. E., at 36, 35 I.L.M. at 835.

¹⁶⁴ Nuclear Weapons Advisory Opinion ¶ 96, at 33 I.L.M. at 830.

¹⁶⁵ Nuclear Weapons Advisory Opinion ¶ 91 at 31, 35 I.L.M. at 829 (citing United Kingdom, Written Statement ¶ 3.70 at 53, and United States of America, Oral Statement, CR 95/34 at 89–90).

¹⁶⁶ Nuclear Weapons Advisory Opinion ¶ 92, at 32, 35 I.L.M. at 829.

whether such limited use would not tend to escalate into the all-out use of high yield nuclear weapons. This being so, the Court does not consider that it has a sufficient basis for a determination of the validity of this view.¹⁶⁷

The Court noted at the outset of its opinion that, ostensibly based on the advisory nature of its task, it did not intend to descend into the nitty-gritty of the facts:

The Court does not consider that, in giving an advisory opinion in the present case, it would necessarily have to write “scenarios,” to study various types of nuclear weapons and to evaluate highly complex and controversial technological, strategic and scientific information. The Court will simply address the issues arising in all their aspects by applying the legal rules relevant to the situation.¹⁶⁸

Similarly, in the above-quoted language as to proportionality, the Court stated that it did “not find it necessary to embark upon the quantification of [risk factors as to the use of nuclear weapons]” and did not “need to inquire into the question whether tactical nuclear weapons exist which are sufficiently precise to limit those risks.”¹⁶⁹

As to the limits on a State’s right of self-defense, the Court, after noting that a State’s exercise of the right of self-defense must comply, *inter alia*, with the principle of proportionality, specifically stated that a “use of force that is proportionate under the law of self-defense, must in order to be lawful, also meet the requirements of the law applicable in armed conflict which comprise in particular the principles and rules of humanitarian law.”¹⁷⁰

The Court also quoted the statement on this point by the United Kingdom, a proponent of the potential lawfulness of the use of nuclear weapons, “Assuming that a State’s use of nuclear weapons meets the requirements of self-defense, it must then be considered whether it conforms to the fundamental principles of the law of armed conflict regulating the conduct of hostilities.”¹⁷¹ The Court further emphasized in the final paragraph of its decision that the various grounds set forth in the Court’s decision were to be read in the light of one another.¹⁷²

The Court also addressed the issue under the UN Charter. Noting that under the Charter the threat or use of force is prohibited except in individual or collective self-defense in response to armed attack or in instances of military enforcement measures undertaken by the Security Council,¹⁷³ the Court stated that under customary international law the right of self-defense is subject to the conditions of necessity and proportionality. The Court quoted its decision in the *Nicaragua* case: “there is a specific rule whereby

¹⁶⁷ *Id.* ¶ 94 at 32.

¹⁶⁸ Nuclear Weapons Advisory Opinion ¶ 15, at 11, 35 I.L.M. at 819.

¹⁶⁹ *Id.* ¶ 43, at 18, 35 I.L.M. at 822.

¹⁷⁰ Nuclear Weapons Advisory Opinion ¶ 42, at 18, 35 I.L.M. at 822.

¹⁷¹ Nuclear Weapons Advisory Opinion ¶ 91, at 31, 35 I.L.M. at 829 (citing the written statement of the United Kingdom ¶ 3.44, at 40).

¹⁷² The Court stated “that its reply to the question put to it by the General Assembly rests on the totality of the legal grounds set forth by the Court above (paragraphs 20 to 103), each of which is to be read in the light of the others. Some of these grounds are not such as to form the object of formal conclusions in the final paragraph of the Opinion; they nevertheless retain, in the view of the Court, all of their importance.” Nuclear Weapons Advisory Opinion ¶ 104, at 35, 35 I.L.M. at 831.

¹⁷³ *See* Nuclear Weapons Advisory Opinion ¶ 38, at 17 35 I.L.M. at 822 (citing the U.N. CHARTER art. 51).

self-defense would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law.”¹⁷⁴

THE UNLAWFULNESS OF THE USE OF NUCLEAR WEAPONS

As noted, the ICJ found the threat and use of nuclear weapons generally unlawful under international humanitarian law, but did not reach the question of such threat and use in extreme circumstances of self-defense and where “low-yield” nuclear weapons are concerned. We address those questions left open by the Court.

Applying the foregoing legal requirements of international humanitarian law to the known facts as to nuclear weapons, including such facts as stated by various judges of the ICJ, it seems evident that nuclear weapons cannot be used consistently with international humanitarian law.

First of all, the effects of nuclear weapons, including radiation effects, are inherently uncontrollable. They are not subject to the control of the State using them or of any force on earth. Even the blast, heat, and electromagnetic impulse effects of nuclear weapons are beyond human control. As the International Court of Justice observed, “The destructive power of nuclear weapons cannot be contained in either space or time.”¹⁷⁵ Because their effects are uncontrollable, nuclear weapons cannot be used in such a way as to limit their effects to those permitted under the rules of distinction, proportionality, and necessity. Under the statements of the law by the United States’ own military, this makes the use of these weapons unlawful.

This point does not seem debatable. Even low yield, so-called mininukes,¹⁷⁶ are not controllable in their effects. The resultant radiation will spread unpredictably and at

¹⁷⁴ Nuclear Weapons Advisory Opinion ¶ 41, at 18, 35 I.L.M. at 822 (citing the case *Concerning Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America 1986 I.C.J. Reports 94)).

¹⁷⁵ Nuclear Weapons Advisory Opinion ¶ 35, at 21.

¹⁷⁶ While there is no definitive definition of a low yield nuclear weapon or of a mini-nuke, it is notable that the Joint Chiefs of Staff in their earlier manual *Doctrine for Joint Theater Nuclear Operations* define the various levels of nuclear weapons as follows:

- Very low — less than 1 kiloton.
- Low — 1 kiloton to 10 kilotons.
- Medium — over 10 kilotons to 50 kilotons.
- High — over 50 kilotons to 500 kilotons.
- Very high — over 500 kilotons. (Joint Pub 1-02)

DOCTRINE FOR JOINT THEATER NUCLEAR OPERATIONS, *supra* note 30, at GL-3. This manual does not seem to still be in effect. The current manuals do not appear to cover this point. We are not aware of any reason these definitions would change. As a frame of reference, the nuclear weapons exploded in Hiroshima and Nagasaki were approximately 15 and 12 kilotons respectively. Nagendra Singh & Edward McWhinney, *NUCLEAR WEAPONS AND CONTEMPORARY INTERNATIONAL LAW* 29 (1989)). When the U.S. Congress in 1994 banned research and development of low yield nuclear weapons, it defined such weapons as ones with yields of less than five kilotons, tactical weapons with virtually no strategic value. *See* § 3136 of P.L. 103-160, National Defense Authorization Act For Fiscal Year 1994, H.R. CONF. REP. 103-357, *repealed* by National Defense Authorization Act for Fiscal Year 2004 § 3136, 42 U.S.C. § 2121. *See* 42 USCS § 2121

great distances in space and time. In addition, the use of nuclear weapons by a State would not likely be in a vacuum, but rather would carry the risk of leading to counter-nuclear strikes and escalation.

By definition, a weapon whose effects cannot be controlled is indiscriminate and violates the rule of distinction, the “grandfather of all principles.”¹⁷⁷ Such a weapon is

(1998) Prohibition on Research and Development of Low-Yield Nuclear Weapons, Act. Nov. 30, 1993, P.L. 103-160, Div C. Title XXX, Subtitle C § 3136, 107 Stat. 1946, *repealed* by National Defense Authorization Act For Fiscal Year 2004, National Defense Authorization Act for Fiscal Year 2004 § 3136, 42 U.S.C. § 2121.

Describing the rationale for the legislation, Congressman Spratt stated, "The United States has wisely decided to retire our tactical nuclear weapons." See National Defense Authorization Act for Fiscal Year 1994, 139 Cong. Rec. H. 7065, *H7083, 103rd Cong 1st Session, Sept. 28, 1993. The Congressman further stated, "A 5-kiloton yield nuclear weapon is a very small nuclear weapon that is surely tactical; it has virtually no strategic value." Congressman Spratt, National Defense Authorization Act for Fiscal Year 1994, 139 Cong. Rec. H. 7065, *H7083, Sept. 28, 1993.

The statute defining low yield nuclear weapons, as indicated above, has been repealed (albeit for reasons unrelated to the definition of low yield nuclear weapons). To the best of our knowledge, alternate definition of a low yield nuclear weapon has been enacted by the Congress.

Based on this definition of 5 kilotons or less, the United States currently has two types of non-strategic nuclear weapons with low yield capabilities. See Robert S. Norris and Hans M. Kristensen, *U.S. Nuclear Forces 2010*, BULL. OF THE ATOMIC SCIENTISTS, May/June 2010, *available at* <http://thebulletin.metapress.com/content/067796p218428428/fulltext.pdf>. One of these weapons is the sea-launched, land-attack Tomahawk (TLAM/N) cruise missile equipped with W80-0 warheads, of which the United States has 100. *See Id.* The other is the non-strategic B61 gravity bomb, of which the United States has 400. *See Id.* In addition, the United States has several strategic bombers that could be used as low yield weapons. *See Id.*

During the Bush administration, the United States sought to expand the role of these low yield tactical nuclear weapons. *See* United States Department of Defense, Nuclear Posture Review, January 2002, <http://www.defense.gov/news/Jan2002/d20020109npr.pdf>. The Obama administration however has reversed this trend as the 2010 Nuclear Posture Review “recommends that the nuclear version of the TLAM be retired. Designed for deployment on selective attack submarines, the TLAM/N is now stored at the SSBN bases in Washington and Georgia.” United States Department of Defense, Nuclear Posture Review Report at 27-28, April 2010, *available at* <http://www.defense.gov/npr/docs/2010%20Nuclear%20Posture%20Review%20Report.pdf>

Low yield nuclear weapons have uncertain effects and remain extremely destructive. For example, “detonating a low-yield nuclear weapon in or even near a city could cause much collateral damage. By one estimate, a 5-kiloton weapon detonated near and upwind from Damascus, Syria, at a depth of 30 feet would cause 230,000 fatalities and another 280,000 casualties within two years. Use of a low-yield earth penetrator against the bunkers thought to house Saddam Hussein in Baghdad, a city of nearly 5 million people, could have caused casualties on a similar scale.” Jonathan Medalia, *Nuclear Weapon Initiatives: Low-Yield R&D, Advanced Concepts, Earth Penetrators, Test Readiness*, Congressional Research Service Report for Congress at 22-23, March 8, 2004, *available at* http://assets.opencrs.com/rpts/RL32130_20031211.pdf (*Citing* U.S. Congress. Congressional Record, May 20, 2003: S6666. Senator Kennedy cited this estimate.).

Further, regardless of its size, the use of a low yield nuclear weapon crosses the nuclear threshold, and “[t]he State at the receiving end of such a nuclear response would not know that the response is a limited or tactical one involving a small weapon and it is not credible to posit that it will also be careful to respond in kind, that is, with a small weapon. The door would be opened and the threshold crossed for an all-out nuclear war.” *See Dissenting Opinion of Judge Weeramantry to the Nuclear Weapons Advisory Opinion at 82-83, 35 I.L.M. at 921.*

¹⁷⁷ INT’L & OPERATIONAL LAW DEP’T, U.S. DEP’T OF THE ARMY, LAW OF WAR DESKBOOK, 141 (2010) *available at* www.loc.gov/rr/frd/Military_Law/pdf/LOW-Deskbook.pdf.

also unable to satisfy the requirement of proportionality, which requires that a state using a weapon be able to control its effects.¹⁷⁸ If the state cannot control such effects, it cannot ensure that the collateral effects of the attack will be proportional to the anticipated military advantage.

A weapon whose effects cannot be limited similarly cannot satisfy the requirement of necessity. If a State cannot control the effects of a weapon, it cannot ensure that the level of force it would be using with that weapon would be limited to that necessary to achieve the particular military objective.

Accordingly, we conclude that the inherent uncontrollability of nuclear weapons, even low yield nuclear weapons, renders them unlawful under international humanitarian law. This seems to us to be the end of the matter. The application of the established principles of international law to the essentially incontrovertible effects of nuclear weapons renders the use of such weapons unlawful.

The United States, as we understand it, has interposed essentially ten arguments as to why some uses of nuclear weapons could be lawful under international law:

- **Controllability**: The U.S. argues that the effects of some nuclear weapons are controllable.
- **Radiation as an inherent effect of nuclear weapons**: The U.S. argues that the radiation effects of nuclear weapons do not cause them to violate the rule of necessity, because radiation is an inherent effect of nuclear weapons, not an effect added to cause extra injury to its victims.
- **Radiation as a secondary byproduct of nuclear weapons**: The U.S. argues that radiation does not matter as a nuclear weapons effect because it is not an intended effect of nuclear weapons, but rather merely a byproduct.
- **Use of low yield nuclear weapons in remote areas**: The U.S. argues that it cannot be said that nuclear weapons have impermissible effects under international law because some such weapons could be used selectively in remote areas where the collateral effects would be minor.
- **Use of nuclear weapons in reprisal for another State's unlawful use of such weapons**: The U.S. argues that, even if would be unlawful to use nuclear weapons in the first instance, a State could properly use them in reprisal to respond to another State's use of such weapons.
- **Need for evaluation of the use of nuclear weapons on a case by case basis**: The U.S. argues that no categorical judgments can be made as the lawfulness or not of the use of nuclear weapons, but rather that each potential use has to be evaluated on its individual merits.
- **No prohibition of the use of nuclear weapons unless the U.S. agrees to such a prohibition**: The U.S. argues that, because international law is of a voluntary nature, there can be no prohibition of the use of nuclear weapons unless the

¹⁷⁸ See footnote __ supra and accompanying text.

U.S. (or, presumably, each other nuclear State) agrees explicitly to such a prohibition.

- **Lawfulness of the threat of use of all nuclear weapons in the U.S. arsenal if it can be said that the use of any nuclear weapon in that arsenal is lawful:** The U.S. impliedly argues that its policy of deterrence with respect to its entire arsenal of nuclear weapons is lawful as long as the use of any weapon in that arsenal could potentially be lawful.
- **The characterization that the ICJ found the use of nuclear weapons to be lawful:** The U.S. at times characterizes the ICJ decision in the Nuclear Weapons Advisory Case as upholding the lawfulness of the use and threat of use of nuclear weapons; and
- **The implicit argument that nuclear weapons may be used in extreme circumstances of self-defense:** The U.S. seems implicitly to have adopted the position that nuclear weapons could lawfully be used extreme circumstances of self-defense.

To the best of our knowledge, these arguments represent the totality of the bases upon which the United States has explicitly or even implicitly justified the potential use of nuclear weapons under international law.

Based on our analysis, these purported bases of legality are unfounded. We consider them one by one.

Controllability

The United States, in its defense before the ICJ of the potential lawfulness of some uses of nuclear weapons, did not contest the requirement of controllability under international law. Its defense, instead, was that the effects of some nuclear weapons, particularly low yield nuclear weapons, are controllable and hence that such weapons may lawfully be used. The U.S. made no defense before the ICJ of the lawfulness of the use of higher yield nuclear weapons, the type that typifies its nuclear arsenal.¹⁷⁹ It did not even defend the lawfulness of the use of multiple low yield weapons or of low yield nuclear weapons in populated areas. Its defense was, in fact, exceedingly narrow, limited to the defense of a small portion of its nuclear arsenal.¹⁸⁰

John H. McNeill, the U.S. Senior Deputy General Counsel, Department of Defense, argued the U.S. position to the ICJ:

The argument that international law prohibits, in all cases, the use of nuclear weapons appears to be premised on the incorrect assumption that every use of every type of nuclear weapon will necessarily share certain characteristics which contravene the law of armed conflict. Specifically, it appears to be assumed

¹⁷⁹ Robert S. Norris & Hans M. Kristensen, *Nuclear Notebook: U.S. Nuclear Forces*, 66 BULL. OF THE ATOMIC SCIENTISTS 57-71 (May/June 2010), available at <http://thebulletin.metapress.com/content/067796p218428428/fulltext.pdf>

¹⁸⁰ See Robert S. Norris & Hans M. Kristensen, *Nuclear Notebook: U.S. Nuclear Forces*, 66 BULL. OF THE ATOMIC SCIENTISTS 57-71 (May/June 2010), available at <http://thebulletin.metapress.com/content/067796p218428428/fulltext.pdf>.

that any use of nuclear weapons would inevitably escalate into a massive strategic nuclear exchange, resulting automatically in the deliberate destruction of the population centers of opposing sides.¹⁸¹

Nuclear weapons, as is true of conventional weapons, can be used in a variety of ways: they can be deployed to achieve a wide range of military objectives of varying degrees of significance; they can be targeted in ways that either increase or decrease resulting incidental civilian injury or collateral damage; and their use may be lawful or not depending upon whether and to what extent such use was prompted by another belligerent's conduct and the nature of the conduct.¹⁸²

Noting that it has been argued that nuclear weapons are inherently indiscriminate in their effect and cannot reliably be targeted at specific military objectives, McNeill stated:

This argument is simply contrary to fact. Modern nuclear weapon delivery systems are, indeed, capable of precisely engaging discrete military objectives.¹⁸³

Alluding to the assumptions made by the World Health Organization (WHO) in its 1987 study as to the effects of nuclear weapons, McNeill objected to the “four scenarios” depicted by the WHO as “highly selective” in that they addressed “civilian casualties expected to result from nuclear attacks involving significant numbers of large urban area targets or a substantial number of military targets.”¹⁸⁴

But no reference is made in the report to the effects to be expected from other plausible scenarios, such as a small number of accurate attacks by low-yield weapons against an equally small number of military targets in non-urban areas.¹⁸⁵

Reinforcing the point as to “other plausible [low-end use] scenarios,” McNeill stated that such plausibility “follows from a fact noted in the WHO Report by Professor Rotblat: namely, that ‘remarkable improvements’ in the performance of nuclear weapons in recent years have resulted in their ‘much greater accuracy,’”¹⁸⁶ stating that such scenarios “would not necessarily raise issues of proportionality or discrimination.”¹⁸⁷

Addressing the subject of the many studies indicating that impermissible levels of damage would result from the use of nuclear weapons, McNeill objected that any given study “rests on static assumptions” as to such factors as the following: “the yield of a weapon, the technology that occasions how much radiation the weapon may release, where, in relation to the earth’s surface it will be detonated, and the military objective at which it would be targeted.”¹⁸⁸

In its memorandum to the ICJ, the United States similarly argued that, through the technological expertise of “modern weapon designers,” it is now able to control the effects of nuclear weapons—specifically, “to tailor the effects of a nuclear weapon to deal with various types of military objectives:”

It has been argued that nuclear weapons are unlawful because they cannot be directed at a military objective. This argument ignores the ability of modern delivery systems to target specific military

¹⁸¹ ICJ Hearing, November 15, 1995, at 85 (John H. McNeill, arguing).

¹⁸² ICJ Hearing, November 15, 1995, at 87 (John H. McNeill, arguing).

¹⁸³ ICJ Hearing, November 15, 1995, at 88

¹⁸⁴ ICJ Hearing, November 15, 1995, at 90.

¹⁸⁵ ICJ Hearing, November 15, 1995, at 90.

¹⁸⁶ ICJ Hearing, November 15, 1995, at 90.

¹⁸⁷ ICJ Hearing, November 15, 1995, at 90.

¹⁸⁸ ICJ Hearing, November 15, 1995, at 89.

objectives with nuclear weapons, and the ability of modern weapons designers to tailor the effects of a nuclear weapon to deal with various types of military objectives. Since nuclear weapons can be directed at a military objective, they can be used in a discriminate manner and are not inherently indiscriminate.¹⁸⁹

Beyond arguing that the effects of any particular use of a nuclear would depend on the particular circumstances, the United States minimized the differences between the effects of nuclear and conventional weapons. McNeill argued:

It is true that the use of nuclear weapons would have an adverse collateral effect on human health and both the natural and physical environments. But so too can the use of conventional weapons. Obviously, World Wars I and II, as well as the 1990-1991 conflict resulting from Iraq's invasion of Kuwait, dramatically demonstrated that conventional war can inflict terrible collateral damage to the environment. The fact is that armed conflict of any kind can cause widespread, sustained destruction; the Court need not examine scientific evidence to take judicial notice of this evident truth.¹⁹⁰

These arguments by the U.S. asserting the controllability of the effects of low yield nuclear weapons and generally minimizing the effects of nuclear weapons do not withstand analysis. First of all, these were merely assertions. The U.S. presented no evidence to the Court that it could control the effects of its nuclear weapons or limit their effects to those permissible within the rules of distinction, proportionality, or necessity. For the reasons discussed above,¹⁹¹ it does not seem possible that the United States could have this ability. The radiation and other effects of nuclear weapons simply are not subject to such control or limitation. To the best of our knowledge, neither the United States nor any other nuclear weapons State is able to exert such control or impose the limits of law on the effects of nuclear weapons.

In short, based on the statements of the requirement of controllability by the U.S.,¹⁹² the uncontrollability of the effects of nuclear weapons means that the use of such weapons would be unlawful under the rules of distinction, proportionality, and necessity.¹⁹³ Based on the statement of the rule of distinction by the U.S.,¹⁹⁴ the use of nuclear weapons cannot comport with the rule of distinction because the effects of nuclear weapons cannot discriminate between belligerent and non-belligerent persons and objects. Based on the statements of the rules of proportionality¹⁹⁵ and necessity¹⁹⁶ by the U.S., a State using nuclear weapons could not assure that the effects would be limited to those permitted by those rules.

In addition, the rule of necessity requires that the strike appear likely to yield a concrete military benefit.¹⁹⁷ A strike that is likely to boomerang, resulting, whether

¹⁸⁹ U.S. ICJ Memorandum/GA App at 23.

¹⁹⁰ ICJ Hearing, November 15, 1995, at 89.

¹⁹¹ See footnotes __ through __ and accompanying text.

¹⁹² See footnotes __ through __ and accompanying text.

¹⁹³ See footnotes __ through __ and accompanying text.

¹⁹⁴ See footnotes __ through __ and accompanying text.

¹⁹⁵ See footnotes __ through __ and accompanying text.

¹⁹⁶ See footnotes __ through __ and accompanying text.

¹⁹⁷ See *e.g.* INT'L & OPERATIONAL LAW DEP'T, U.S. DEP'T OF THE ARMY, LAW OF WAR WORKSHOP DESKBOOK, 350, fn. 81 (2010) available at http://www.loc.gov/tr/frd/Military_Law/pdf/operational-law-handbook_2010.pdf; U.S. DEP'T OF THE AIR FORCE, DOCTRINE DOC. 2-1.9, TARGETING, 89 (2006) available at www.fas.org/irp/doddir/usaf/afdd2-1.9.pdf. See also U.S. DEP'T OF THE ARMY, LAW OF WAR DESKBOOK, 142 (2010).

because of escalation or miscalculation or mistake or the operation of the winds and waters or the like, in a net detriment to the acting State, would not satisfy the necessity test.

Outside the courtrooms of the ICJ, the United States recognizes the uncontrollability of the effects of nuclear weapons. The Chairman of the Joint Chiefs in an earlier publication *Doctrine for Joint Nuclear Operations*, addressed the controllability question explicitly:¹⁹⁸

[T]here can be no assurances that a conflict involving weapons of mass destruction could be controllable or would be of short duration. Nor are negotiations opportunities and the capacity for enduring control over military forces clear.¹⁹⁹

As referenced above in the statement by Judge Shahabuddeen in the Nuclear Weapons Advisory Decision,²⁰⁰ the United States, in ratifying the Treaty of Tlatelolco, subscribed to the statement that the “terrible effects” of nuclear weapons “are suffered, indiscriminately and inexorably, by military forces and civilian population alike; and “through the persistence of the radioactivity they release, an attack on the integrity of the human species and ultimately may even render the whole earth uninhabitable.”²⁰¹

The Army in its manual *Nuclear Operations* emphasized the unpredictability of the effects of nuclear weapons and of the risk of escalation which are inherently unpredictable, “The potential employment of nuclear weapons at theater level, when combined with the means and resolve to use them, makes the prospects of conflict more dangerous and the outcome more difficult to predict.”²⁰²

The U.S. Joint Chief of Staff’s prior *Joint Nuclear Operations* manual recognized that “the use of nuclear weapons represents a significant escalation from conventional warfare,” a factor that highlights the uncontrollability of nuclear weapons effects.²⁰³ The manual stated:

The fundamental differences between a potential nuclear war and previous military conflicts involve the speed, scope, and degree of destruction inherent in nuclear weapons employment, as well as the uncertainty of negotiating opportunities and enduring control over military forces.²⁰⁴

Since nuclear weapons have greater destructive potential, in many instances they may be inappropriate.²⁰⁵

¹⁹⁸ JOINT CHIEFS OF STAFF, JOINT PUB 3-12, DOCTRINE FOR JOINT NUCLEAR OPERATIONS i, (Dec. 15, 1995), available at http://www.dtic.mil/doctrine/jel/new_pubs/jp3_12.pdf.

¹⁹⁹ *Id.* at i, I-6, I-6-7 (emphasis omitted).

²⁰⁰ See footnote __ supra and accompanying text.

²⁰¹ Treaty for the Prohibition of Nuclear Weapons in Latin America (Treaty of Tlatelolco), Feb. 14, 1967, 22 U.S.T. 762, 634 U.N.T.S. 762, quoted in dissenting opinion of Judge Shahabuddeen at 5-6, 35 I.L.M. at 863-864.

²⁰² U.S. DEP’T OF THE ARMY, FM 100-30, NUCLEAR OPERATIONS, 3-14 (1996) available at www.fas.org/irp/doddir/army/fm100-30.pdf. While this manual is no longer in effect and the point does not appear to be covered in the more recent manuals, there is no reason to believe nuclear weapons have become any less uncontrollable since 1996.

²⁰³ DOCTRINE FOR JOINT NUCLEAR OPERATIONS, supra note __, at II-1.

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²⁰⁵ DOCTRINE FOR JOINT THEATER NUCLEAR OPERATIONS, supra note __, at v-vi.

The immediate and prolonged effects of WMD—including blast, thermal radiation, prompt (gamma and neutron) and residual radiation—pose unprecedented physical and psychological problems for combat forces and noncombatant populations alike.²⁰⁶

Thus, it seems evident that the effects of nuclear weapons, including the radiation effects, are uncontrollable and that indeed responsible representatives of the U.S. military and government have recognized this uncontrollability. On this basis alone, the use of nuclear weapons, even of relatively low yield nuclear weapons, is precluded by international humanitarian law.

Radiation as an Inherent Effect of Nuclear Weapons

The United States' second argument in support of the lawfulness of the use of nuclear weapons is that, because radiation is an inherent effect of nuclear weapons, not an effect added to cause extra injury to its victims, the radiation effects of nuclear weapons do not cause nuclear weapons to violate the rule of necessity. We saw this position in the argument quoted above which the United States made to the ICJ to the effect that the rule of necessity only precludes “weapons designed to increase the injury or suffering of the persons attacked beyond that necessary to accomplish the military objective”²⁰⁷ or “weapons designed specifically to increase the suffering of persons attacked beyond that necessary to accomplish a particular military objective.”²⁰⁸

This restriction on the scope of the requirement of necessity seems inconsistent with the traditional formulation of this rule as precluding all levels of destruction not necessary under the circumstances.²⁰⁹ Such a gloss would emasculate the rule, opening the door for a virtually limitless range of unnecessary uses of weapons. It certainly is the case that the addition of an element to the design of a weapon (such as adding glass to a bullet or designing the bullet to fracture when it enters the body) so as to cause unnecessary injury would cause the use of the weapon to violate the rule of necessity, but there does not appear to be any basis for the assertion that the effect of the weapon causing the unnecessary injury does not count in the legal analysis unless it was intentionally build into the weapon.

The only source the United States cited in its brief to the ICJ in support of this limitation was p. 18, para. 34 of the Army's Field Manual 27-10, Change No. 1, The Law of Land Warfare (1976).²¹⁰ That paragraph reads as follows:

34. Employment of Arms Causing Unnecessary Injury a. Treaty Provision.

²⁰⁶ DOCTRINE FOR JOINT NUCLEAR OPERATIONS, *supra* note ___, at II-7.

²⁰⁷ See footnotes ___ and ___ *supra* and accompanying footnotes, citing U.S. ICJ Memorandum/GA App. at 28–29 (citing the Army's THE LAW OF LAND WARFARE, p. 18, para. 34, available at <http://faculty.ed.umuc.edu/~nstanton/Ch2.htm#s3>).

²⁰⁸ ICJ Hearing, November 15, 1995, at 91.

²⁰⁹ See discussion *supra* at footnotes __ and accompanying text.

²¹⁰ U.S. ICJ Memorandum/GA App. at 22

It is especially forbidden * * * to employ arms, projectiles, or material calculated to cause unnecessary suffering. (HR, art. 23, par. (e).)

b. Interpretation. What weapons cause "unnecessary injury" can only be determined in light of the practice of States in refraining from the use of a given weapon because it is believed to have that effect. The prohibition certainly does not extend to the use of explosives contained in artillery projectiles, mines, rockets, or hand grenades. Usage has, however, established the illegality of the use of lances with barbed heads, irregular-shaped bullets, and projectiles filled with glass, the use of any substance on bullets that would tend unnecessarily to inflame a wound inflicted by them, and the scoring of the surface or the filing off of the ends of the hard cases of bullets.²¹¹

The Navy in its earlier *Naval Commander's Handbook* similarly suggested this limitation on the rule of necessity:

The Unnecessary Suffering Argument. Customary international law prohibits the use of weapons calculated to cause unnecessary suffering; the rule is declared in the Hague Regulations, article 23(e), and now confirmed in Additional Protocol I, article 35(2), which prohibits the employment of weapons, projectiles and materials and methods of warfare of a nature such as would cause superfluous injury or unnecessary suffering. However, these humanitarian considerations are offset by a due regard for the military interests at stake. The Declaration of St. Petersburg 1868 ... contrasts the two: on the one hand, the only legitimate object during a war is to weaken the military forces of the enemy. On the other, this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable. Nuclear weapons can be selectively directed against military targets. In the context of this balance, it is not clear the use of nuclear weapons necessarily violates international law.²¹²

However, the actual formulation of this rule in the referenced Hague Regulations, article 23(e) and Additional Protocol 1, article 35(2) does not contain this gloss on the rule. Article 23(e) of the Hague Regulations makes it unlawful "To employ arms, projectiles, or material of a nature to cause superfluous injury."²¹³ Article 35(2) of Additional Protocol I provides, "It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary

²¹¹ LAW OF LAND WARFARE at 18.

²¹² THE NAVAL/MARINE COMMANDER'S HANDBOOK, *supra* note 28, at 10-2.

²¹³ Convention (II) with Respect to the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land, July 29, 1899 available at <http://www.icrc.org/ihl.nsf/FULL/150?OpenDocument>.

suffering.”²¹⁴ In each instance, the reference is to the “nature” of the weapon or method of warfare, not to whether the objectionable effects of the weapons or method were intentionally designed for or added or even whether those effects were the result of separate “calculation.”

Accordingly, the United States’ gloss on the rule of necessity postulating that, to be unlawful, the excessive effects must have been specifically designed for seems unsupported by the language of the rule and contrary to its purpose. Surely, whether the putatively unnecessary effects were intentionally added or are an inherent characteristic of the weapon or method of warfare is irrelevant to the objective of avoiding unnecessary effects.

Judge Weeramantry in his dissent in the ICJ Nuclear Weapons case discussed at length the contention of the United States and other nuclear weapons States that they are able to use low yield nuclear weapons in such a way as to keep their effects within legal limits:

6. Limited or Tactical or Battlefield Nuclear Weapons

Reference has already been made to the contention, by those asserting legality of use, that the inherent dangers of nuclear weapons can be minimized by resort to "small" or "clean" or "low yield" or "tactical" nuclear weapons. This factor has an important bearing upon the legal question before the Court, and it is necessary therefore to examine in some detail the acceptability of the contention that limited weapons remove the objections based upon the destructiveness of nuclear weapons. The following are some factors to be taken into account in considering this question:

(i) No material has been placed before the Court demonstrating that there is in existence a nuclear weapon which does not emit radiation, does not have a deleterious effect upon the environment, and does not have adverse health effects upon this and succeeding generations. If there were indeed a weapon which does not have any of the singular qualities outlined earlier in this opinion, it has not been explained why a conventional weapon would not be adequate for the purpose for which such a weapon is used. We can only deal with nuclear weapons as we know them.

(ii) The practicality of small nuclear weapons has been contested by high military and scientific authority.

²¹⁴ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (“Protocol I”), 12 December 1977, 1125 U.N.T.S. 21 *available at* <http://treaties.un.org/doc/Publication/UNTS/Volume%201125/volume-1125-I-17512-English.pdf>.

(iii) Reference has been made (see Section IV above), in the context of self-defence, to the political difficulties, stated by former American Secretaries of State, Robert McNamara and Dr. Kissinger, of keeping a response within the ambit of what has been described as a limited or minimal response. The assumption of escalation control seems unrealistic in the context of nuclear attack.

(iv) With the use of even "small" or "tactical" or "battlefield" nuclear weapons, one crosses the nuclear threshold. The State at the receiving end of such a nuclear response would not know that the response is a limited or tactical one involving a small weapon and it is not credible to posit that it will also be careful to respond in kind, that is, with a small weapon. The door would be opened and the threshold crossed for an all-out nuclear war. The scenario here under consideration is that of a limited nuclear response to a nuclear attack. Since, as stated above,

(a) the "controlled response" is unrealistic; and
 (b) a "controlled response" by the nuclear power making the first attack to the "controlled response" to its first strike is even more unrealistic, the scenario we are considering is one of all-out nuclear war, thus rendering the use of the controlled weapon illegitimate. The assumption of a voluntary "brake" on the recipient's fullscale use of nuclear weapons is, as observed earlier in this opinion, highly fanciful and speculative. Such fanciful speculations provide a very unsafe assumption on which to base the future of humanity.

(v) As was pointed out by one of the States appearing before the Court : "it would be academic and unreal for any analysis to seek to demonstrate that the use of a single nuclear weapon in particular circumstances could be consistent with principles of humanity. The reality is that if nuclear weapons ever were used, this would be overwhelmingly likely to trigger a nuclear war." (Australia, Gareth Evans, CR 95/22, pp. 49-50.)

(vi) In the event of some power readying a nuclear weapon for a strike, it may be argued that a pre-emptive strike is necessary for self-defence. However, if such a pre-emptive strike is to be made with a "small" nuclear weapon which by definition has no greater blast, heat or radiation than a conventional weapon, the question would again arise why a nuclear weapon should be used when a conventional weapon would serve the same purpose.

(vii) The factor of accident must always be considered. Nuclear weapons have never been tried out on the battlefield. Their potential for limiting damage is untested and is as yet the subject of theoretical assurances of limitation. Having regard to the possibility of human

error in highly scientific operations - even to the extent of the accidental explosion of a space rocket with all its passengers aboard one can never be sure that some error or accident in construction may deprive the weapon of its so-called "limited" quality. Indeed, apart from fine gradations regarding the size of the weapon to be used, the very use of any nuclear weapons under the stress of urgency is an area fraught with much potential for accident '94. The UNIDIR study, just mentioned, emphasizes the "very high risks of escalation once a confrontation starts" 195.

(viii) There is some doubt regarding the "smallness" of tactical nuclear weapons, and no precise details regarding these have been placed before the Court by any of the nuclear powers. Malaysia, on the other hand, has referred the Court to a United States law forbidding "research and development which could lead to the production . . . of a low-yield nuclear weapon" (Written Comments, p. 20), which is defined as having a yield of less than 5 kilotons (Hiroshima and Nagasaki were 15 and 12 kilotons, respectively) '96. Weapons of this firepower may, in the absence of evidence to the contrary, be presumed to be fraught with all the dangers attendant on nuclear weapons, as outlined earlier in this opinion.

(ix) It is claimed a weapon could be used which could be precisely aimed at a specific target. However, recent experience in the Gulf War has shown that even the most sophisticated or "small" weapons do not always strike their intended target with precision. If there should be such error in the case of nuclear weaponry, the consequence would be of the gravest order.

(x) Having regard to WHO estimates of deaths ranging from one million to one billion in the event of a nuclear war which could well be triggered off by the use of the smallest nuclear weapon, one can only endorse the sentiment which Egypt placed before us when it observed that, having regard to such a level of casualties: "even with the greatest miniaturization, such speculative margins of risk are totally abhorrent to the general principles of humanitarian law" (CR95123, p. 43).

(xi) Taking the analogy of chemical or bacteriological weapons, no one would argue that because a small amount of such weapons will cause a comparatively small amount of harm, therefore chemical or bacteriological weapons are not illegal, seeing that they can be used in controllable quantities. If, likewise, nuclear weapons are generally illegal, there could not be an exception for "small weapons". If nuclear weapons are intrinsically unlawful, they cannot be rendered lawful by being used in small quantities or in smaller versions. Likewise, if a State should be attacked with chemical or bacteriological weapons, it

seems absurd to argue that it has the right to respond with small quantities of such weapons. The fundamental reason that all such weapons are not permissible, even in self-defence, for the simple reason that their effects go beyond the needs of war, is common to all these weapons.²¹⁵

Radiation as a Secondary Effect of Nuclear Weapons

This is a variant of the immediately preceding U.S. defense of the lawfulness of the use of nuclear weapons. Here, the thrust of the argument seems to be that the U.S., if it chose to use a nuclear weapon, would be using it for the blast and heat effects of the weapon, and that the ongoing and outwardly spreading radiation effects would not have been the focus of the U.S.'s intent in using the weapon and hence would not cause the use to be unlawful.

The U.S. makes this argument under several guises. First, as we saw above in the discussion of the controllability point, the U.S. argues that it can deliver its missiles carrying nuclear weapons to their targets with great accuracy, so that, impliedly, the radiation effects should not matter. Similarly, in its discussion of the prohibition of the use of poisons, it argues that poisons are prohibited, but that it is acceptable under international law to use other weapons – such as nuclear weapons – that have poisons (here, radiation) as a side effect. The U.S. contends that, because the delivery of the poisons is accompanied by other effects (here, blast and heat) that putatively are permissible, the overall use of the weapon is acceptable.

Following are examples of the United States' articulation of these positions in statements to the ICJ:

This argument is simply contrary to fact. Modern nuclear weapon delivery systems are, indeed, capable of precisely engaging discrete military objectives.²¹⁶

It has been argued that nuclear weapons are unlawful because they cannot be directed at a military objective. This argument ignores the ability of modern delivery systems to target specific military objectives with nuclear weapons, and the ability of modern weapons designers to tailor the effects of a nuclear weapon to deal with various types of military objectives. Since nuclear weapons can be directed at a military objective, they can be used in a discriminate manner and are not inherently indiscriminate.²¹⁷

[The prohibition of the use of poison weapons] was established with particular reference to projectiles that carry poison into the body of the victim. It was not intended to apply, and has not been applied, to weapons that are designed to injure or cause destruction by other means, even though they also may create toxic byproducts.

For example, the prohibition on poison weapons does not prohibit conventional explosives or incendiaries, even though they may produce dangerous fumes. By the same token, it does not prohibit

²¹⁵ Dissenting opinion of Judge Weeramantry at 82-83, 35 I.L.M. at 921.

²¹⁶ *Id.* at 88.

²¹⁷ U.S. ICJ Memorandum/GA App at 23 (citing the Army's THE LAW OF LAND WARFARE, *supra* note 30, at 5).

nuclear weapons, which are designed to injure or cause destruction by means other than poisoning the victim, even though nuclear explosions may also create toxic radioactive byproducts.²¹⁸

The United States made essentially the same argument to the ICJ with respect to the application of the 1925 Geneva Protocol's prohibition of the first use in war of asphyxiating, poisonous or other gases and analogous liquids, materials and devices, contending, without citation of authority, that the Protocol was "not intended" to cover weapons that kill other than by the inhalation or other absorption into the body of poisonous gases or analogous substances²¹⁹ and that the prohibition of the use of poison weapons in the 1907 Hague Convention was only intended to cover the situation of projectiles which carry poison into the body of the victim.²²⁰

The United States further argued that the limitations on the scope of these agreements is reflected in the fact that they do not prohibit conventional explosives or incendiaries, even though such weapons "may produce dangerous fumes."

This prohibition was intended to apply to weapons that are designed to kill or injure by the inhalation or other absorption into the body of poisonous gases or analogous substances.

This prohibition was not intended to apply, and has not been applied, to weapons that are designed to kill or injure by other means, even though they may create asphyxiating or poisonous byproducts. Once again, the Protocol does not prohibit conventional explosives or incendiary weapons, even though they may produce asphyxiating or poisonous byproducts, and it likewise does not prohibit nuclear weapons.²²¹

The Navy in its an earlier edition of its *Naval Commander's Handbook* elaborated on the U.S. position:

Poison Gas Analogy. It has been contended that nuclear radiation is sufficiently comparable to a poison gas to justify extending the 1925 Gas Protocol's prohibition to include the use of nuclear weapons. However, this ignores the explosive, heat and blast effects of a nuclear burst, and disregards the fact that fall-out is a by-product which is not the main or most characteristic feature of the weapon. The same riposte is available to meet an argument that the use of nuclear weapons would violate the prohibition on the use of poisoned weapons, set out in article 23(a) of the Hague Regulations.²²²

Thus, the U.S. position seems to be that the explosive, heat and blast effects of a nuclear weapon are the primary effects, against which radiation is only an incidental "by-product" which is not "the main or most characteristic feature" of the weapon, and that this secondary nature of radiation eliminates or diminishes its legal significance as an effect of the use of nuclear weapons.

We are not aware of a legal basis for this putative rule that secondary effects of weapons, such as radiation, do not count in the legal analysis. Such a limitation on international humanitarian law would defeat its purpose. Certainly the "dangerous

²¹⁸ U.S. ICJ Memorandum/GA App. at 23–23 (citing Hague Convention (IV) Respecting the Laws and Customs of War on Land, Annex, Art. 23(a) *reprinted in* ROBERTS & GUELFF, DOCUMENTS ON THE LAW OF WAR (2nd ed. 1989, p. 63)).

²¹⁹ See U.S. ICJ Memorandum/GA App. at 24–25 (citing F. Kalshoven, *Arms, Armaments and International Law*, 191 HAGUE ACADEMY OF INTERNATIONAL LAW, 283–84 (Recueil de Cours) (1985-II)).

²²⁰ See U.S. ICJ Memorandum/GA App. at 24.

²²¹ *Id.* at 24–25 (citing Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous, or Other Gases, and of Bacteriological Methods of Warfare, 17 June 1925, 94 L.N.T.S. 65; F. Kalshoven, *Arms, Armaments and International Law*, 191 HAGUE ACADEMY OF INTERNATIONAL LAW (RECUEIL DE COURTS) (1985-II), pp. 283–84).

²²² THE NAVAL/MARINE COMMANDER'S HANDBOOK, *supra* note ___, at 10-2.

fumes” produced by conventional explosives or incendiaries are not factually or legally comparable to radiation from nuclear weapons that is carried forward on a virtually unlimited basis in space and time.

While the ICJ concluded that the various conventions banning the use of poisons in warfare were not understood, in the practice of States, as referring to nuclear weapons,²²³ it provided no support for the proposition that the radiation effects of nuclear weapons are irrelevant under international humanitarian law.

Use of Low Yield Nuclear Weapons in Remote Areas

As discussed above, the United States’ primary defense of the lawfulness of nuclear weapons before the ICJ was based on the premise that the U.S. has low yield nuclear weapons whose effects it can control, with the United States postulating what it characterized as “plausible scenarios, such as a small number of accurate attacks by low-yield weapons against an equally small number of military targets in non-urban areas.”²²⁴

While, as noted above,²²⁵ the United States in its presentations to the ICJ did not define what it meant by “low” yield nuclear weapons, the term at the time was defined in the Joint Chiefs’ of Staff’s manual *Doctrine for Joint Theater Nuclear Operations*:

Very low — less than 1 kiloton.
 Low — 1 kiloton to 10 kilotons.
 Medium — over 10 kilotons to 50 kilotons.
 High — over 50 kilotons to 500 kilotons.
 Very high — over 500 kilotons. (Joint Pub 1-02)²²⁶

This argument seems to lack substantial merit. First of all, while the U.S. maintains some low yield nuclear weapons, the U.S. arsenal is made up predominately of high yield nuclear weapons.²²⁷ In addition, as discussed above, even the low yield nuclear weapons are unlawful under international humanitarian law, *inter alia*, because their effects are uncontrollable.²²⁸

Use of lower yield nuclear weapons would also appear potentially to be precluded under international law because virtually any military objectives for which such weapons might be used could also be addressed by conventional weapons. The rules of necessity and proportionality prohibit the use of nuclear weapons if the military objective could be achieved through conventional weapons.²²⁹

²²³ Nuclear Weapons Advisory Opinion ¶¶ 54-55 at 26 *citing* Second Hague Declaration of 29 July 1899, (b) Regulations Respecting the Laws and Customs of War on Land Annexed to the Hague Convention IV of 18 October 1907, Article 23 (a); Geneva Protocol of 17 June 1925.

²²⁴ *Id.*

²²⁵ See footnotes ____ and accompanying text.

²²⁶ DOCTRINE FOR JOINT THEATER NUCLEAR OPERATIONS, *supra* note 3, at GL-3.

²²⁷ See Robert S. Norris & Hans M. Kristensen, *Nuclear Notebook: U.S. Nuclear Forces, 2009*, 66 BULL. OF THE ATOMIC SCIENTISTS 57-71 (May/June 2010), *available at* <http://thebulletin.metapress.com/content/067796p218428428/fulltext.pdf>

²²⁸ See footnotes ____ *supra* and accompanying text.

²²⁹ See footnotes ____ *supra* and accompanying text.

In addition, this argument by the United States ignores the likely effects of counter-strike and escalation, effects which have to be included in the legal analysis. Scenarios of laboratory condition strikes are an realistic basis upon which to conduct the legal analysis or establish legal norms.

The U.S. argument raises questions as to whether the real world production, deployment and other policies regarding nuclear weapons are based on exceptional circumstances, extraordinary events in which a nuclear weapon might theoretically be used in compliance with law, or on real world circumstances as to likely use, were use to occur. Thousands of these bombs remain with us. It is time that nuclear weapons States demonstrate explicitly how they intend to use them in a legal fashion and if they cannot what are their rapid specific plans to change.

Use of Nuclear Weapons in Reprisal for Another State's Unlawful First Use

The United States argued before the ICJ that, even if the use of nuclear weapons were deemed *per se* unlawful, such weapons could still be used in reprisal:

Even if it were to be concluded—as we clearly have not—that the use of nuclear weapons would necessarily be unlawful, the customary law of reprisal permits a belligerent to respond to another party's violation of the law of armed conflict by itself resorting to what otherwise would be unlawful conduct.²³⁰

Acknowledging that reprisals must be taken with intent to cause the enemy to cease violations of the law of armed conflict and after all other means of securing compliance have been exhausted, and that they must be proportionate to the violations, the United States, in its memorandum to the ICJ, took the position that the legality of reprisals must be determined on a case-by-case basis.²³¹

The United States further dismissed as inapplicable to nuclear weapons and as new provisions not assimilated into customary law the provisions of Additional Protocol I containing prohibitions on reprisals against specific types of persons or objects, including the civilian population or individual civilians, civilian objects, cultural objects and places of worship, objects indispensable to the survival of the civilian population, the natural environment, and works and installations containing dangerous forces.²³²

²³⁰ ICJ Hearing, November 15, 1995, at 95.

²³¹ *See id.* at 30 (citing U.S. Army Field Manual 27-10, Change No. 1, THE LAW OF LAND WARFARE (1976), at 177, para. 497). *See also* ICJ Hearing, November 15, 1985 at 94–95.

²³² *See* U.S. ICJ Memorandum/GA App. at 31 (citing Additional Protocol I, arts. 51(6), 52(1), 53(c), 54(4), 55(2), and 56(4)).

The Navy in an earlier edition of its *Naval Commander's Handbook* hedged the issue, saying that targeting enemy civilians in reprisal was “lawful[]” and “legitimate” but “not appropriate.”

Reprisals may lawfully be taken against enemy individuals who have not yet fallen into the hands of the forces making the reprisals. While the United States has always considered that civilian persons are not appropriate objects of attack in reprisal, members of the enemy civilian population are still legitimate objects of reprisals. However, since they are excluded from this category by the 1977 Protocol I Additional to the 1949 Geneva Conventions, for nations party thereto, enemy civilians and the enemy civilian population are prohibited objects of reprisal by their armed forces. The United States has found this new prohibition to be militarily unacceptable.²³³

We address this issue first on the United States' terms (that the restrictions on reprisals in Additional Protocol I do not apply to nuclear weapons) and then comment on the status of the issue as to the applicability of Additional Protocol I to attacks on civilians in reprisal.

It seems highly unlikely that a State considering the use of nuclear weapons in reprisal for an adversary's use of nuclear weapons would – or would even be able to -- comply with the legal requirements for reprisals. Almost inevitably, the use of nuclear weapons in reprisal to respond to a prior unlawful use of nuclear weapons by the adversary would be excessive and would likely lead to escalation and an expansion of the scope of the violence.

The above referenced requirements that reprisals be both necessary to make the adversary comply with the law and proportionate to the offending violation would appear to make nuclear reprisals unlawful, since the effects of nuclear weapons are uncontrollable – and hence cannot be limited or constrained within such requirements.²³⁴

Consider the potential effects of the second use in reprisal, including the sheer destructiveness of the nuclear weapon(s) used; the electromagnetic effects; the radiation effects; the risks of hitting the wrong target; the risks of precipitating escalation to higher levels of nuclear warfare; the risks of precipitating the enemy's or even one's own further preemptive strikes; the long-term effects of radioactive fallout; the risks of precipitating chemical or biological weapons use. Any one of these effects would likely exceed the level of action necessary to convince the other side to constrain itself to lawful warfare and be so provocative as to have the opposite effect of precipitating total violence. Taken together, these effects would appear to be of a radically different nature and order than that contemplated by the law of reprisal.²³⁵

Given the uncontrollability of such effects, how could a State considering a nuclear reprisal reasonably believe that it could limit the strike to that necessary to induce the adversary to follow the law in the future? Without such a reasonable belief, how could the State be said to intend the reprisal to be within the legal limits?

²³³ THE NAVAL/MARINE COMMANDER'S HANDBOOK at 6-18 n.33.

²³⁴ See footnotes _____ supra and accompanying text.

²³⁵ See footnotes _____ supra and accompanying text.

And is it not clear, given all we know of the practicalities of nuclear strategy, that the purported use of nuclear weapons in reprisal would almost inevitably be designed to punish the enemy and, not incidentally, in the case of a substantial nuclear adversary, to use one's own nuclear assets before they could be preemptively struck by the adversary, and to attempt to preemptively strike the adversary's nuclear assets (many of which would likely be "co-located" with civilian targets) before they could be used. Even assuming adequate command and control, crucial decisions would have to be made within a very short time and would likely be dictated largely by existing war plans contemplating nuclear weapons use. The notion of a second strike as limited to the legitimate objectives of reprisal seems oxymoronic.

Thus, the very idea of a State's second nuclear strike responding to an adversary's first strike in reprisal is unrealistic, given the real purposes the State would have in conducting the second strike. The upshot is that the second strike would be subject to all of the requirements of international humanitarian law discussed above, including the requirements of discrimination, proportionality, necessity, and controllability.

The very premise of the attempted justification of the second use as a reprisal (the assumption that the first strike was unlawful for failure to comply with such rules as those of necessity, proportionality, distinction, and the corollary requirement of controllability) portends the unlawfulness of the second use in reprisal. Just as the likely effects of the first use were impermissibly excessive and far-reaching under the referenced rules of international humanitarian law, so too would the likely effects of the second use be impermissibly excessive and far-reaching under the requirements of international humanitarian law for reprisals.

It must be recognized that the second use in reprisal would likely carry greater risks of impermissible effects than the first. Specifically, even assuming that the adversary's first use could have been conducted in such a limited fashion as not to threaten impermissible effects, the second use—constituting the fact of a mutual willingness to engage in nuclear war and the heightened likelihood of precipitating major escalation—would involve the risk of even more severe and uncontrollable effects.

While one can conjure up reprisals comparable to the limited strikes at remote sea or desert targets that were the focus of the U.S. defense of nuclear weapons before the ICJ, such legalistic exercises are unrealistic in the real world context of the types of circumstances in which these weapons might be used and their potential effects, and cannot reasonably serve as the basis for the evaluation of lawfulness.

Even if one hypothesizes a lawful nuclear reprisal using a low yield nuclear weapons in a remote area to convince the adversary to step back from the precipice of nuclear mutual destruction, does such a laboratory conditions exercise serve to justify the lawfulness of huge nuclear arsenals such as those of the United States made up predominately of nuclear weapons with yields of between 100 and over 400 kilotons?

It is also clear that a nuclear reprisal could not satisfy the prerequisite of being necessary if the reprising State could achieve the objective with conventional weapons. For the United States, given its conventional weapons capabilities, this would be a hard test to meet in many circumstances, particularly in connection with an armed conflict with a smaller nuclear weapons State possessing a limited number of such weapons.

The ICJ in the Nuclear Weapons Advisory Case did not express a conclusion as to reprisals:

46. Certain States asserted that the use of nuclear weapons in the conduct of reprisals would be lawful. The Court does not have to examine, in this context, the question of armed reprisals in time of peace, which are considered to be unlawful. Nor does it have to pronounce on the question of belligerent reprisals save to observe that in any case any right of recourse to such reprisals would, like self-defence, be governed *inter alia* by the principle of proportionality.²³⁶

However, as noted above, the Court did conclude that States “must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets.”²³⁷

The ICJ also did not express a conclusion on the issue of the applicability of Additional Protocol I to nuclear weapons, except to note that, to the extent that that Protocol merely codified pre-existing customary law, said customary law remained in effect

84. Nor is there any need for the Court to elaborate on the question of the applicability of Additional Protocol 1 of 1977 to nuclear weapons. It need only observe that while, at the Diplomatic Conference of 1974-1977, there was no substantive debate on the nuclear issue and no specific solution concerning this question was put forward, Additional Protocol 1 in no way replaced the general customary rules applicable to all means and methods of combat including nuclear weapons. In particular, the Court recalls that all States are bound by those rules in Additional Protocol 1 which, when adopted, were merely the expression of the pre-existing customary law, such as the Martens Clause, reaffirmed in the first article of Additional Protocol 1. The fact that certain types of weapons were not specifically dealt with by the 1974-1977 Conference does not permit the drawing of any legal conclusions relating to the substantive issues which the use of such weapons would raise.²³⁸

The International Committee of the Red Cross, in a recent study *Customary International Humanitarian Law*, concluded that, while state practice may not yet have led to a customary rule specifically prohibiting reprisals against civilians, that there appears to be at least a trend in favor of prohibiting such reprisals:

Because of existing contrary practice, albeit very limited, it is difficult to conclude that there has yet crystallised a customary rule specifically

²³⁶ Nuclear Weapons Advisory Opinion ¶ 46 at 24.

²³⁷ Nuclear Weapons Advisory Opinion ¶ 78 at 35.

²³⁸ Nuclear Weapons Advisory Opinion ¶ 84 at 37.

prohibiting reprisals against civilians during the conduct of hostilities. Nevertheless, it is also difficult to assert that a right to resort to such reprisals continues to exist on the strength of the practice of only a limited number of States, some of which is also ambiguous. Hence, there appears, at a minimum, to exist a trend in favour of prohibiting such reprisals. The International Criminal Tribunal for the Former Yugoslavia, in its review of the indictment in the Martić case in 1996 and in its judgement in the Kupreškić case in 2000, found that there was such a prohibition already in existence, based largely on the imperatives of humanity or public conscience.⁸⁴ These are important indications, consistent with a substantial body of practice now condemning or outlawing such reprisals.²³⁹

The Red Cross's sense that there is, at a minimum, a trend in favor of prohibiting reprisals against civilians is supported by the ICJ's finding in the Nuclear Weapons Advisory case that States "must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets."²⁴⁰ Also supporting this conclusion is the recognition by the U.S. military that reprisals against civilians are "not appropriate."²⁴¹

Mexico's Ambassador Sergio Gonzalez Galvez addressed the ICJ on this point in the Nuclear Weapons Advisory Case:

Torture is not a permissible response to torture. Nor is mass rape acceptable retaliation to mass rape. Just as unacceptable is retaliatory deterrence – "You burn my city, I will burn yours."²⁴²

Professor Eric David, on behalf of Solomon Islands, stated before the ICJ in the Nuclear Weapons Advisory Case:

If the dispatch of a nuclear weapon causes a million deaths, retaliation with another nuclear weapon which will also cause a million deaths will perhaps protect the sovereignty of the state suffering the first strike, and will perhaps satisfy the victim's desire for revenge, but it will not satisfy humanitarian law, which will have been breached not once but twice; and two wrongs do not make a right.²⁴³

One can speculate that the United States has refused to ratify Protocol I and resisted the contemporary prohibition of reprisals against civilians in an effort to strengthen the perceived efficacy of its policy of nuclear deterrence. Yet the question must be faced as

²³⁹ Jean-Marie Henckaerts and Louise Doswald-Beck, *International Committee of the Red Cross, Customary Humanitarian International Law*, Vol I, Rule 146, 520-523 (citations omitted) (Cambridge University Press, 2005, reprinted with corrections, 2009), available at <http://www.icrc.org/web/eng/siteeng0.nsf/html/pcustom>.

²⁴⁰ Nuclear Weapons Advisory Opinion ¶ 78 at 35.

²⁴¹ THE NAVAL COMMANDER'S HANDBOOK at 6-18 n.33.

²⁴² Gonzalez Galvez, Mexico, Verbatim record, Nov. 3, 1995, 51, available at <http://www.icj-cij.org/docket/files/95/5931.pdf>.

²⁴³ Eric David, Solomon Islands, Verbatim record (trans) Nov. 14, 1995, 49, available at <http://www.icj-cij.org/docket/files/95/5943.pdf>.

to whether the price – the continuation of the hair trigger nuclear world and the inevitable resultant proliferation – is worth the putative benefit.

Need for Evaluation of the Use of Nuclear Weapons on a Case by Case Basis

This is the United States’ overriding position—that the lawfulness of the use of nuclear weapons cannot be determined in the abstract or categorically, but must be made on an ad hoc basis.

This position is not tenable. First of all, from the United States’ own statements of the matter, the reality is that the time within which the United States would have to decide whether to use nuclear weapons under crisis conditions would be so short as, realistically, not to allow for sufficient time for weighing of the legalities of the matter. As a result, the position that the matter is to be evaluated on an ad hoc basis in practical terms means that the legalities would not be considered.

For example, the Joint Chiefs in their earlier *Doctrine for Joint Nuclear Operations* emphasized the extremely short periods of time—often matters of minutes or even seconds—that would be available for crucial decision making in nuclear confrontations:

Very short timelines impact decisions that must be made. In a matter of **seconds for the defense**, and **minutes for the offense**, critical decisions must be made in concert with discussions with NCA.²⁴⁴

The *Doctrine for Joint Nuclear Operations* also noted the need for decisive strikes, once the decision to go nuclear has been made:

Responsiveness. Some targets must be struck quickly once a decision to employ nuclear weapons has been made. Just as important is the requirement to promptly strike high-priority, time-sensitive targets that emerge after the conflict begins. Because force employment requirements may evolve at irregular intervals, some surviving nuclear weapons must be capable of striking these targets within the brief time available. Responsiveness (measured as the interval between the decision to strike a specific target and detonation of a weapon over that target) is critical to ensure engaging some emerging targets.²⁴⁵

The Joint Chiefs in their earlier manual *Doctrine for Joint Theater Nuclear Operations* further emphasized the potential time constraints—and the need for quick ad hoc judgments as to targeting:

Because preplanned theater nuclear options do not exist for every scenario, CINCs must have a capability to plan and execute nuclear options for nuclear forces generated on short notice during crisis and emergency situations. During crisis action planning, geographic combatant commanders evaluate their theater situation and propose courses of action or initiate a request for nuclear support.²⁴⁶

Against this background, the U.S. position that the lawfulness of the use of nuclear weapons must be made on an *ad hoc* basis according to the circumstances of each contemplated use is problematical from a practical perspective and unsupportable as a matter of law. With only minutes (or even hours) to make these huge decisions involving many pragmatic considerations, *ad hoc* legal evaluation would likely amount to

²⁴⁴ *Id.* at III-8 (Emphasis supplied).

²⁴⁵ DOCTRINE FOR JOINT NUCLEAR OPERATIONS, *supra* note ___, at II-3–4 (emphasis omitted).

²⁴⁶ DOCTRINE FOR JOINT THEATER NUCLEAR OPERATIONS, *supra* note ___, at III-10 (emphasis omitted).

little or no legal evaluation. The result is the virtual abnegation of international humanitarian law, in effect putting nuclear weapons and the policy of deterrence largely outside the realm of law.

But it does not have to be this way—and should not. The effects of nuclear weapons are already clear. The excessive and unnecessary nature of such effects can be evaluated now on a categorical basis from which the unlawfulness of their use becomes apparent.

No General Prohibition of Nuclear Weapons Unless the U.S. Agrees to Such a Prohibition

The United States position, as expressed before the ICJ, is that there is no *per se* rule banning the use of nuclear weapons because the United States has not consented to any such rule, and hence that each contemplated use of such weapons must be evaluated on an *ad hoc* basis.

The United States argues that it is only bound by conventional law specifically agreed to by the United States and customary law established by the practice of the community of nations, including the nations specially involved (here, the nuclear powers), out of a sense of obligation. The United States concludes that, since it has not agreed to a convention specifically prohibiting the use of nuclear weapons and has not refrained from their use out of a sense of obligation, such use cannot be *per se* unlawful.

Conrad K. Harper, Legal Advisor of the United States Department of State, told the Court that its “starting point in examining the merits” should be “the fundamental principle of international law that restrictions on States cannot be presumed, but must be established by conventional law specifically accepted by them, or in customary law established by the conduct of the community of nations.”²⁴⁷

Michael J. Matheson, the Deputy Legal Advisor, Department of State, in his presentation to the Court, made the same point: Restrictions upon States must “be found in conventional law specifically accepted by States, or in customary law generally accepted as such by the community of nations.”²⁴⁸ Matheson relied upon the Court’s statement in the *Nicaragua* case that:

“in international law there are no rules, other than such rules as may be accepted by the State concerned, by treaty or otherwise, whereby the level of armaments of a sovereign State can be limited.”²⁴⁹

This U.S. position on this point, as presented to the ICJ, overlooks the existence of other sources of international law, including general principles of law. Moreover, it ignores the fact that the United States, as evidenced by the numerous references to United States military documents in this article, recognizes that the broad rules of the law of armed conflict—such as the rules of distinction, proportionality and necessity and the

²⁴⁷ ICJ Hearing, November 15, 1995, at 70.

²⁴⁸ *Id.* at 74–75.

²⁴⁹ *Id.* (citing Nicaragua v. United States (1986 I.C.J. 135)).

corollary requirement of controllability— apply to any application of force, including nuclear weapons²⁵⁰

Once the applicability of such rules is acknowledged, the United States is bound by their application regardless of whether it agrees with the particular application. Neither the consensual basis of international law nor the principle of sovereignty limits the application of established rules of law. If the use of nuclear weapons is *per se* unlawful under those principles, the United States and other nuclear weapons States are subject to such unlawfulness fully as much as if they had signed a convention or purposefully joined in the formation of custom to that effect.

The Air Force in its prior *Manual on International Law* stated that the use of a weapon may be unlawful based not only on “expressed prohibitions contained in specific rules of custom and convention,” but also on “those prohibitions laid down in the general principles of the law of war.”²⁵¹

Similarly, in discussing how the lawfulness of new weapons and methods of warfare is determined, the manual stated that such determination is made based on international treaty or custom, upon “analogy to weapons or methods previously determined to be lawful or unlawful,” and upon the evaluation of the compliance of such new weapons or methods with established principles of law, such as the rules of necessity, discrimination and proportionality.²⁵²

The manual noted that the International Military Tribunal at Nuremberg in the case of the *Major War Criminals* found that international law is contained not only in treaties and custom but also in the “general principles of justice applied by jurists and practiced by military courts.”²⁵³

The Air Force Manual on International Law further stated that the practice of States “does not modify” the legal obligation to comply with treaty obligations since such obligations are “contractual in nature.”²⁵⁴

The Army’s *Law of Land Warfare* states “[t]he conduct of armed hostilities on land is regulated by the law of land warfare which is both written and unwritten.”²⁵⁵

²⁵⁰ The United States has recognized these rules as arising under customary and treaty law and general principles of law. See footnotes __ supra and accompanying text. In its arguments before the ICJ, the United States acknowledged that scientific evidence could justify a total prohibition of nuclear weapons if it demonstrated the unlawfulness of all such uses: “[S]cientific evidence could only justify a total prohibition on the use of nuclear weapons if such evidence covers the full range of variables and circumstances that might be involved in such uses.” ICJ Hearing, November 15, 1995, at 90.

²⁵¹ THE UNITED STATES DEPARTMENT OF THE AIR FORCE, INTERNATIONAL LAW—THE CONDUCT OF ARMED CONFLICT AND AIR OPERATIONS 6-1, 6-9 n.3 (Air Force Pamphlet 110-31, 19 November 1976). While this manual no longer appears to be in effect (see _____), we are not aware of any reason to believe that the law relating to the development of international law has changed.

²⁵² See *id.* at 6-7.

²⁵³ *Id.* at 1-6.

²⁵⁴ *Id.* at 1-15 n.35.

The United States recognizes “analogy” as well as “general principles” as sources of the law of armed conflict. *The Air Force Manual on International Law* stated:

The law of armed conflict affecting aerial operations is not entirely codified. Therefore, the law applicable to air warfare must be derived from general principles, extrapolated from the law affecting land or sea warfare, or derived from other sources including the practice of states reflected in a wide variety of sources. Yet the US is a party to numerous treaties which affect aerial operations either directly or by analogy.²⁵⁶

The manual noted that *per se* unlawfulness is not limited to prohibitions established in treaties or customary law:

[A] new weapon or method of warfare may be illegal, *per se*, if it is restricted by international law including treaty or international custom. The issue is resolved, or attempted to be resolved, by analogy to weapons or methods previously determined to be lawful or unlawful.²⁵⁷

Based on the foregoing, it seemed clear that the use of nuclear weapons can be unlawful *per se* regardless of whether there is a treaty or custom establishing such unlawfulness. We conclude that the known effects of nuclear weapons, as described above,²⁵⁸ are such that the use of nuclear weapons, even low yield nuclear weapons, would be unlawful in virtually all circumstances.

Lawfulness of the Threat of Use of All Nuclear Weapons in the U.S. Arsenal if It Can Be Said that The Use of Any Nuclear Weapon in that Arsenal Is Lawful

This argument of the United States was alluded to in the discussion of the controllability point. It seems evident that, if the use of some nuclear weapons, say the higher yield weapons, were assumed, *arguendo*, to be putatively unlawful, and the use of other nuclear weapons, say low-yield nuclear weapons, were assumed to be putatively lawful, the result would be a conclusion that weapons falling within certain parameters would putatively be lawful and those falling outside such parameters would putatively be unlawful.

What would make no sense and would seem to be legally untenable would be the position that the threat and use of the State’s entire nuclear arsenal was lawful because some of its lower yield weapons could possibly be used within permissible parameters.

Yet that seems to be the U.S. position. As noted above,²⁵⁹ the U.S., in its defense of nuclear weapons before the ICJ, focused on its ability to use low yield nuclear weapons in a surgical way, limiting collateral effects and complying with international law. Yet the U.S. continues to maintain an arsenal composed mostly of nuclear weapons with yields of between 100 and over 400 kilotons, to keep those weapons at alert for use, and continues to threaten their use through the policy of nuclear deterrence. Other nuclear

²⁵⁵ UNITED STATES DEPARTMENT OF THE ARMY, THE LAW OF LAND WARFARE 3 (FM27-10/18 July 1956) with Change No. 1 (15 July 1976) [hereinafter THE LAW OF LAND WARFARE].

²⁵⁶ THE AIR FORCE MANUAL ON INTERNATIONAL LAW, *supra* note 9, at 1-7.

²⁵⁷ *Id.* at 6-7.

²⁵⁸ See footnotes __ *supra* and accompanying text.

²⁵⁹ See footnotes __ *supra* and accompanying text.

weapons States are doing the same.

The Characterization that the ICJ Found the Use of Nuclear Weapons To Be Lawful

Subsequent to the ICJ decision, the U.S. military manuals seem to have taken the tack that the ICJ, in effect, found the use and threat of use of nuclear weapons to be lawful.

The Army in its 2010 *Law of War Deskbook* states:

Not prohibited by international law. In 1996, the International Court of Justice (ICJ) issued an advisory opinion¹⁷ that “[t]here is in neither customary nor international law any comprehensive and universal prohibition of the threat or use of nuclear weapons.”²⁶⁰

The manual went on to state, “However, by a split vote, the ICJ also found that ‘[t]he threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict.’ The ICJ stated that it could not definitively conclude 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 the state would be at stake.”²⁶¹

Similarly, the Army in its 2010 *Operational Law Handbook* stated:

Nuclear Weapons. Nuclear weapons are not prohibited by international law. On 8 July 1996, the International Court of Justice (ICJ) issued an *advisory* opinion that “[t]here is in neither customary nor international law any comprehensive and universal prohibition of the threat or use of nuclear weapons.” However, by a split vote, the ICJ also found that “[t]he threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict.” The Court stated that it could not definitively conclude 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 the state would be at stake.²⁶²

While the foregoing language is subject to interpretation, we have the impression

²⁶⁰ INT’L & OPERATIONAL LAW DEP’T, U.S. DEP’T OF THE ARMY, LAW OF WAR DESKBOOK, 153 (2010) available at http://www.loc.gov/rr/frd/Military_Law/pdf/LOW-Deskbook-2010.pdf citing FM 27-10, para. 35.

²⁶¹ INT’L & OPERATIONAL LAW DEP’T, U.S. DEP’T OF THE ARMY, LAW OF WAR DESKBOOK, 153 (2010) available at http://www.loc.gov/rr/frd/Military_Law/pdf/LOW-Deskbook-2010.pdf citing FM 27-10, para. 35.

²⁶² INT’L & OPERATIONAL LAW DEP’T, U.S. DEP’T OF THE ARMY, OPERATIONAL LAW HANDBOOK, 19 (2010) available at [www.jagcnet.army.mil/8525751D0057F1B6/0/9AA89AFB204D01BE8525776100451636/\\$file/Operational%20Law%20Handbook%20%282010%29.pdf](http://www.jagcnet.army.mil/8525751D0057F1B6/0/9AA89AFB204D01BE8525776100451636/$file/Operational%20Law%20Handbook%20%282010%29.pdf)

that the U.S. has generally interpreted the ICJ decision as giving a green light to nuclear weapons. “Nuclear weapons are not prohibited by international law.” Yet, as is evident from the discussion above,²⁶³ this is clearly an inaccurate characterization of the Court’s decision and of the United States’ broader position as to the applicability of the law of war to nuclear weapons..

Specifically, as discussed above,²⁶⁴ the U.S. has repeatedly acknowledged that the use of nuclear weapons is subject to the requirements of international humanitarian law, including the rules of distinction, necessity, and proportionality, and the corollary rule of controllability.

In addition, it is inaccurate to say that the ICJ found the use of nuclear weapons to be not prohibited under international law. As discussed above,²⁶⁵ the Court found the use of nuclear weapons to be subject to international humanitarian law. It further found that the use of nuclear weapons “seems scarcely reconcilable” with such requirements²⁶⁶ and “would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law.”²⁶⁷ The Court then went on to say that “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.”²⁶⁸ This is a far cry from finding that the use of nuclear weapons is not prohibited by international law.

The Implicit Argument that Nuclear Weapons May Be Used in Extreme Circumstances of Self-Defense

As discussed above, the United States, in its arguments to the ICJ, acknowledged that the use and threat of use of nuclear weapons is subject to international humanitarian law.²⁶⁹ Thus, the U.S. did not take the position before the ICJ that a State’s right of self-defense overrides international law. However, the U.S., in the 2010 Nuclear Posture Review issued by the Obama Administration states several times that the United States would only use nuclear weapons in “extreme circumstances.”²⁷⁰

We do not know if this language was intended to invoke the ICJ’s formulation of extreme circumstances of self-defense, but, if it was, or if it was intended to suggest that extreme circumstances render use of nuclear weapons more lawful, it must be addressed. The ICJ was explicit that it was not determining that the use of nuclear

²⁶³ See footnotes ___ supra and accompanying text.

²⁶⁴ See footnotes ___ supra and accompanying text.

²⁶⁵ See footnotes ___ supra and accompanying text.

²⁶⁶ Nuclear Weapons Advisory Opinion ¶ 95 at 40.

²⁶⁷ Nuclear Weapons Advisory Opinion ¶ 105. E., at 44.

²⁶⁸ Nuclear Weapons Advisory Opinion ¶ 105. E., at 36, 35 I.L.M. at 835.

²⁶⁹ See footnotes ___ supra and accompanying text.

²⁷⁰ United States Department of Defense, Nuclear Posture Review Report viii-ix, 16-17, April 2010, available at <http://www.defense.gov/npr/docs/2010%20Nuclear%20Posture%20Review%20Report.pdf>.

weapons is lawful in extreme circumstances of self-defense in which the very survival of a State is at stake. It said, quite differently, that it was unable to reach a conclusion on this point.

In addition, while the language of the ICJ decision was unclear at some points, the totality of the ICJ decision, as discussed above,²⁷¹ was clear that a State's exercise of its right of self-defense, whether it be in "extreme" or non-extreme self-defense, is subject to international humanitarian law. A State's exercise of the right of self-defense must "conform[] to the fundamental principles of the law of armed conflict regulating the conduct of hostilities."²⁷²

The Court noted, for example, that the exercise by a State of the right of self-defense must comply, *inter alia*, with the principle of proportionality, specifically stating that a "use of force that is proportionate under the law of self-defense, must in order to be lawful, also meet the requirements of the law applicable in armed conflict which comprise in particular the principles and rules of humanitarian law."²⁷³ The Court stated:

40. The entitlement to resort to self-defence under Article 51 is subject to certain constraints. Some of these constraints are inherent in the very concept of self-defence. Other requirements are specified in Article 51.

41. The submission of the exercise of the right of self-defence to the conditions of necessity and proportionality is a rule of customary international law. As the Court stated in the case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (I.C.J. Reports 1986, p. 94, para. 176): "there is a specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law". This dual condition applies equally to Article 51 of the Charter, whatever the means of force employed.

42. The proportionality principle may thus not in itself exclude the use of nuclear weapons in self-defence in all circumstances. *But at the same time, a use of force that is proportionate under the law of self-defence, must, in order to be lawful, also meet the requirements of the law applicable in armed conflict*

In addition, as discussed above as to the purposes of international humanitarian law,²⁷⁴ the very purpose of such law is to address the exigencies of war.

Threat and Deterrence

Accordingly, there are cogent reasons to conclude that the use of nuclear weapons would be unlawful under international humanitarian law. This has significant implications for the policy of nuclear deterrence followed by the nuclear weapons states.

Specifically, the ICJ concluded in the Nuclear Weapons Advisory Case and the States before the Court generally agreed that it is unlawful under international law for a State to threaten to do that which it would be unlawful to do. The Court stated, "If an

²⁷¹ See footnotes __ supra and accompanying text.

²⁷² Nuclear Weapons Advisory Opinion ¶ 91, at 39, 35 I.L.M. at 829 (citing the written statement of the United Kingdom ¶ 3.44, at 40).

²⁷³ Nuclear Weapons Advisory Opinion ¶ 42, at 23, 35 I.L.M. at 822.

²⁷⁴ See footnotes __ supra and accompanying text.

envisaged use of weapons would not meet the requirements of humanitarian law, a threat to engage in such use would also be contrary to that law.”²⁷⁵

Then, in its discussion of the status of deterrence under the UN Charter, the Court indicated that a threat to perform an act violative of international humanitarian law violates not only that law but also the Charter. The Court said that “The notions of ‘threat’ and ‘use’ of force under Article 2, paragraph 4, of the Charter stand together in the sense that if the use of force itself in a given case is illegal-for whatever reason-the threat to use such force will likewise be illegal.”²⁷⁶ “For whatever reason” would incorporate international humanitarian law.

The Court also said, “Whether [a policy of deterrence] is a ‘threat’ contrary to Article 2, paragraph 4, depends upon whether the particular use of force envisaged would be directed against the territorial integrity or political independence of a State, or against the Purposes of the United Nations or whether, in the event that it were intended as a means of defence, it would necessarily violate the principles of necessity and proportionality.”²⁷⁷ The Court had stated earlier in its discussion of proportionality as a condition for the exercise of self-defense (as opposed to proportionality in carrying out a particular military operation) that proportionality requires conformity with international humanitarian law.²⁷⁸

The United States, in its written and oral arguments to the ICJ, acknowledged that deterrence would be invalidated if the use of nuclear weapons would be unlawful. U.S. lawyer Michael J. Matheson, in his oral argument to the Court, stated:

[E]ach of the Permanent Members of the Security Council has made an immense commitment of human and material resources to acquire and maintain stocks of nuclear weapons and their delivery systems, and many other States have decided to rely for their security on these nuclear capabilities. If these weapons could not lawfully be used in individual or collective self-defense under any circumstances, there would be no credible threat of such use in response to aggression and deterrent policies would be futile and meaningless. In this sense, it is impossible to separate the policy of deterrence from the legality of the use of the means of deterrence. Accordingly, any affirmation of a general prohibition on the use of nuclear weapons would be directly contrary to one of the fundamental premises of the national security policy of each of these many states.²⁷⁹

This formal statement by the United States representatives is a powerful confirmation of the significant point that the lawfulness of the policy of nuclear deterrence depends upon the lawfulness of the underlying use. If nuclear weapons cannot lawfully be used, their use may not be lawfully threatened. As Mr. Mattheson put it so memorably, if nuclear weapons could not lawfully be used, “there would be no credible threat of such use in response to aggression and deterrent policies would be futile and meaningless.”

²⁷⁵ Nuclear Weapons Advisory Opinion ¶ 78, at 35.

²⁷⁶ Nuclear Weapons Advisory Opinion ¶ 47, at 24.

²⁷⁷ Nuclear Weapons Advisory Opinion ¶ 47, at 24.

²⁷⁸ Nuclear Weapons Advisory Opinion ¶ 41, at 23.

²⁷⁹ U.S. ICJ Memorandum/GA App. at 78.

This limitation on the lawfulness of the policy of deterrence becomes particularly significant in light of the fact discussed above²⁸⁰ that the United States' defense of the lawfulness of the use of nuclear weapons has been focused upon the defense of the use of low yield nuclear weapons.

The importance of clarifying the legal position of nuclear weapons under international law is confirmed by the United States' explicit statement in its memorandum to the ICJ that the United States would not acquire and maintain nuclear weapons and the attendant delivery systems if it were known that the use of the weapons was unlawful:

It is well known that the Permanent Members of the Security Council possess nuclear weapons and have developed and deployed systems for their use in armed conflict. These States would not have borne the expense and effort of acquiring and maintaining these weapons and delivery systems if they believed that the use of nuclear weapons was generally prohibited. On the contrary, the possible use of these weapons is an important factor in the structure of their military establishments, the development of their security doctrines and strategy, and their efforts to prevent aggression and provide an essential element of the exercise of their right of self-defense.²⁸¹

Given the legal rule that a threat is unlawful if the underlying action would be unlawful, it is evident that there are serious questions whether the policy of nuclear deterrence followed by nuclear weapons states can withstand analysis. Given our conclusion that the use of nuclear weapons, even of low yield nuclear weapons in extreme circumstances of self-defense, would be unlawful under the law of armed conflict, the policy of deterrence seems equally unlawful.

PART II: THE NPT COMMITMENT TO COMPLIANCE WITH INTERNATIONAL HUMANITARIAN LAW

We have shown that the United States accepts rules of international humanitarian law and accepts that they apply to nuclear weapons. That position is shared by other States with nuclear weapons. As the ICJ noted in its advisory opinion:

None of the statements made before the Court in any way advocated a freedom to use nuclear weapons without regard to humanitarian constraints. Quite the reverse; it has been explicitly stated,

"Restrictions set by the rules applicable to armed conflicts in respect of means and methods of warfare definitely also extend to nuclear weapons"
(Russian Federation, CR 95/29, p. 52);

"So far as the customary law of war is concerned, the United Kingdom has always accepted that the use of nuclear weapons is subject to the general

²⁸⁰ See footnotes __ supra and accompanying text.

²⁸¹ U.S. ICJ Memorandum/GA App. at 14 (citing Report of the U.N. Secretary-General on Nuclear Weapons, A/45/373, 18 September 1990, pp. 19–24).

principles of the *jus in bello*" (United Kingdom, CR 95/34, p. 45); and

"The United States has long shared the view that the law of armed conflict governs the use of nuclear weapons -- just as it governs the use of conventional weapons" (United States of America, CR 95/34, p. 85.)²⁸²

Moreover, the content of the applicable rules in the main is reasonably clear, though there can be disputes about the details. This is demonstrated by a major study, *Customary Humanitarian International Law*, published in 2005 by the International Committee of the Red Cross (ICRC).²⁸³ The ICRC has a well deserved reputation as the guardian of IHL. The study is an authoritative statement of the applicable requirements. It identifies IHL rules based upon exhaustive research into state practice and legal opinion as manifested by armed forces manuals on the law of armed conflict, multilateral treaties including Protocol I to the Geneva Conventions and the Rome Statute of the International Criminal Court, and other sources. The ICRC formulations are generally consistent with those found in U.S. sources discussed in Part I of this article.

Among the general rules identified by the ICRC most relevant to nuclear weapons are the prohibition of indiscriminate attacks, the requirement of proportionality in attack, the prohibition of means of attack causing unnecessary suffering, and the requirement of due regard for protection and preservation of the natural environment. *Indiscriminate attacks* are defined as those (a) which are not directed at a specific military objective; (b) which employ a method or means of combat which cannot be directed at a specific military objective; or (c) which employ a method or means of combat the effects of which cannot be limited as required by international humanitarian law; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.²⁸⁴ *Proportionality in attack* prohibits launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.²⁸⁵ The use of means and methods of warfare which are of a nature to cause *superfluous injury or unnecessary suffering* is prohibited.²⁸⁶ *Due regard for the environment* imposes a similar requirement of proportionality in attack with respect to damage to the environment.²⁸⁷ Further, the use of methods or means of warfare that are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment is prohibited.²⁸⁸ Destruction of

²⁸² Nuclear Weapons Advisory Opinion ¶ 86 at 37.

²⁸³ Jean-Marie Henckaerts and Louise Doswald-Beck, International Committee of the Red Cross, *Customary Humanitarian International Law*, 2 volumes (Cambridge University Press, 2005, reprinted with corrections, 2009), available at <http://www.icrc.org/web/eng/siteeng0.nsf/html/pcustom>.

²⁸⁴ *Customary International Humanitarian Law*, *supra* note ____, at 40.

²⁸⁵ *Id.* at 46.

²⁸⁶ *Id.* at 237.

²⁸⁷ *Id.* at 143, 147.

²⁸⁸ *Id.* at 151. While this is a rule codified in Protocol I to the Geneva Conventions, the United States does not accept that it is a customary rule applicable to nuclear weapons. See *Customary International Humanitarian Law*, *supra* note ____, at 153-154. The United States is not a party to Protocol I. The United States appears to accept that the requirement of proportionality includes consideration of effects on the environment. See, e.g., U.S. Dep't of the Army, Operational Law Handbook, 350, fn. 81, *supra* note __.

the natural environment may not be used as a weapon.²⁸⁹ Many of the numerous specific rules identified by the study, for example those protecting hospitals and cultural property, also come into play in view of the immense effects of nuclear weapons.

Given that states accept the bindingness of IHL and that IHL is reasonably well defined, what is the significance of the 2010 NPT Review Conference declaration of “the need for all States at all times to comply with applicable international law, including international humanitarian law”? First, NPT parties have now taken on the existing obligation of compliance with IHL with respect to nuclear weapons as an *NPT commitment* for which they are accountable within the NPT review process. That NPT commitment is embedded within the matrix of commitments for implementation of the fundamental NPT Article VI obligation of good-faith negotiation of nuclear disarmament. Second, in subtle but nonetheless important ways, the commitment advances beyond the conclusions of the ICJ advisory opinion and reinforces a rigorous application of IHL. Below, we analyze these two points, and then explain implications of the commitment for policy.

A. Compliance with IHL as an NPT Commitment

1) Background on the NPT and the 2010 Review Conference

The Nuclear Non-Proliferation Treaty entered into force in 1970 and currently has 189 states parties. Three states, all now with nuclear arsenals, never joined the treaty, India, Pakistan, and Israel; a fourth, North Korea, announced its withdrawal in 2003 and is believed to have a few nuclear weapons. Under Articles II and III, member states that had not conducted a nuclear test prior to 1968 are obligated not to acquire nuclear weapons and to accept monitoring of their civilian nuclear programs through safeguards administered by the International Atomic Energy Agency (IAEA). Article IV recognizes the right “to develop research, production and use of nuclear energy for peaceful purposes” and provides for “the fullest possible exchange of equipment, materials and scientific and technological information” for peaceful uses, notably nuclear reactor powered generation of electricity. Five states that had carried out nuclear tests prior to 1968 – China, France, Russia, the United Kingdom, and the United States – are acknowledged by Article IX to have nuclear weapons but are obligated by Article VI to pursue nuclear disarmament. Article VIII provides for convening of a conference every five years to review the operation of the treaty.

Pursuant to Article X, the 1995 Review and Extension Conference decided to extend the treaty’s duration indefinitely. In connection with that decision, the conference adopted procedures to strengthen the review process; Principles and Objectives on Nuclear Non-Proliferation and Disarmament; and a resolution on the Middle East calling for efforts to make that region free of nuclear weapons.²⁹⁰ The Principles and Objectives provide, *inter alia*, for “systematic and progressive efforts to reduce nuclear weapons

²⁸⁹ *Customary International Humanitarian Law*, *supra* note ____, at 151.

²⁹⁰ For the package of decisions adopted in 1995, see 1995 NPT Review Conference Package of Decisions at <http://www.reachingcriticalwill.org/legal/npt/1995dec.html>.

globally, with the ultimate goal of eliminating those weapons,” negotiation of the Comprehensive Nuclear-Test-Ban Treaty (CTBT) by 1996, and commencement of negotiations on a treaty banning production of fissile materials for use in nuclear weapons, the Fissile Materials Cut-off Treaty (FMCT). The 2000 Review Conference adopted Thirteen Practical Steps for Disarmament building on the Principles and Objectives. Among the steps are an unequivocal undertaking to accomplish the total elimination of nuclear arsenals; signatures and ratifications to bring the CTBT into force (its negotiation was concluded in 1996 as promised); negotiating an FMCT; U.S.-Russian bilateral reductions through the START process; application of the principle of irreversibility to arms control and disarmament measures; development of verification capabilities; and diminishing the role of nuclear weapons in security policies.²⁹¹

Despite the robust development of the NPT regime at the 1995 and 2000 conferences, in the following decade there was widespread concern that it was deteriorating. The nuclear weapon states, in particular the United States, largely failed to implement the Practical Steps for Disarmament. Under the George W. Bush administration, the United States even rejected some of the commitments made in 2000, notably to ratify the CTBT and to pursue verified U.S.-Russian reductions through the START process. No efforts were made to implement the 1995 Middle East resolution. Non-proliferation restraints appeared to be eroding. North Korea acquired nuclear weapons in defiance of treaty obligations. Much apprehension was aroused by the Iranian program to acquire nuclear fuel production technology, inherently also capable of producing materials for nuclear weapons, and Iran’s concomitant refusal to follow directives of the IAEA and the Security Council. Especially in the United States, where the September 11 attacks heightened awareness of the risk of terrorist use of nuclear weapons by non-state actors, attention turned to means of preventing non-state actor trafficking in and acquisition of nuclear weapons-related material and technology. Under the pressure of those and other factors, the 2005 Review Conference failed to yield an agreed outcome.

Accordingly, in the run-up to the 2010 Review Conference, there was a widely held conviction that the regime should be strengthened by a reaffirmation and elaboration of the bargain underlying the NPT – most states’ renunciation of nuclear weapons in return for the negotiation of nuclear disarmament and for support for “peaceful uses” of nuclear energy. This led to an outcome of the Review Conference generally regarded as a success, though not perceived as decisive in and of itself in revitalizing the regime.²⁹² Some of the key provisions are:

²⁹¹ For the Practical Steps for Disarmament, *see* the Final Document of the 2000 NPT Review Conference, Part I, Article VI and eighth to twelfth preambular paragraphs, provision 15, at 14-15, *available at* <http://www.un.org/disarmament/WMD/Nuclear/2000-NPT/pdf/FD-PartIand2.pdf>. A standalone version, with unofficial headers, is at <http://www.reachingcriticalwill.org/legal/npt/13point.html>. For more detail on the 1995 and 2000 conferences, and an account of the failed 2005 Review Conference, *see* Jonathan Granoff, “The Nuclear Nonproliferation Treaty and Its 2005 Review Conference: A Legal and Political Analysis,” 29 *JOURNAL OF INTERNATIONAL LAW AND POLITICS* 995-1006 (Summer 2007, No. 4).

²⁹² For an overview of the Final Document, *see* Beatrice Fihn, “Summary of the 2010 NPT final outcome document,” *News in Review*, June 1, 2010, *available at* <http://www.reachingcriticalwill.org/legal/npt/NIR2010/finaldocsummary.html>.

- Regarding non-proliferation, the Final Document encourages states parties to accept enhanced IAEA inspection powers (the “Additional Protocol”) and to consider establishing multilateral mechanisms to assure supply of fuel for nuclear reactors. It does not specifically address issues of non-compliance raised by the Iranian and other nuclear programs, but generally underscores the importance of complying with non-proliferation obligations and addressing all compliance matters by diplomatic means.
- Regarding peaceful uses, the Final Document reaffirms the Article IV right and stresses the need to meet the highest possible standards of nuclear security and safety.
- Regarding the need for “universality,” bringing in states outside the treaty, the Final Document *inter alia* calls for a 2012 conference on the subject of a Middle Eastern zone free of nuclear weapons and also chemical and biological weapons and the appointment of a facilitator to make it happen.
- Regarding disarmament, the Final Document reaffirms the Practical Steps on Disarmament adopted by the 2000 Review Conference. Building on the Practical Steps, it specifies: “All States parties commit to apply the principles of irreversibility, verifiability and transparency in relation to the implementation of their treaty obligations.”
- The Final Document also contains innovative commitments on disarmament, among them an affirmation of the need for all states to make special efforts to establish a framework to achieve a world without nuclear weapons coupled with an acknowledgement the UN Secretary-General’s proposal for negotiation of a convention or framework of instruments to that end; a commitment by the nuclear weapon states to “promptly engage” on “rapidly moving” toward the reduction of the overall global stockpile and other steps and to report on the results to the 2014 preparatory meeting for the 2015 review; and the affirmation of the need to comply with international humanitarian law.

2) The IHL Commitment in the NPT Context

The IHL provision in the Final Document agreed by the 2010 NPT Review Conference is as follows: “The Conference expresses its deep concern at the catastrophic humanitarian consequences of any use of nuclear weapons, and reaffirms the need for all states at all times to comply with applicable international law, including international humanitarian law.”²⁹³ The context of this provision is important. It comes in a section of the Final Document entitled “Conclusions and recommendations for follow-on actions,” and is inserted in Part I of that section, “Nuclear Disarmament,” under “A. Principles and Objectives.” The chapeau for Part I reads as follows:

In pursuit of the full, effective and urgent implementation of article VI of the Treaty on the Non-Proliferation of Nuclear Weapons and paragraphs 3 and 4 (c) of the 1995 decision entitled “Principles and objectives for nuclear non-proliferation and disarmament”, and building upon the practical steps agreed to in

²⁹³ Final Document, *supra* note 291, at 19, I(A)(v).

the Final Document of the 2000 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, the Conference *agrees* on the following action plan on nuclear disarmament which includes concrete steps for the total elimination of nuclear weapons²⁹⁴

The agreement set forth in Part I, Nuclear Disarmament, was reached in the context of a proceeding – a review conference - authorized by Article VIII of the NPT "to review the operation of this Treaty with a view to *assuring that the purposes of the Preamble and the provisions of the Treaty are being realized.*"²⁹⁵ It was adopted through the strengthened review process, which, the 1995 Review Conference specified, "should look forward as well as back [and] identify the areas in which, and the means through which, further progress should be sought in the future."²⁹⁶

Because it strongly supports the non-use of nuclear weapons, the IHL commitment contributes to the realization of the first preambular provision of the NPT: "Considering the devastation that would be visited upon all mankind by a nuclear war and the consequent need to make every effort to avert the danger of such a war and to take measures to safeguard the security of peoples[.]" Non-use, and the acknowledgement of legal requirements supporting non-use, also contributes to nuclear disarmament by reinforcing the illegitimacy of nuclear weapons and helping to create an environment of trust in which disarmament negotiations can succeed. It therefore contributes to the realization of preambular provisions on nuclear disarmament and to Article VI.²⁹⁷

This point comes through in the brilliantly phrased commitment adopted by the 2000 Review Conference to a "diminishing role for nuclear weapons in security policies to minimize the risk that these weapons ever be used and to facilitate the process of their total elimination."²⁹⁸ That commitment and other 2000 commitments were reaffirmed by the 2010 Review Conference.²⁹⁹ Further, Action 5 of the action plan on nuclear disarmament contained in the 2010 Final Document calls upon the nuclear weapon states to "promptly engage" to, *inter alia*, "further diminish the role and significance of nuclear

²⁹⁴ Final Document, *supra* note 291, at 19 (emphasis supplied).

²⁹⁵ Emphasis supplied.

²⁹⁶ See 1995 NPT Review Conference Package of Decisions May 12, 1995 available at <http://www.reachingcriticalwill.org/legal/npt/1995dec.html>.

²⁹⁷ Relevant preambular provisions are these: "Declaring their intention to achieve at the earliest possible date the cessation of the nuclear arms race and to undertake effective measures in the direction of nuclear disarmament," and "Desiring to further the easing of international tension and the strengthening of trust between States in order to facilitate the cessation of the manufacture of nuclear weapons, the liquidation of all their existing stockpiles, and the elimination from national arsenals of nuclear weapons and the means of their delivery pursuant to a Treaty on general and complete disarmament under strict and effective international control." Article VI provides: "Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control."

²⁹⁸ Practical Steps for Disarmament, *supra* note 291.

²⁹⁹ Final Document, *supra* note 291, at 19, I(A)(iii) ("The Conference reaffirms the continued validity of the practical steps agreed to in the Final Document of the 2000 Review Conference.").

weapons in all military and security concepts, doctrines and policies.”³⁰⁰ Understanding of the connection between non-use and disarmament indeed goes back to the origins of the NPT. After the NPT was opened for signature on July 1, 1968, the Soviet Union and the United States placed specific measures before the predecessor to today's Conference on Disarmament, the Eighteen Nation Disarmament Committee, where the NPT had been negotiated. Under a heading taken from Article VI, they proposed an agenda including "the cessation of testing, *the non-use of nuclear weapons*, the cessation of production of fissionable materials for weapons use, the cessation of manufacture of weapons and reduction and subsequent elimination of nuclear stockpiles....”³⁰¹

The action plan on nuclear disarmament, and the IHL commitment included within it, are not *per se* legally binding.³⁰² Though it is an “agreement” of a conference of states, it is not accompanied by the procedures for treaties including signature and ratification. But, the action plan was adopted by a review proceeding provided for by the treaty, as part of the strengthened review process agreed in connection with the 1995 legally binding decision to extend the treaty indefinitely. *It represents states parties’ collective understanding of the appropriate means for implementation of Article VI.* Implementation of action plan commitments consequently would be strong evidence that states parties are complying with Article VI and the NPT. This point certainly applies to the IHL commitment, due to the close interconnection with the application of IHL to realization of core purposes of the NPT, prevention of nuclear war and disarmament. This conclusion is reinforced by the legal principle of good faith.

3) The Principle of Good Faith

“Good faith is a fundamental principle of international law, without which all international law would collapse, “declared Judge Mohammed Bedjaoui, former President of the ICJ.³⁰³ Good faith is the guarantor of international stability, Judge

³⁰⁰ *Id.* at 21, I(B) Action 5(c).

³⁰¹ ENDC/PV. 390, 15 August 1968, ¶ 93 (emphasis supplied).

³⁰² Nonetheless, at least when commitments made as part of an agreement by a review conference identify means integral to implementation of a treaty obligation, they appear to supply legal criteria for assessment of compliance. *See* Article 31(3)(a) of the Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331, which provides that “subsequent agreements between the parties regarding the interpretation of the treaty or the application of its provisions” shall be taken into account in interpreting a treaty; Peter Weiss, John Burroughs, and Michael Spies, Lawyers Committee on Nuclear Policy, “The Thirteen Practical Steps: Legal or Political?” (May 2005), *available at* <http://www.lcnp.org/disarmament/npt/13stepspaper.htm>; Carlton Stoiber, “The Evolution of NPT Review Conference Final Documents, 1975-2000,” 10 *The Nonproliferation Review* (Fall/Winter 2003, no. 3) 126, 127; *contra*, Christopher Ford, “Interpreting Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons,” 14 *Nonproliferation Review* (November 2007, no. 3) 401, 411-413. This argument seems persuasive, for example, with respect to the principles of verification and irreversibility as applied to disarmament pursuant to Article VI agreed by the 2000 and 2010 NPT review conferences. For some commitments, however, alternative means of meeting treaty obligations are possible. Regarding the NPT IHL commitment, determination of its exact legal status in the NPT context is less important because case states are legally obligated to comply with IHL independently of the NPT.

³⁰³ Mohammed Bedjaoui, Keynote Address, Conference on Good Faith, International Law, and Elimination of Nuclear Weapons: The Once and Future Contributions of the International Court of Justice, May 1,

Bedjaoui explained, because it allows one state to foresee the behavior of its partner. States acting in good faith take into account other states' legitimate expectations.³⁰⁴ Essentially, good faith means abiding by agreements in a manner true to their purposes and working sincerely and cooperatively, by negotiations or other means, to attain agreed objectives.³⁰⁵

One key aspect of the principle is codified in Article 26 of the Vienna Convention on the Law of Treaties, which provides: “*Pacta sunt servanda*: Every treaty in force is binding upon the parties to it and *must be performed by them in good faith*.”³⁰⁶ The ICJ has elucidated the requirement, stating that the “principle of good faith obliges the Parties to apply [a treaty] in a reasonable way and in such a manner that its purpose can be realized.”³⁰⁷ At least where circumstances had rendered implementation of treaty provisions as originally agreed impossible, the Court was prepared to go so far as to say that “it is the purpose of the Treaty, and the intentions of the parties in concluding it, which should prevail over its literal application.”³⁰⁸

A treaty review conference is a collaborative process aimed at assessing achievement of treaty objectives and mapping further action to meet those objectives. When successful, a conference is an instance of states cooperating in good faith to advance agreed objectives. Good faith can subsequently be further demonstrated by implementing agreed actions. In the case of the 2010 NPT IHL commitment, good faith mandates that states make sincere efforts to bring their policies into line with the IHL, as we discuss below.

B. Policy Implications of the NPT IHL Commitment

1) Analysis of the IHL Commitment

The IHL commitment was negotiated during the May 2010 meeting of the Review Conference. The original version of the provision read: “The Conference expresses its deep concern at the humanitarian consequences of any use of nuclear weapons, and reaffirms the need for all states to comply with international humanitarian law at all times.”³⁰⁹ In closed negotiations over the provision as first proposed, France reportedly called for its deletion, and the United Kingdom at least expressed doubts about it. In its idiosyncratic argument before the ICJ in 1995, France remained silent on the application

2008, Geneva, at 18, *available at* <http://www.lcnp.org/disarmament/2008May01eventBedjaoui.pdf> (hereinafter “Keynote Address”).

³⁰⁴ *Id.* at 19-20.

³⁰⁵ *See generally* John Burroughs, *et al.*, “The Imperative of Good Faith,” Civil Society Presentation to the 2009 Preparatory Committee Meeting for the 2010 NPT Review, May 5, 2009, *available at* <http://www.reachingcriticalwill.org/legal/npt/prepcom09/ngostatements/GoodFaith.pdf>.

³⁰⁶ Emphasis supplied.

³⁰⁷ *Case Concerning the Gabčíkovo-Nagymaros Project* (Hungary v. Slovakia), I.C.J. Reports 1997, at ¶ 142.

³⁰⁸ *Id.*

³⁰⁹ Subsidiary Body I, Revised Chairman’s Draft Action Plan, May 21, 2010, at 1, *available at* <http://www.reachingcriticalwill.org/legal/npt/revcon2010/SBI-Revision2.pdf>.

of international humanitarian law to use of nuclear weapons, arguing instead that absent an express prohibition their use is “authorized in the event of the exercise of the inherent right of individual or collective self-defence.”³¹⁰

As revised and approved by the Conference, the second part of the provision was changed to call for compliance with “applicable international law, including international humanitarian law.” Why the reference to “applicable” law? First, because IHL governs methods and means of warfare, the extent of its application in time of peace is controversial. It is also sometimes a matter of dispute as to whether and where an armed conflict has commenced or ended. Second, the use of the phrase “at all times” could raise the question of whether that phrase should be added elsewhere in the Final Document when it calls for compliance with an NPT obligation. Modification of “at all times” by “applicable law” assuaged these concerns.

The reference to “applicable international law” is regrettable because it provides a textual basis for invoking self-defense and reprisal, though this could have been done in any case. And because it provides a textual basis for arguing that IHL is not applicable in time of peace, it cuts against the argument that doctrines generally contemplating use of nuclear weapons - as opposed to signals in specific circumstances of armed conflict - are “threats” contrary to IHL. Note, however, that IHL is not the only basis for challenging the lawfulness of general doctrines of “deterrence”; there is no question that the UN Charter prohibition of threat or use of force, which the ICJ found potentially applicable to doctrines of “deterrence,” is in effect whether or not an armed conflict is underway.

Nonetheless, the provision remains powerful. The reference to the catastrophic humanitarian consequences of “any” use of nuclear weapons directly joined with the call for compliance with law “at all times” supports the position that use of nuclear weapons is unlawful in all circumstances. *Importantly, the insistence on compliance with applicable international law “at all times” weighs against any suggestion that IHL bends or wavers depending upon the circumstances of armed conflict.* That includes the “extreme circumstance of self-defence in which the very survival of a State is at stake” as to which the ICJ could not reach a conclusion one way or the other regarding the lawfulness of threat or use of nuclear weapons; self-defense as invoked by the French; or second use in “reprisal” purportedly aimed at deterring further attacks.

In light of the foregoing, the IHL provision adopted by the Review Conference develops the norm of non-use of nuclear weapons. Indeed, when combined with the *practice* of non-use since the US atomic bombings of Japanese cities, the provision strengthens the case for a customary legal obligation categorically prescribing non-use. The welcome US statement in its Nuclear Posture Review is also relevant here: “It is in the US interest and that of all other nations that the nearly 65-year record of nuclear non-use be extended forever.”³¹¹

³¹⁰ International Court of Justice, Public Sitting, *Legality of Threat or Use of Nuclear Weapons*, Verbatim Record, November 1, 1995, at 66, available at <http://www.icj-cij.org/docket/files/95/5927.pdf?PHPSESSID=824406939531fa21a815a5c0a3365dfe>.

³¹¹ Department of Defense, *Nuclear Posture Review Report* (April 2010), at 16.

The ICJ had rejected the argument that the record demonstrates a customary obligation of non-use on the ground that doctrines of deterrence show that there is no shared legal opinion that use is illegal.³¹² However, the ICJ also observed that the “adoption each year by the General Assembly, by a large majority, of resolutions recalling the content of resolution 1653 (XVI), and requesting the member States to conclude a convention prohibiting the use of nuclear weapons in any circumstance, reveals the desire of a very large section of the international community to take, by a specific and express prohibition of the use of nuclear weapons, a significant step forward along the road to complete nuclear disarmament.”³¹³ The Court continued: “The emergence, as *lex lata*, of a customary rule specifically prohibiting the use of nuclear weapons as such is hampered by the continuing tensions between the nascent *opinio juris* on the one hand, and the still strong adherence to the practice of deterrence on the other.”³¹⁴ With the Review Conference statement, the world is moving closer to the day when it can be said that the practice of non-use has become a *custom* of non-use recognized by law.

2) Implementation of the IHL Commitment

For NPT nuclear weapon states, good faith fulfillment of the commitment to comply with international law including IHL with respect to nuclear weapons would be demonstrated in part by visible and conscientious efforts to address the incompatibility of existing doctrines and deployments with the requirements of IHL and to change their policies accordingly.

Implementation of the IHL commitment also demands more expeditious and energetic implementation of the obligation to achieve the global elimination of nuclear weapons through good-faith negotiations. This is the dynamic of what has been called “humanitarian disarmament” as applied to cluster munitions and anti-personnel mines: elimination of inhumane weapons incapable of compliance with IHL.³¹⁵ It was also the logic of the global treaty bans on possession and use of chemical and biological weapons.

The International Committee of the Red Cross has squarely recognized that disarmament is implied by nuclear weapons’ incompatibility with IHL and humanitarian values. In an April 20, 2010 statement, ICRC President Jakob Kellenberger said that “*the ICRC finds it difficult to envisage how any use of nuclear weapons could be compatible with the rules of international humanitarian law.*”³¹⁶ He added: “The position of the

³¹² Nuclear Weapons Advisory Opinion ¶¶ 66, 67 at 32.

³¹³ *Id.* ¶ 73 at 33.

³¹⁴ *Id.*

³¹⁵ See Ken Berry, Patricia Lewis, Benoît Pélodidas, Nikolai Sokov and Ward Wilson, *Delegitimizing Nuclear Weapons: Examining the validity of nuclear deterrence*, Swiss Confederation, James Martin Center on Nonproliferation Studies, Monterey Institute of International Studies (May 2010) at 43-48, available at http://cns.miis.edu/opapers/pdfs/delegitimizing_nuclear_weapons_may_2010.pdf.

³¹⁶ “Bringing the era of nuclear weapons to an end,” Statement of Jacob Kellenberger, President of the International Committee of the Red Cross, Geneva, April 20, 2010, available at <http://www.icrc.org/web/eng/siteeng0.nsf/html/nuclear-weapons-statement-200410> (emphasis supplied).

ICRC, as a humanitarian organization, goes – and must go – beyond a purely legal analysis. Nuclear weapons are unique in their destructive power, in the unspeakable human suffering they cause, in the impossibility of controlling their effects in space and time, in the risks of escalation they create, and in the threat they pose to the environment, to future generations, and indeed to the survival of humanity. The ICRC therefore appeals today to all states to ensure that such weapons are never used again, regardless of their views on the legality of such use.”³¹⁷ Kellenberger concluded: “*In the view of the ICRC, preventing the use of nuclear weapons requires fulfilment of existing obligations to pursue negotiations aimed at prohibiting and completely eliminating such weapons through a legally binding international treaty.* It also means preventing their proliferation and controlling access to materials and technology that can be used to produce them.”³¹⁸

The ICJ also effectively recognized the implication. The General Assembly asked the Court about the legality of threat or use of nuclear weapons. The Court, however, determined that an adequate response to the question required interpretation of the NPT Article VI disarmament obligation. The Court declared, with all judges concurring, the “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.”³¹⁹ The Court also noted that the “pattern until now has been for weapons of mass destruction to be declared illegal by specific instruments,” citing the Biological Weapons Convention and the Chemical Weapons Convention.³²⁰

We will not attempt here an in-depth analysis of everything that good-faith compliance with the disarmament obligation requires.³²¹ In brief, good faith would be demonstrated by implementing NPT commitments agreed at the 2000 and 2010 Review Conferences – among them bringing the test ban treaty into force, negotiating a treaty banning production of fissile materials for nuclear weapons, and accomplishing verified, irreversible reductions leading to elimination. Good faith also requires refraining from actions undermining the achievement of the disarmament objective.³²²

Beyond those steps, good faith would be demonstrated by *commencing* negotiations directly aimed at achieving the global elimination of nuclear weapons through a

³¹⁷ *Id.*

³¹⁸ *Id.* Emphasis supplied.

³¹⁹ Nuclear Weapons Advisory Opinion, *supra* note 15 at ¶ 105(2)F.

³²⁰ *Id.* at ¶ 57.

³²¹ For more detail, see, e.g., John Burroughs,

"The U.S. Nuclear Posture Review and International Law," 22 Michigan International Lawyer (Summer 2010, no. 11) 2, at 3-6, *available at*

http://www.michbar.org/international/pdfs/MIL_summer10.pdf; John Burroughs, "A Global Undertaking: Realizing the Disarmament Promise of the NPT," Middle Powers Initiative Briefing Paper, January 2010, *available at*

http://www.gsstitute.org/mpi/pubs/Atlanta_Briefing_Paper_2010.pdf.

³²² In the NPT context, Judge Bedjaoui explained, good faith proscribes “every initiative the effect of which would be to render impossible the conclusion of the contemplated disarmament treaty” eliminating nuclear weapons globally pursuant to Article VI. Keynote Address, *supra* note ____, at 22. Modernization of nuclear forces and infrastructure by the United States and other states with nuclear arsenals, especially absent serious multilateral efforts at negotiating nuclear disarmament, would seem to fall under this proscription.

multilateral agreement.³²³ That is a process called for by a large majority of the world's states in the UN General Assembly³²⁴ and in NPT review proceedings, but so far refused by the NPT nuclear weapon states except China. Encouragingly, though, in the 2010 NPT action plan on nuclear disarmament, the nuclear weapon states agreed to the following provision which at least recognizes the need for a comprehensive approach:

The Conference calls on all nuclear-weapon states to undertake concrete disarmament efforts and affirms that all States need to make special efforts to establish the necessary framework to achieve and maintain a world without nuclear weapons. The Conference notes the five-point proposal for nuclear disarmament of the Secretary-General of the United Nations, which proposes, inter alia, consideration of negotiations on a nuclear weapons convention or agreement on a framework of separate mutually reinforcing instruments, backed by a strong system of verification.³²⁵

Once negotiations, of whatever kind, are commenced, they must be *conducted* in good faith. That requires making the negotiations meaningful, showing willingness to compromise, avoiding delay, and generally negotiating with a genuine intention to achieve a positive result.³²⁶ Indeed, the ICJ held that the disarmament obligation encompasses both conduct and result.³²⁷ States must not only negotiate with serious efforts to achieve the elimination of nuclear weapons but must actually achieve that result.

It is high time that debate focus on the best way to achieve the global elimination of nuclear weapons in the most expeditious, thorough, and practical manner. The question now is not whether, but how. The Secretary-General's proposal brings a new clarity to the debate.

CONCLUSION

Weapons are intended to protect that which we value - including morality and law. Because of their indiscriminate effect and overwhelming destructive capacity nuclear weapons can hardly be reconciled with the most basic values of

³²³ See International Association of Lawyers Against Nuclear Arms and International Human Rights Clinic at Harvard Law School, *Good Faith Negotiations Leading to the Total Elimination of Nuclear Weapons: Request for an Advisory Opinion from the International Court of Justice* (2009), at 23-25, available at <http://icnp.org/disarmament/2009.07.ICJbooklet.pdf> (hereinafter *Good Faith Negotiations*).

³²⁴ E.g., Follow-up to the advisory opinion of the International Court of Justice on the *Legality of the Threat or Use of Nuclear Weapons*, G.A. Res. GAOR 64/55, UN Doc. A/RES/64/55 (December 2, 2009).

³²⁵ Final Document, *supra* note 291, at 20, I(B)(iii). For Ban Ki-moon's remarks first setting out his proposal for nuclear disarmament, see UN Secretary-General address, "The United Nations and Security in a Nuclear-Weapon-Free World," October 24, 2008, East-West Institute conference, "Seizing the Moment," United Nations, New York, available at <http://www.un.org/News/Press/docs/2008/sgsm11881.doc.htm>.

³²⁶ See *Good Faith Negotiations*, *supra* note ____, at 26-29.

³²⁷ Nuclear Weapons Advisory Opinion, *supra* note 15, at ¶ 99.

civilization. It is incoherent to plan for the use of nuclear weapons and even threaten to use them even if the only purpose is allegedly to prevent their use. Such a practice is not only unstable but intrinsically violates the highest values we are seeking to protect.

It is not hyperbole to say that the challenge to human civilization presented by nuclear weapons may be the consummate test of the human race's ability to survive. The very existence of nuclear weapons requires that human societies - both the most technologically efficient and affluent of societies and societies still struggling to establish their place in the world -- overcome the historical and contemporary human burden of aggressiveness and tribalism. Containing the dangers of such human dynamics is one of the purposes of law.

Pursuing peace and security based on the rule of law is necessary for any just society. International humanitarian law is an existing body of law universally recognized as necessary to limit war and preserve the possibility of a just peace. That law must now be rigorously applied to nuclear weapons.

Some are satisfied that because they imagine there are uses of nuclear weapons which do not violate international humanitarian law that the law need not be applied to the main contemplated uses of nuclear weapons. This is akin to making the exception the basis for establishing a norm.

As this article systematically demonstrates, it is only a cognitively creative exception to real world practice that can even describe an instance in which the use of a nuclear weapon would not violate international humanitarian law. Is it not time that the nations and people of the world demanded that States with nuclear weapons bring their practices into strict compliance with the law? A first step would be a public disclosure of the actual targeting, impact that use would have, and adjustment to eliminate all uses that violate the law. Such steps would surely invigorate the security enhancing process of moving rapidly to a nuclear weapons free world.

As long as powerful states pursue international peace and security as well as their own national interests through threatening the use of nuclear weapons, and as other less economically and politically developed states seek nuclear weapons as an "equalizer" to hold more powerful states at bay, the specter of the use of these weapons, with potentially apocalyptic results, will remain with us, threatening the survival of human civilization. Not only is this unacceptably risky, but it is also being done in contravention of that which we are allegedly protecting, our civilized values and institutions.

World leaders are increasingly articulating aspirations to obtain the peace and security of a nuclear weapons free world. The legal basis of this pursuit is compelling and there are increasing dangers of proliferation with the spread of nuclear technology. These dynamics make this an opportune moment. We have the required tools to effectively reign in the hazard, international humanitarian law and the verification techniques, law

and institutions used for nuclear arms control and for elimination of other weapons. It is time we used those tools.

Lawyers and citizens, States and statesmen, peoples and leaders from big countries and small, must find the wisdom to see that the use and threat of use of nuclear weapons is unlawful under long-established principles of international law and morally and humanly unacceptable. They must act accordingly, and renounce policies of possible use of the weapons, and move forward decisively on a program of action to eliminate them.