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NUCLEAR RISKS: NECESSITY AND ILLEGALITY

"...the international legal rules on weapons do allow us to assess what happened in Hiroshima and Nagasaki...then, as now, law prohibited and prohibits such inhuman acts."

--Cassese

Summary: Illegal, outrageous acts can never be justified by claims of necessity.

Throughout history, attempts to define what is legal in resorting to war have had to balance claims of military necessity with the laws of war and humanitarian concerns. States have an apparent proclivity to overstate a case for military necessity: just as Truman declared that it was 'necessary' for the U.S. to drop atomic bombs on Hiroshima and Nagasaki to 'end' World War II, George W. Bush now overstates claims of military necessity by linking, in weak and unwise ways, risks of terrorism and weapons of mass destruction.

During the past sixty years, since the first atomic bomb was developed in Los Alamos and the U.S. dropped atomic bombs on Hiroshima and Nagasaki, a profound dichotomy has continued, between a public awareness of the grave risks inherent in the threat or use of nuclear weapons, and the official U.S. policy of continued reliance on their development and deployment as 'necessary' for national security. The impossibility, however, of adequately addressing issues such as proportionality--including the risk of escalation of a 'limited' nuclear war-- and protection of civilians, points squarely to their categorical illegality.

In 1945, existing international laws, such as those from the 1907 Hague Convention, included precepts related to proportionality and protection of civilians. The first precept states that only force proportionate to expected military gains should be

used, and that any incidental injuries to civilians should not be disproportionate to these gains. The second precept protects civilians from direct and indiscriminate injuries.

The 1923 Draft Hague Rules of Air Warfare included laws limiting the right of states to adopt weapons or means of warfare calculated to cause excessive or unnecessary suffering. The precept of protection of civilians was implicit in rules requiring that precautions be taken to avoid the destruction of religious, cultural, and medical buildings, and in rules designating combatants as the sole subjects and objects of warfare. While these Rules were not binding as Treaty law, they were accorded considerable status by military officers, and were cited by the District Court of Tokyo in the 1955 Shimoda case, brought by five Japanese plaintiffs to recover damages for injuries sustained by the U.S. atomic bombings... [B]y reasoning that "international jurists regard the Draft Rules as authoritative, and that some countries use them to guide the conduct of their armed forces...the Court is able to treat these Draft Rules as customary international law".[1]

Moreover, While the Court denied the plaintiffs recovery on jurisdictional grounds, the principal holding of the Court was that the U.S. atomic bombings violated international law, for the following reasons:.

1. International law forbids an indiscriminate or blind attack upon an undefended city; Hiroshima and Nagasaki were undefended; therefore the attacks were illegal.
2. International law permits, if at all, indiscriminate bombing of a defended city if it is justified by military necessity; no military necessity of sufficient magnitude could be demonstrated here; therefore the attacks were illegal.
3. international law, as...developed to govern aerial bombardment might...permit zone or area bombing of an enemy city in which military objectives were concentrated;[this was not the case] in either Hiroshima or Nagasaki, therefore, no legal basis exists for contending that the atomic attacks might be allowable by analogy to aerial bombing...
4. international law prohibits the use of weapons...that produce unnecessary and cruel forms of suffering as illustrated by the prohibition of lethal poisons...the atomic bomb causes suffering far more severe and extensive than the prohibited weapons; therefore, it is illegal to use the atomic bomb to realize belligerent objectives
 - (a) that is, the duty to refrain from causing unnecessary suffering is a principle of international law by which all belligerent activity is tested, whether

specifically regulated or not

(b) that is, specific prohibitions embody a wider principle [extending] to new weapons developments not foreseen ...when the specific prohibition was agreed upon. [2]

The International Court of Justice [ICJ], in its 1996 Advisory Opinion on the Legality of Threat or Use of Nuclear Weapons, implicitly condemned the U.S. atomic bombings, in its analysis of uncertainty as to the legality of threat or use of nuclear weapons by a State in an extreme circumstance of self-defense, in which its very survival would be at stake:

In the only instances of *use* of nuclear weapons in time of war, the United States' atomic bombings of Hiroshima and Nagasaki, the survival of the United States was not threatened in any way. Those bombings were unquestionably illegal because they violated prohibitions of attacking civilians and inflicting indiscriminate harm, which the Court expressly held existed prior to the commencement of the nuclear age..[3]

Radiation and genetic illnesses, and other detrimental long-lasting effects intrinsic to nuclear weapons were accorded great weight in deliberations by the ICJ:

[I]n order correctly to apply to the present case the [U.N.] Charter law on the use of force and the law applicable in armed conflict, in particular humanitarian law, 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 for generations to come.[4]

Principles of proportionality and protection of civilians, as essential to humanitarian law, were also emphasized by the ICJ:

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 [.5]

The debate over the illegality, versus the justification of necessity, of the Allied bombings in Europe during World War II; the U.S. incendiary bombings of Japanese cities--which killed more than 100,000 civilians; and the U.S. atomic bombings of Hiroshima

and Nagasaki, have all been discussed by Michael Walzer in the context of 'supreme emergency'. He cites Churchill's use of the term to justify Britain's 1939 massive aerial bombardment of German cities to counter the greater threat of Hitler's victory. Walzer perceives 'supreme emergency' as

defined by two criteria, which correspond to the two levels on which ...necessity works: the ...imminence of the danger and... its nature. The two criteria must both be applied. Neither one by itself is sufficient as an account of extremity.. Nazi rule...was a threat to human values so radical that its imminence would surely constitute a supreme emergency [however], the British policy...had further consequences: it was the crucial precedent for the fire-bombing of Tokyo and other Japanese cities and then for ...Truman's decision to drop atomic bombs on Hiroshima and Nagasaki...the [indefensible claim] for the Hiroshima. attack .. was a utilitarian calculation made without the sliding scale..a claim to override the rules of war and the rights of Japanese civilians[.6]

The violation of these rights is perhaps best indicated simply by accounts of victims' sufferings. In the words of Satoko Matsumoto, a survivor of Hiroshima:

A most violent flash lit up everything around me...[as] I picked up my little girl (who was two) the house collapsed and we were buried under the rubble. My first struggles brought more plaster down on our heads. Finally, I managed to free myself and the baby and, with great care, clambered out into the open. But then I stood amazed: all the buildings in the town seemed to have been razed to the ground and nothing vertical was left standing ...Mount Eba, which I had never been able to see from my home, now appeared before my eyes. Among the clouds of dust and smoke I could make out human silhouettes moving towards us. The roads were buried under the rubble and people were picking their way over the ruins....At first I thought some were dressed in rags, but then I realized that it was their skin peeling off, leaving the flesh naked...Then it began to rain. Great drops fell on the naked flesh of those burnt figures. Mad with pain, they ran to the nearby fields to shelter under any vegetation they could find. But I noticed at once something strange: this rain-water was neither transparent nor refreshing: it was dark, thick and gummy like kerosene..[.7]

And in the eyewitness account of Tsugiya Umabayashi, who was ten years old when the bomb fell on Nagasaki, describing her flight:

Our compartment on the train was full of refugees. The air stank with their sores, on which flies settled obstinately despite all efforts to shoo them off; many wounds were gangrenous. Some spat blood into the washbasin. Others were completely bald. it was impossible to tell men from women.[8]

Accounts of familial suffering due to the lingering genetic effects of radiation are as horrifying, in a different way. In the words of Toyomi Hashimoto, a survivor of Nagasaki:

In 1952, four years after his birth, I noticed that my fourth son had an abnormal eye. The ophthalmic surgeon diagnosed cancer of the eye, an extremely rare disease that can occur in one case out of ten thousand...About fifteen months later, the same child started to cough in a strange manner...when I saw that he was getting worse, I took him again to the doctor and learned he had diphtheria...in June 1956 we had a fifth child; my happiness was short-lived. I had hoped he would replace the child we had lost; instead, by a tragic irony, he had the same eye complaint as his brother. The boy died after an operation. [9]

The U.S. atomic bombings were criminal; no claim can justify their necessity, even on a pragmatic level: recent scholarship by Hasegawa indicates, contrary to long-held beliefs, that Soviet entry into the war was a critical factor in Japan's surrender:

On the basis of available evidence.....it is clear that the two atomic bombs on Hiroshima and Nagasaki alone were not decisive in inducing Japan to surrender. Despite their destructive power, the atomic bombs were not sufficient to change the direction of Japanese diplomacy. The Soviet invasion was. Without the Soviet entry into the war, the Japanese would have continued to fight until numerous atomic bombs, a successful allied invasion of the home islands, or continued aerial bombardments, combined with a naval blockade, forced them to do so .[10]

The moral implications of the illegality of the U.S. atomic bombings and lack of any defense of necessity is emphasized by Cassese:

...we should reject out of hand the suggestion that no useful alternative existed that conformed with the law...the most significant and acceptable was... [that of] the Franck [scientific] Committee [which, two months before the bombs were dropped] suggested that, at most, Truman should use the bomb in the desert or on an uninhabited island, simply as a demonstration...they..indicated quite clearly why to use the bomb would be very dangerous *for the future*...In the 'optimistic' event that an international agreement banning the use of the atomic bomb was soon reached, it would be very difficult to persuade the world that the United States seriously intended to respect a ban...after it had already used one, to devastating and inhuman effect...the United States could say to the world, in Franck's words, 'you see what sort of a weapon we had but did not use. We are ready to renounce its use in the future if other nations join us in this renunciation and agree to the establishment of an efficient international control.' In the 'pessimistic' event of [a lack of] an international agreement, even the 'demonstration' would seem ill-advised, because after the United States had announced its intention...an atomic race would start, with very dangerous consequences for the whole of humanity.[11]

A subverted defense of military necessity, albeit in a different context, was invoked by the U.S. Supreme Court in an infamous decision, Korematsu v. the United States, 32 U.S. 214 (1944) This case grew out of the dispossession and

incarceration of all persons of Japanese ancestry on the West Coast following the Japanese attack on Pearl Harbor. In February 1942 President Roosevelt signed Executive Order 9066; Lt. General De Wit was named to execute this Order, and Congress backed evacuation measures with Public Law 77-503. Ten permanent camps were built :

Manzanar and Tule Lake in California; Poston and Gila River in Arizona, Rohwer and Jerome in Arkansas, Minidoka in Idaho, Heart Mountain in Wyoming, Topaz in Utah, and Granada (Ameche) in Colorado...Each of the ten permanent camps held between 8,000 and 16,000 evacuees, and a total of approximately 120,000 were ultimately detained.... Enclosed by high barbed-wire fences, the inland camps were located in desolate areas, miles from the nearest town. Guard towers were placed at strategic locations, with armed soldiers...Living quarters were cramped; privacy was scarce. Assigned to specific barrack and block numbers, large families were squeezed into tiny, unpartitioned rooms, the biggest being 24 by 24 feet. Since the rooms had no running water or plumbing, internees were forced to use common latrine, shower, and laundry facilities. Meals were served in large dining halls, and makeshift schools that lacked enough qualified teachers, textbooks, and supplies were created.[12]

The Supreme Court upheld the constitutionality of the incarceration, " citing 'the judgment of the military authorities and Congress that there were disloyal members of that population, whose number and strength could not be quickly ascertained.' Accordingly, the Court found that 'the judgment that 'exclusion of the whole group [was] a military imperative answer[ed]the contention that the exclusion was in the nature of group punishment based on antagonism to those of Japanese origin.'"[13]

This defense however, has been shown to be flawed, attenuated, and unjustified. Overinclusiveness and racism are evident:

[i]f the purpose of the evacuation orders was to protect the West Coast against espionage and sabotage, how can we account for the infants, elderly, and mentally and physically ill people who were included in the orders? Any person with any percentage of Japanese blood was interned. The only exceptions were imprisoned convicts, patients in asylums, and the few adults with 1/32nd or less Japanese ancestry who were able to prove that they had no contact with the Japanese-American community. If military necessity had been the real issue, then both people of German and Italian descent and Japanese-Americans in Hawaii should have been interned as well. Yet only Japanese-Americans on the West Coast endured across-the-board evacuation and internment under the military orders.[14]

In the decades since 1945, while U.S. nuclear strategic policies have shifted from 'massive retaliation' to 'flexible response' to 'limited nuclear war', Fujita notes that, as the United States has increasingly grown to rely on nuclear weapons "for its national security, the government has been compelled to develop legal justifications for its nuclear weapons policies in order to legitimate the first use of nuclear weapons." [15]

In recent years, following the events of September 11, 2001, the George W. Bush administration has made dubious claims of urgent necessity in linking the risks of terrorism and weapons of mass destruction. On November 13, 2001, Bush issued a Military Order which stated in part:

- (e) To protect the United States...and *prevention* of terrorist attacks, it is *necessary* for individuals subject to this order ... to be detained, and...to be tried for violations of the laws of war
- (g) having fully considered the magnitude of the *potential* deaths [and] injuries...that would result from *potential* acts of terrorism against the United States, and the *probability* that such acts will occur, I have determined that an *extraordinary emergency exists for national defense purposes*, that this *emergency* constitutes an *urgent* and compelling government interest, and that issuance of this order is *necessary to meet this emergency* [16] [emphases added].

The 1949 Geneva Convention on the Treatment of Prisoners of War, of which the U.S. is a signatory, among other things prohibits violence, torture and cruel, humiliating or degrading treatment to persons protected by Prisoner of War status.. The 1987 Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, of which the U.S. is also a signatory, among other things states:

the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him ...information or a confession, or punishing him ..or intimidating or coercing him...when such pain or suffering is inflicted by.. a public official... sitting in an official capacity...

No exceptional circumstances whatsoever, whether a state of war or a threat of war...or any other public emergency, may be invoked as a justification for torture.[17]

In order to achieve its goals and deflect criticism of its policies under international law, Bush administration officials used obscure and extremely dubious reasoning to justify its reclassification of members of the Taliban and al-Qaeda from protections of the Geneva

Conventions Prisoner of War status to that of 'unlawful combatants'; and its redefinition of torture as constituting only the most severe physical injury, inflicted by interrogators with the 'specific intent' of causing this suffering.

The unjust effects of the excessively cruel and overinclusive practices of the Coalition Forces (CF) in Iraq may be found in entries of the 2004 Report of the International Committee of the Red Cross (ICRC):

Arresting authorities entered houses usually after dark, breaking down doors, waking up residents roughly, yelling orders, forcing family members into one room while they searched the rest of the house...They arrested suspects, tying their hands [and] ...hooding them...Sometimes they arrested all adult males in a house, including elderly, handicapped, or sick people. Treatment often included pushing people around, insulting, taking aim with rifles, punching and kicking and striking with rifles. Individuals were often led away in whatever they happened to be wearing...and were denied the opportunity to gather a few essential belongings, such as...medicine or eyeglasses. In many case personal belongings were seized, with no receipt being issued...

Certain CF military officers told the ICRC that in their estimate *between 70% and 80% of the persons deprived of their liberty in Iraq had been arrested by mistake* [emphases added] [18] [emphases added].

The Bush administration's specious, expedient redefinition of torture relied on the U.S.. reservation, codified in 18 U.S.C. §§ 2340--2340A, in its ratification of the U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment. A Memorandum recommending the standards of conduct for interrogators stated that, to constitute torture

the victim must experience pain or suffering of a kind...equivalent to [that] ...associated with serious physical injury so severe that death, organ failure, or permanent damage resulting in a loss of significant body function would likely result. If that pain or suffering ...is psychological, [it] must result from one of the [predicate] acts ...in the statute, i.e. the prolonged mental pain caused by or resulting from

1. the intentional or threatened infliction of severe physical pain or suffering
2. the threatened or actual administration of mind-altering substances, or other procedures calculated to disrupt profoundly the senses or personality
3. the threat of imminent death or
4. the threat that another person will imminently be subjected to death, severe pain or suffering...

Moreover, because [§2340A] requires that a defendant [interrogator] act with the specific intent of inflicting severe pain, the infliction of such pain must be the defendant's precise objective. [19]

The recommendations of such memoranda written by Gonzales, Yoo and Bybee; sent to Bush; criticised by then-Secretary of State Powell; approved by Secretary of Defense Rumsfeld; were then modified somewhat, but not before confusion over the execution of official policies resulted in instances of abuse by interrogators that were tantamount to torture. According to the affidavit of one detainee, as reported by the ICRC:

The guards started to hit me on my broken leg several times with a solid plastic stick...they stripped me naked. One of them told me he would rape me...someone else asked me, 'Do you believe in anything?' I said to him, 'I believe in Allah'. So he said, 'But I believe in torture and I will torture you.' Then they handcuffed me and hung me to the bed. They ordered me to curse Islam and because they started to hit my broken leg, I cursed my religion...They left me hang from the bed and after a little while I lost consciousness when i woke up, I found myself still hang from the bed and the floor. Until now, I lost feeling in three fingers in my right hand.[20]

Ironically, the Bybee Memorandum outlined a potential defense of Necessity for interrogators charged with §2340 violations. This suggested defense seems novel in its nastiness and expediency, but also weak in its speculative nature, or insufficient consideration of imminence:

Necessity...or choice of evils...[is a situation when] the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged...a detainee *may* possess information that *could* enable the United States to prevent attacks that *potentially could* equal or surpass the September 11 attacks ...Clearly, any harm that *might* occur during an interrogation would pale to insignificance compared to the harm avoided by preventing such an attack [21][emphases added].

Sadistic as are such accounts of abuses or those publicised in the infamous 'torture photos', the deeper scandal has been the continuing policy of the Bush administration to deny any connection of these abuses with official policies and discount them as mere anomalies:

administration officials, and particularly those at the Department of Defense, have managed to orchestrate a slowly-unfolding series of investigations, almost all.. carried out within the military by officers who, by definition, can only direct their gaze down the chain of command...and who are each empowered to examine only a limited and precisely-defined series of links in the chain that connects the highest levels of government to what happened on the ground at Abu Ghraib and elsewhere...[a] key strategy of the defense is to focus on the photographs and to isolate the acts they depict...from any inference that they might have resulted...from policy.[22]

In September 2002, in its National Security Strategy, the Bush administration stated a right to take preemptive military action against threats arising from possession or development of weapons of mass destruction and from links to terrorism 'even if uncertainty remains as to the time and place of the enemy's attack' (U.S. National Security Strategy, September 2002).

Invoked as a basis for [the U.S. to invade] Iraq, the doctrine is incompatible with international legal constraints on resort to force..[Both customary international law and treaty law under the U.N. Charter have carefully limited the doctrine of anticipatory self-defense.] ...A recent treatise states that self-defense may justify the use of force [when, among other things], an attack is immediately threatened; ...there is no practicable alternative, particularly when another state or authority that legally could stop or prevent the infringement does not or cannot do so; and the use of force is limited to what is necessary to prevent the infringement. [23]

The above requirements were clearly not met In George Bush's decision to invade Iraq. The lack of imminence is indicated in the protracted, unavailing search for 'weapons of mass destruction' purportedly reconstituted by Saddam Hussein in Iraq, and the administration's failure to comply with practicable alternatives is indicated in its flawed reading of U.N. Security Council Resolution 1441, which held that a return to the Security Council was required before resorting to force.

The current U.S. nuclear posture is contained in National Security Presidential Directive [NSPD]-17, "National Strategy to Combat Weapons of Mass Destruction" (December 2002) This stated in its introduction that "weapons of mass destruction (WMD)--nuclear, biological and chemical--in the position of hostile states and terrorists represent one of the gravest security challenges facing the United States." The classified version of NSPD-17, as reported by the Washington Times on January 32. 2003, included the controversial sentence that "[t]he United States will continue to make clear that it reserves the right to respond with overwhelming force--*including potentially nuclear weapons*--to the use of [weapons of mass destruction] against the United States ..." [emphases added]

Read together, these official U.S. national security policy statements of November 2001, September 2002 and December 2002 raise alarming questions about the proclivity of the G.W.Bush administration to initiate the use of nuclear weapons, and its invocation of necessity for military force by linking, in attenuated and unwise ways, threats of terrorism and weapons of mass destruction.

The continued reliance of the U.S. on nuclear weapons is indicated in its strong ongoing support for the Stockpile Stewardship and Management (SS&M) Program, a vast complex of projects involving 'subcritical' tests (i.e.those technically allowable as not reaching a 'critical mass'); the capacity to design and develop new weapons... encompass[ing] both a test site of rapid resumption of full-scale underground testing and a nuclear warhead production facility...intended to allow rapid, flexible warhead production ..at the weapons laboratories".[24]

Moreover, the U.S. policy of making ratification of the Comprehensive Test Ban Treaty (CTBT) conditional on its continued support for the SSMP, among other grave risks, prevents credence, in the international community, of any genuine or significant commitment of the U.S. to the goals of nuclear disarmament.

The develop[ing] race in nuclear weapons laboratory testing and simulation technologies makes a Comprehensive Test Ban simultaneously less 'comprehensive' and more necessary...advances in nuclear weapons technology...have rendered the CTBT, *without more*, an arms control and horizontal proliferation device rather than a disarmament measure...Advanced nuclear weapon states...can upgrade their existing facilities while remaining within the parameters of well-understood concepts and designs..Despite (and in some ways because of) these developments, the CTBT remains an important goal. A legally binding global norm banning explosive testing would provide something of a 'firebreak' if tensions among the nuclear weapons states rise still further, making the decision to resume testing in order to deploy new weapons systems...more consequential.[25]

U.S. claims for the necessity of its continuing dependence on the development and deployment of nuclear weapons, essentially unchanged for the past sixty years, may be inferred from a statement by a U.S. Department of Energy (DOE) official before a Senate committee in 1997, that 'the DOE will ensure the *safety, security, and reliability* of the

enduring stockpile without nuclear tests...through the vigorous implementation of the integrated Stockpile Stewardship and Management program, a scientific and technical challenge perhaps as formidable as the Manhattan Project.” [26][emphases added].

Unlike 1945, however, “each warhead in the U.S nuclear arsenal--currently ready to quickly launch 2000 strategic warheads---would inflict vast heat, blast and radiation” [27] many times greater than those of the atomic bombs dropped on Hiroshima and Nagasaki.

The stakes are consequently much higher now for the U.S. to acknowledge the risks inherent in nuclear weapons and to act on their illegality. The only real Necessity is for the U.S. and the other nuclear weapon states to finally begin now in earnest to comply with their disarmament obligations under Article VI of the Nuclear Non-Proliferation Treaty. These obligations were strengthened by the International Court of Justice in its 1996 Advisory Opinion, which held unanimously that “there exists an obligation to pursue *in good faith* and *bring to a conclusion* negotiations leading to nuclear disarmament *in all its aspects* under strict and effective international control” [28] [emphases added].

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