

An Unsanitized Recourse: The Absolute Unlawfulness Of Nuclear
Reprisals

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My attitude was clear throughout. For more than a century, imperialists had frequently bullied, humiliated and oppressed China. To put an end to this situation, we had to develop sophisticated weapons such as the guided missile and the atomic bomb, so that we would have the minimum means of reprisal if attacked by the imperialist with nuclear weapons.

- Marshall Nie Rongzhen, *Memoirs*

INTRODUCTION

The last decade has seen fewer war deaths than any decade in the past one hundred years.¹ As Richard K. Betts, director of the Institute of War and Peace Studies at the School of International and Public Affairs at Columbia University, said, "There is less danger [today] of complete annihilation, but more danger of mass destruction."² Nevertheless, since 1990, there have been at least thirteen instances of States threatening

¹ Joshua S. Goldstein, *Think Again: War*, FOREIGN POLICY (Sept/Oct 2011), *retrieved from*

[http://www.foreignpolicy.com/articles/2011/08/15/think again war](http://www.foreignpolicy.com/articles/2011/08/15/think_again_war)

² Richard K. Betts, *The New Threat of Mass Destruction*, FOREIGN AFFAIRS (Jan/Feb 1998), *retrieved from*

<http://www.foreignaffairs.com/articles/53599/richard-k-betts/the-new-threat-of-mass-destruction>

other States with nuclear weapons.³ Throughout this period, the legality of nuclear weapons remained and still, to some degree, remains uncertain. Even though the International Court of Justice ("ICJ") pronounced the general unlawfulness of nuclear weapons in its Advisory Opinion, *Legality of the Threat or Use of Nuclear Weapons in Armed Conflict* ("Legality"), it simultaneously left in place an ambiguity by hedging the issue, as this Note will later explain. Much has been written about the legal status of nuclear weapons after *Legality*, but few have addressed the issue of nuclear reprisals. This Note will take up that substantial task.

Towards this end, then, this Note will assume nuclear weapons to be unlawful, which gives rise to the question of whether a nuclear reprisal to an adversary's use of WMDs - whether chemical, biological, or nuclear - could ever be lawful. Because the US is a signatory to both the chemical and biological weapons conventions, an in kind retaliation against chemical or biological weapons would be violative of Article 1.⁴

³ Joseph Gerson, *Empire and Nuclear Weapons*, Foreign Policy in Focus (Nov. 30, 2007), *retrieved from* http://www.fpif.org/articles/empire_and_nuclear_weapons.

⁴ See Natalino Ronzitti, *Missile Warfare and Nuclear Warheads--An Appraisal in the Light of the 1996 ICJ Advisory Opinion on the*

A nuclear reprisal, thus, provides the only possibility of a non-conventional response to a chemical or biological attack.

Part I of this Note will provide a synopsis of the Court's decision in *Legality* as well as the background law on reprisals. Because the International Committee of the Red Cross ("ICRC") is considered to be the primary institution for international humanitarian law ("IHL"), Part II will apply the conditions set forth in Part I by the ICRC for lawful reprisals to nuclear weapons used in reprisal. This analysis will convincingly demonstrate the unlawfulness of nuclear reprisals. Part III

Legality of the Threat or Use of Nuclear Weapons, in Yoram Dinstein (ed) (1997) ISRAEL YEARBOOK ON HUMAN RIGHTS 27, n65. See also Natalino Ronzitti, "Relations Between the Chemical Weapons Conventions and Other Relevant International Norms," *The Convention on the Prohibition and Elimination of Chemical Weapons: A Breakthrough in Multilateral Disarmament* at 184, Hague Academy of International Law Workshop, Martinus Nijhoff Publishers, Dordrecht, 1994 ("The 1993 Chemical Weapons Convention prohibits the use of chemical weapons in any circumstances, including by way of reprisal, and also obliges States parties not to use chemical weapons against non-parties. Article XXII states: 'The Articles of this Convention shall not be subject to reservations.'")

concludes by restating that nuclear weapons are simply too uncontrollable, indiscriminate, and powerful to satisfy the Laws of Armed Conflict ("LOAC"), and specifically the requirements of IHL.

I. BACKGROUND LAW

This section will provide an overview of the relevant international law addressing the legal status of nuclear weapons and reprisals, respectively. First, this Note will discuss the ICJ *Legality* decision, which is the only semi-authoritative pronouncement on the issue, even though it was only an Advisory Opinion. Thereafter, customary and conventional international law vis-à-vis nuclear weapons will be surveyed to see if any conventions or treaties came to be after *Legality* that assist in clarifying their legal status. Finally, the legality of reprisals will be discussed at length, with a specific intention of showing that, despite the international community's general disapproval of them, reprisals are lawful in certain, "reasonable" instances.

A. THE LEGAL STATUS OF NUCLEAR WEAPONS

1. ICJ ADVISORY OPINION ON NUCLEAR WEAPONS

In a split decision, the ICJ in *Legality* ruled that the use of nuclear weapons would generally be unlawful, as contrary to LOAC, and in particular the principles of IHL. The Court, however, noted that because of the current state of

international law and the facts at its disposal, it could not reach a definitive conclusion whether use of nuclear weapons would be lawful in "an extreme circumstance of self-defense, in which the very survival of a State would be at stake."⁵ The Court, nevertheless, reached two basic conclusions. First, the Court observed that there is no *per se* rule in customary or conventional international law prohibiting the use of nuclear weapons. Even though various conventions exist prohibiting the use of asphyxiating gases, poison, or poisoned weapons, like Article 23(a) of the Regulations annexed to the Hague Convention IV of 1907 or the 1925 Geneva Protocol, the Court found that none applied to nuclear weapons. Second, nuclear weapons fall under the scope of IHL. The Court highlighted three of these principles particularly relevant to assessing the legality of nuclear weapons:

- (a) The principle of distinction between combatants and non-combatants, which aims at protecting the civilian population and discriminating between civilian and military targets;
- (b) the obligation not to cause unnecessary suffering to combatants, which prohibits weapons having such an effect;
- (c) the Martens clause, according to which civilians and combatants, in cases not covered by *ad hoc* rules of conventional law, remain under the protection and authority of the principles of international law derived from established customs, from the principles of humanity, and from dictates of public conscience.

⁵ ICJ, *Legality*, Advisory Opinion, 8 July 1996, ICJ Reports 1996, para. 105 *sub* 2E.

While the Court did recognize the inherent difficulty of reconciling these fundamental principles of international law with the use of nuclear weapons, the Court nonetheless stated that it was unable to conclude that "the use of nuclear weapons would necessarily be at variance with the principles and rules of law applicable in armed conflict."⁶ As such, 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."⁷ It was in this context that the Court pronounced its ambiguous conclusion, declining to rule on whether the use of nuclear weapons would be lawful in an "extreme circumstance of self-defense."⁸

2. CUSTOMARY INTERNATIONAL LAW

As the ICJ recognized in *Legality*, there are no conventions treating nuclear weapons as *per se* unlawful. The UN General Assembly, however, has adopted several resolutions declaring nuclear weapons as contrary to international law, laws of

⁶ *Id.* para. 95.

⁷ *Id.* para. 105 *sub* 2E, italics added.

⁸ *Id.*

humanity, as well as being violative of the UN Charter.⁹ Among other resolutions, the Declaration on the Prohibition of the Use of Nuclear and Thermo-Nuclear Weapons (1961) states:

(a) The use of nuclear and thermonuclear weapons is contrary to the spirit, letter, and aims of the United Nations and, as such, a direct violation of the Charter of the United Nations;

(b) The use of nuclear and thermonuclear weapons would exceed even the scope of war and cause indiscriminate suffering and destruction to mankind and civilization and, as such, is contrary to the rules of international law and to the laws of humanity;

(c) The use of nuclear and thermonuclear weapons is a war directed not against an enemy or enemies alone but also against mankind in general, since the peoples of the world not involved in such a war will be subjected to all the evils generated by the use of such weapons;

(d) Any State using nuclear and thermonuclear weapons is to be considered as violating the Charter of the United Nations, as acting contrary to the laws of humanity, and as committing a crime against mankind and civilization.¹⁰

The ICJ in *Legality* considered the effect of such Resolutions and found that they did not create sufficient *opinio juris* to

⁹ Paula B. McCarron and Cynthia A. Holt, *A Faustian Bargain? Nuclear Weapons, Negative Security Assurances, and Belligerent Reprisal*, 25 Fletcher F. World Aff. 203, 208 (2001).

¹⁰ UN Resolution 1653 (1961), available at <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/167/06/IMG/NR016706.pdf?OpenElement>. This Resolution was adopted by 55 votes to 20, with 26 abstentions. France, the UK, and the U.S. - all nuclear weapons States - voted against the resolution while Russia voted in favor.

establish a rule of customary law because of the large number of negative votes and abstentions.¹¹ Fourteen years after the ICJ's *Legality* decision, however, 130 countries called for a convention prohibiting and eliminating nuclear weapons globally at the 2010 Nuclear Proliferation Treaty Review Conference.¹² Whether this is sufficient to create satisfactory *opinio juris* on the matter remains to be determined.

B. INTERNATIONAL LAW OF REPRISALS

A reprisal occurs when a party to a conflict "resorts to what is normally an unlawful act in response to another belligerent's unlawful violation of the laws of armed conflict."¹³ While the lawfulness of reprisals has been challenged and debated for some time, there is no customary international law prohibition on reprisals *per se* and "recent State practice indicates that States have yet to give up the possibility of exercising a right of reprisal in response to

¹¹ ICJ, *Legality*, supra note 5, p. 255, § 73.

¹² The Simons Foundation, *Vancouver Declaration: Law's Imperative for the Urgent Achievement of a Nuclear-Weapon-Free World* (Feb. 11, 2011), available at <http://www.lcnp.org/wcourt/Feb2011VancouverConference/vancouverdeclaration.pdf>

¹³ See McCarron and Holt supra note 9 at 220.

serious violations of the law of armed conflict to prevent further violations.”¹⁴ This was the implicit conclusion reached by the ICJ in *Legality* as well, when the Court pronounced that that the Court need not address the issue of reprisals, “save to observe that in any case any right of recourse to such reprisals would, like self-defense, be governed *inter alia* by the principle of proportionality.”¹⁵ That is to say, even if the Court deemed nuclear weapons *per se* unlawful, the use of a nuclear weapon may nonetheless be lawful in the limited circumstance of reprisals. Indeed, the US argued exactly this position when it told the Court that “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.”¹⁶ Nevertheless, in the

¹⁴ *Air Force Operations and the Law: A Guide for Air, Space, and Cyber Forces* 44, The Judge Advocate General's Corps (2009), available at <http://www.afjag.af.mil/shared/media/document/AFD-100510-059.pdf>

¹⁵ See *Legality* *supra* note 5 para. 46.

¹⁶ See *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, Written Statement of the United States at 31, (June 20, 1995), available at <http://www.icj-cij.org/docket/files/95/8700.pdf> (prepared by Conrad K. Harper,

dissenting opinions of Judge Koroma and Judge Weeramantry, both judges opined that belligerent reprisals are prohibited under the Geneva Conventions Additional Protocol I of 1977 and the Declaration concerning Principles of Friendly Relations and Cooperation among States (1970), respectively.¹⁷ Whether Protocol I and the Declaration state customary international law, however, is debated.¹⁸ Therefore, because of the absence of a *per se* prohibition on reprisals, it is worth examining the arguments of both sides, those for and against the lawfulness of reprisals.

Michael J. Matheson, Bruce C. Rashkow, and John H. McNeill on behalf of the United States).

¹⁷ See *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J 334, 352-53 (July 8) (Koroma, J. dissenting) ("According to the Protocol, all belligerent parties are prohibited from carrying out belligerent reprisals.") and *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J 226, 320-22 (July 8) (Weeramantry, J. dissenting) ("The Declaration concerning Principles of Friendly Relations and Cooperation among States (resolution 2625 (XXV) of 1970) categorically asserted that "States have a duty to refrain from acts of reprisal involving the use of force".).

¹⁸ See *supra* note 23 and accompanying text.

In discussing the debate surrounding the lawfulness of reprisals, the ILC Draft Articles on State Responsibility (2001) provide a useful starting point. Part Three, Chapter II of the ILC Articles deals with the topic of countermeasures,¹⁹ not reprisals, because the latter has been taken as equivalent to belligerent reprisals in times of international armed conflict. Reprisals are differentiated from countermeasures in that the latter are not associated with armed conflict. Countermeasures are non-forcible measures in response to another States internationally wrongful act, in order to "procure its cessation and to achieve reparation for the injury."²⁰ Article 50(1)(a) of the ILC Articles states that "[countermeasures shall not affect] the obligation to refrain from the threat or use of force as

¹⁹ See *International Law: Cases and Materials*, 713 ("The Articles on countermeasures have proven to be among the most controversial of the [ILC] Articles.").

²⁰ Draft Articles on Responsibility of States for Internationally Wrongful Acts 75, in Report of the International Law Commission on the Work of Its Fifty-third Session, UN GAOR, 56th Sess., Supp. No. 10, at 43, UN Doc. A/56/10 (2001), available at <http://www.un.org/law/ilc>.

embodied in the Charter of the United Nations."²¹ The ILC, therefore, does not give much attention to the issue of reprisals because it views them as generally, if not absolutely, unlawful.²² Further, Additional Protocol I to the 1949 Geneva Conventions (1977) prohibited "all attacks against the civilian population or civilians by way of reprisal," but this "sweeping proscription of reprisals against civilians is by no means

²¹ *Id.* para. 5 at 132. The General Assembly proclaimed that "States have a duty to refrain from acts of reprisal involving the use of force". General Assembly resolution 2625 (XXV), annex, first principle.

²² According to the Draft Articles, reprisals are prohibited by the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States, as well as a number of "authoritative pronouncements of international judicial" and "other bodies." The US, however, claims that similar such pronouncements are both "militarily unacceptable", "by no means declaratory," and are "new rules that have not been incorporated into customary law." See U.S. DEP'T OF NAVY, NAVAL WARFARE PUBLICATION 1-14M, COMMANDERS HANDBOOK ON THE LAW OF NAVAL OPERATIONS para. 6.2.3.3 (n.d.) (citing Sofaer, former Legal Adviser to the State Department).

declaratory or customary international law."²³ The US in *Legality* also took this position in front of the Court when it declared that the "provisions on reprisals . . . are new rules that have not been incorporated into customary law."²⁴ Whether reprisals are considered legal or not, and in what circumstances, if ever, is thus a more complicated and controversial question²⁵ that

²³ Yoram Dinstein, *War, Aggression, and Self-Defense*, 2nd ed., (1994), 218-219.

²⁴ ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Written Statement of the Government of the United States of America, June 20, 1995, 25. See also McCarron and Holt *supra* note 9 at footnote 132 ("The U.S. is not a party to Additional Protocol I, but agrees that some of it restates customary international law.").

²⁵ According to William V. O'Brien:

Although the right of self-defense against an actual armed attack is clear, the use of force to retaliate for past attacks or to deter future attacks has been controversial. The status of reprisals in contemporary international law has been debated almost entirely in terms of Israeli counterterror practice since 1953. In recent years, however, the United States has utilized armed force in manners that might be construed as reprisal actions, such as the April 1986 raid on Libya and the attacks on Iranian targets in the Persian Gulf in October 1987 and April 1988.

William V. O'Brien, *Reprisals, Deterrence and Self-Defense in Counter Terror Operations*, 30 *Va. J. Int'l L.* 421, 421 (1990).

warrants a deeper inquiry than both the ILC and Additional Protocol I provide.²⁶ That inquiry will now follow.

1. *DEREK BOWETT, ON REPRISALS*

Derek Bowett, in his seminal article, *Reprisals Involving Recourse to Arms* (1972), observed that there was a "credibility gap"²⁷ when it came to the issue of international law and reprisals: the proposition that reprisals were illegal enjoyed broad support but few States practiced accordingly.²⁸ Bowett's

²⁶ The ILC Articles were drafted before the 9/11 terrorist attacks, in a significantly different legal climate, which most likely explains the absolutist view that the ILC took on the issue of reprisals. Also, as William O'Brien mentions, the legality of reprisals was mostly approached in terms of Israeli counterterrorism practices, a subject that has often and continues to provoke controversies vis-à-vis the UN. See *supra* note 23 and accompanying text.

²⁷ Derek Bowett, *Reprisals Involving Recourse To Armed Force*, 66 *Am. J. Int'l L.* 1, 1 (1972).

²⁸ According to Bowett, "this proposition was generally regarded by writers and by the Security Council as the logical and necessary consequence of the prohibition of force in Article 2(4), the injunction to settle disputes peacefully in Article 2(3) and the limiting of permissible force by states to self-

article, therefore, sought to question the normative utility of the law prohibiting reprisals.²⁹ The difference between reprisals and self-defense, according to Bowett, is that the former is punitive in character: “[reprisals] seek to impose reparation for the harm done, or to compel the delinquent state to abide by the law in the future.”³⁰ Self-defense, in contrast, attempts to protect the security of the state before the harm arises, whereas reprisals, coming after the harm has already been suffered, cannot be characterized as a means of protection.³¹ Bowett, however, finds that the distinction between self-defense and reprisals is often blurred, given that a reprisal may be at the same time both a form of punishment and best form of protection because it may serve to deter future violence.³² As an example, Bowett points to a case involving guerilla activity originating from State A against State B. State B eventually attacks the bases of the guerilla group from which the previous

defense.” *Id.* For another possible explanation of this inconsistency, see O’Brien *supra* note 25 and accompanying text. See also note 26 and accompanying text.

²⁹ See Bowett *supra* note at 2.

³⁰ *Id.* at 3.

³¹ *Id.*

³² *Id.*

attacks have come and in order to deter future attacks.³³ This is not self-defense, as Bowett notes, because the harm inflicted by the guerilla group is already done.³⁴ Bowett then examined twenty-three cases of reprisals considered by the Security Council.³⁵ William V. O'Brien summarized Bowett's findings into

³³ *Id.*

³⁴ *Id.* at 3-4 (“[The guerilla activities] are past, whatever damage has occurred as a result cannot now be prevented and no new military action by State B can really be regarded as a defense against attacks in the past.”).

³⁵ Even though Bowett's article dates to 1972, and so analyzes Security Council cases prior to 1972, O'Brien notes that the Council's practice continued in the way analyzed by Bowett from 1971 to 1989. See O'Brien *supra* note 25 at 474 and accompanying footnote. Bowett also discusses the dubious legal significance of Security Council pronouncements. See Bowett *supra* note 27 (“The principle [of reprisals], as part of the broader prohibition of the use of force, is *jus cogens*, and no spasmodic, inconsistent practice of one organ of the United Nations could change a norm of this character.”). Nevertheless, Security Council pronouncements serve as an indicator of State practice, or customary international law. See Marko Divac Oberg, *The Legal Effects of Resolutions of the UN Security Council and*

five conclusions. First, the Security Council refused to assimilate reprisals into the right of self-defense and condemned them as illegal.³⁶ Second, reprisals are distinguished from self-defense due to their “punitive” nature.³⁷ Third, the Security Council frequently emphasized an alternative rationale for the illegality of specific reprisals (e.g. disproportionate character).³⁸ Fourth, the Security Council refused to take into account the background conflict, and rejected the concept that reprisals could be justified in response to an accumulation of attacks against a State.³⁹ Finally, the Council failed to condemn certain attacks that could be characterized as reprisals when those attacks appeared proportional to the initial harm done.⁴⁰ By examining the Security Council’s record vis-à-vis reprisals, Bowett observed that while reprisals remain *de jure* illegal, the

General Assembly in the Jurisprudence of the ICJ, European Journal of International Law,
<http://ejil.oxfordjournals.org/content/16/5/879.full>.

³⁶ See O’Brien *supra* note 25 at 424.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

Council seemed to be moving towards *de facto* acceptance.⁴¹ Bowett concludes that the more relevant distinction appears not to be between reprisals and self-defense, but “reasonable” reprisals and reprisals likely to be condemned.⁴² This distinction has made its way, in a more qualified form, into the ICRC’s handbook of the rules governing customary IHL.⁴³ Rule 145 of the ICRC handbook states that, “Where not prohibited by international law, belligerent reprisals are subject to stringent conditions.”⁴⁴ This section will conclude by setting forth the ICRC’s conditions for when reprisals may be considered lawful.

⁴¹ See Bowett *supra* note 27 at 10-11.

⁴² *Id.* at 11.

⁴³ According to the American Society of International Law, “[t]he ICRC is the principal international body devoted to developing, implementing, and promoting IHL. The ICRC is generally credited with beginning the development of modern IHL. The ICRC plays a very important role in IHL development and its implementation by states” American Society of International Law, *Resources: International Humanitarian Law*, available at <http://www.asil.org/erg/?page=ihuml>.

⁴⁴ Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law - Volume I: Rules* at 513, International Committee of the Red Cross (2005), available at

2. THE INTERNATIONAL COMMITTEE FOR THE RED CROSS, ON REPRISALS

According to the ICRC, reprisals have been a traditional method of enforcing IHL. Reprisals, nevertheless, are subject to certain stringent conditions and the categories of persons or objects that can be the target of a reprisal has been reduced.⁴⁵ The ICRC points to several military manuals that warn of the escalatory risk of reprisals and still others highlighting the limited military advantage gained by use of reprisals.⁴⁶ The ICRC

<http://www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf>

⁴⁵ *Id.*

⁴⁶ See *id.* at 514 and accompanying footnotes. Interestingly, one of the ICRC's choice manuals, Kenya's LOAC Manual, which states that "reprisals are an unsatisfactory way of enforcing the law" and that "they tend to be used as an excuse for illegal methods of warfare," is, at the time of this writing, engaged in a military operation on the soil of Somalia - without the Somali Transitional Federal Government's consent - against the al-Qaeda affiliated terrorist group, Al-Shabab. Kenya's military operation resembles a reprisal action similar to those condemned by the UN vis-à-vis Israel, among others, as it was taken in response to Al-Shabab's cross-border kidnappings. See *Your Questions: Kenya's Campaign Against Al-Shabab*, VOA NEWS (Nov. 8,

observes that these practices indicate a general shift away from using violations of international humanitarian law as a means of enforcing the law.⁴⁷ The ICRC then provides five conditions required for a reprisal against non-protected persons⁴⁸ to be lawful. First, the reprisal must be undertaken for the purpose of forcing or inducing the adversary to comply with the law, not as punishment or revenge.⁴⁹ Second, reprisals may only be carried out as a measure of last resort, when no other inducement is available to accomplish the same, after notification has been given to the responsible State of its failure to fulfill its

2011) ("Kenya sent troops into Somalia last month in pursuit of al-Shabab, which it blames for a series of cross-border kidnappings."). See also *supra* note 41 and accompanying text (describing the distinction between reprisals, anticipatory self-defense, and preemptive self-defense).

⁴⁷ See *supra* note 44 at 514.

⁴⁸ Reprisals against persons and objects protected by the Geneva Conventions and Hague Convention for the Protection of Cultural Property are prohibited according to the ICRC. In addition, reprisals are prohibited in the course of a non-international armed conflict. See *id.* at 519-27.

⁴⁹ *Id.* at 515.

obligations.⁵⁰ Third, reprisals must be proportionate to the violation it aims to stop.⁵¹ Fourth, the decision to resort to reprisals must be taken at the highest political level.⁵² Finally, the reprisal must terminate as soon as the adversary complies with the law.⁵³ These rules are similar to those listed in the US Navy's Naval Commander's Handbook, *US Army's Law of War Deskbook*, and the US Air Forces' *Manual on International Law*.⁵⁴ The US has generally recognized that the doctrine of reprisals is a dangerous one, likely to be counterproductive or result in conflict escalation, and is thus reluctant to engage in them.⁵⁵ The Annotated Supplement to the *US Naval Handbook* (1997) states that there is "always the risk that it will

⁵⁰ *Id.*

⁵¹ *Id.* at 517.

⁵² *Id.* at 518.

⁵³ *Id.*

⁵⁴ For a fuller treatment of the US military's perspectives on reprisals, see Charles J. Moxley Jr., *Nuclear Weapons and Compliance with International Humanitarian Law and the Nuclear Non-Proliferation Treaty* 624-28, *FORDHAM INTERNATIONAL LAW JOURNAL* (April 2011).

⁵⁵ *See id.*

trigger retaliatory escalation (counter-reprisals) by the enemy."⁵⁶ It adds:

Other factors which governments will usually consider before taking of reprisals include the following:

1. Reprisals may have an adverse influence on the attitudes of governments not participating in an armed conflict.
2. Reprisals may only strengthen enemy morale and underground resistance.
3. Reprisals may only lead to counter-reprisals by an enemy, in which case the enemy's ability to retaliate is an important factor.
4. Reprisals may render enemy resources less able to contribute to the rehabilitation of an area after the cessation of hostilities.
5. The threat of reprisals may be more effective than their actual use.
6. Reprisals, to be effective, should be carried out speedily and should be kept under control. They may be ineffective if random, excessive, or prolonged.
7. In any event, the decision to employ reprisals will generally be reached as a matter of strategic policy. The immediate advantage sought must be weighed against the possible long-range military and political consequences.⁵⁷

Thus, the US recognizes the drawbacks of reprisals but nevertheless maintains a posture supportive of their use in limited circumstances.

⁵⁶ United States, *Annotated Supplement to the Commander's Handbook on the Law of Naval Operations*, prepared by the Oceans Law and Policy Department, Center for Naval Warfare Studies, Naval War College, Newport, Rhode Island, November 1977, § 6.2.3.3, footnote 52.

⁵⁷ *Id.*

II. NUCLEAR REPRISALS: AN IHL ANALYSIS

With the law of reprisals and nuclear weapons now in place, it remains to be determined whether a nuclear reprisal can be undertaken lawfully. This Note will now apply the four ICRC requirements for lawful reprisals to nuclear weapons.⁵⁸

A. TESTING THE LAW OF REPRISALS ON NUCLAR WEAPONS

1. FORCING COMPLIANCE

The first requirement listed by the ICRC, that the reprisal be for the purpose of forcing or inducing the adversary to comply with the law, not as punishment or revenge, is a question both of intention and probable outcomes. The US Air Force, in its *Manual on International Law*, states that "[m]ost attempted uses of reprisals" in past conflicts were unjustified, either because they were undertaken for an improper reason or were disproportionate.⁵⁹ The Manual also points out that reprisals

⁵⁸ While there are five conditions set forth by the ICRC, the fourth one mentioned above, that reprisals must be authorized at the highest political level, will not be discussed further because this condition is easily satisfied and is enshrined in the LOAC Manuals of many countries.

⁵⁹ See Moxley *supra* note 54 at 626 (quoting U.S. Dep't of The Air Force, Pamphlet No. 110-31, *International Law - The Conduct of Armed Conflict and Air Operations* at 10-5).

"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."⁶⁰ While a record of improper or failed State practice is an important consideration in this regard, the issue is not so easily settled. For example, during World War II, US President Roosevelt threatened in kind reprisals against the Axis Powers if they used poison or noxious gases against Allied troops, a threat which some argue compelled the Axis Powers to refrain from using such weapons.⁶¹

Additionally, as Judge Schwebel in his *Legality* dissent highlighted, the US threat of reprisal against Iraq (which Iraq took as a nuclear threat) appears to have deterred it from using chemical and biological weapons against coalition forces in the Gulf War, adding that this was "not only eminently lawful but intensely desirable".⁶² While it can never be proven with

⁶⁰ See *id.*

⁶¹ Andrew D. Mitchell, *Does One Illegality Merit Another? The Law of Belligerent Reprisals in International Law*, 170 *Mil. L. Rev.* 155, 171 (quoting H. Almond, *Remarks*, 74 *PROC. AM. SOC'Y INT'L L.* 211 (1980)).

⁶² See Judge Schwebel's Dissenting Opinion, *Legality*, available at

http://www.fas.org/nuke/control/icj/text/iunan_ijudgment_1996070

certainty whether these threats of reprisal were effective in deterring violations of international laws, it at least raises the possibility that reprisals can have a positively coercive effect on nations thinking about violating the rule of law.

Some commentators have further argued that a nuclear reprisal would "almost inevitably be designed to punish the enemy"⁶³ given the uncontrollable and devastating effects of a nuclear weapon. There are, however, many conceivable circumstances where a nuclear reprisal would force compliance rather than merely punish. For example, imagine that State X, a nuclear power, and State Y, a non-nuclear power in possession of chemical and biological weapons, are at war. If State Y used chemical or biological weapons against State X's combat troops, a nuclear reprisal against State Y's combat troops in a desert, or at sea, *could* demonstrate to State Y that violating the laws of war serves a deleterious purpose, rather than a strategic one. Excluding the possible escalatory effects, there would be limited to no civilian casualties given the terrain and a State

[8 Dissenting Schwebel.htm](#), for an extensive record of the conversation had between the US and Iraq on the matter. See also *Legality* summary prepared by the Court's Registry, available at <http://www.fas.org/nuke/control/icj/text/9623.htm>.

⁶³ See Moxley *supra* note 54 at 663.

lacking nuclear arms, as most States do, would conceivably not risk further nuclear reprisals by continuing using chemical or biological weapons. This parallels the scenario envisioned by Judge Schwebel in his *Legality* dissent, when he said that detonating a nuclear depth charge to destroy a nuclear submarine on the high seas would be lawful, whereas the dessert scenario *could* be lawful but would depend on the circumstances.⁶⁴ Because it is at least possible to conceive of a scenario where a nuclear reprisal would not be “designed to punish” but to compel obedience to the law, nuclear reprisals can at least theoretically satisfy the first of the ICRC’s conditions.

2. LAST RESORT

The ICRC’s second condition mandates that a reprisal be undertaken only as a last resort, when no other inducement is available to accomplish the same, after notification has been given to the responsible State of its failure to fulfill its obligations. Echoing this position, US Secretary of Defense Robert Gates (April 6, 2010), following the release of the Obama Administration’s 2010 Nuclear Posture Review (“NPR”), stated

⁶⁴ See Judge Schwebel, Dissenting Opinion, *Legality*, available at http://www.fas.org/nuke/control/icj/text/iunan_ijudgment_19960708_Dissenting_Schwebel.htm

that nuclear weapons are "obviously a weapon of last resort."⁶⁵ The US Field Manual⁶⁶ (1956), the US Air Force Pamphlet⁶⁷ (1976), and the US Naval Handbook⁶⁸ (1995), as well as the LOAC Manuals of many countries, all state that reprisals are likewise actions of last resort. While the latter of the ICRC's two-pronged "Last

⁶⁵ Arms Control Association, *U.S. "Negative Security Assurances" at a Glance*, available at

<http://www.armscontrol.org/factsheets/negsec>

⁶⁶ United States, *Field Manual*, 27-10, *The Law of Land Warfare*, US Department of the Army (July 18, 1956), as modified by Change No. 1 (July 15, 1976) § 497(d) ("Reprisals are never adopted merely for revenge, but only as an unavoidable last resort to induce the enemy to desist from unlawful practices.").

⁶⁷ United States, *Air Force Pamphlet 110-130, International Law - The Conduct of Armed Conflict and Air Operations*, US Department of the Air Force (1976) § 10-7(a) and (c) ("The action is taken in the last resort, in order to prevent the adversary from behaving illegally in the future.").

⁶⁸ United States, *The Commander's Handbook on the Law of Naval Operations* (2007), U.S. Department of the Navy, Naval War Pub. No. 1-14M § 6.2.3.1 ("Reprisal must only be used as a last resort when other enforcement measures have failed or would be of no avail.").

Resort" condition can easily be met (i.e. notification of intention to resort to reprisals), the former (i.e. when no other inducement can accomplish the same) will be more difficult, or even impossible, for some States to satisfy. Given the United States conventional military superiority and the existence of many powerful non-nuclear weapons at its disposal - precision guided "smart" munitions, automatically guided weapons, cluster munitions, and enhanced blast munitions, all of which can approach the destructive potential of nuclear weapons in performing specific military requirements⁶⁹ - a nuclear reprisal would hardly seem warranted in relation to a chemical or biological attack. This is a point that Secretary of Defense Gates recognized when he remarked that "[T]ry as we might, we could not find a credible scenario where a chemical weapon could have the kind of consequences that would warrant a nuclear response."⁷⁰ In addition, Secretary of Defense Gates also said that "[i]f any state eligible for [the 2010 NPR's assurances] were to use chemical or biological weapons against the United States or its allies or partners, it would face the prospect of

⁶⁹ Harold A. Feiveson and Ernst Han Hogendoorn, *No First Use of Nuclear Weapons* 5, *The Nonproliferation Review* (2003).

⁷⁰ Arms Control Association, *supra* note 65.

a devastating *conventional* military response.”⁷¹ These remarks seem to confirm that, at least for the US, a nuclear reprisal against chemical or biological weapons, and even against an adversaries use of nuclear weapons, would be violative of the Last Resort condition because non-nuclear, conventional means remain at the US’s disposal.⁷² The issue, though, becomes muddled when the perspective shifts away from the US and onto nuclear States lacking the US’s conventional military strength, like Russia or Israel. While both countries possess powerful armies, many scenarios exist in which both may be outmatched on the conventional battlefield, especially given the steady decline of formers conventional forces.⁷³ Acknowledging this prior reality,

⁷¹ See *id* (emphasis added).

⁷² See Moxley *supra* note 54 at 664-65 (“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 against a smaller nuclear weapons state possessing a limited number of such weapons.”).

⁷³ *Russia’s military chief warns that heightened risks of conflict near its borders may turn nuclear*, WASHINGTON POST (Nov. 17, 2011), http://www.washingtonpost.com/world/europe/russias-military-chief-potential-conflicts-near-russian-borders-may-grow-into-nuclear-war/2011/11/17/gIQAWQTJUN_story.html (“A

Russian General Nikolai recently stated that, "under certain conditions local and regional conflicts may develop into a full-scale war involving nuclear weapons."⁷⁴ Likewise, Israel, in both its 1967 ("Six Day War") and 1973 ("Yom Kippur War") wars, apparently considered using nuclear weapons against its Arab adversaries. The Israeli plan was dubbed the "Samson Option", in homage to the Biblical character, Samson, who pushed apart the pillars in a Philistine temple as a last resort, crushing himself and his adversaries in the process. In the Six Day War, Israel felt its nuclear facilities threatened and Israeli Prime Minister Levi Eshkol reportedly ordered his country's nuclear arsenal to be armed (then believed to consist of two deliverable nuclear bombs).⁷⁵ The situation was even more alarmist during the Yom Kippur War. After a coordinated, surprise invasion by its Arab neighbors nearly overran the small country, Israel's Defense Minister Moshe Dayan reportedly told Prime Minister

steady decline in Russia's conventional forces has prompted the Kremlin to rely increasingly on its nuclear deterrent.").

⁷⁴ *Id.*

⁷⁵ Warner D. Farr, *The Third Temple's Holy of Holies: Israel's Nuclear Weapons* (September 1999), USAF Counterproliferation Center, Air War College.

Golda Meir that "this is the end of the Third Temple;"⁷⁶ that night, Israel assembled thirteen twenty-kiloton nuclear bombs on Golda Meir's orders.⁷⁷ If in either the Russian or Israeli context an adversary used WMDs against either, a nuclear reprisal may indeed be a weapon of last resort. Further, this may be precisely the situation the Court in *Legality* had in mind when it pronounced its conclusion, that resort to a nuclear weapon may be lawful in "an extreme circumstance of self-defense, in which the very survival of a State would be at stake."⁷⁸ Thus, whether or not the condition of Last Resort is fulfilled must be assessed on a case-by-case basis, and depends on the State's conventional alternatives to a nuclear reprisal. Some situations, nevertheless, appear able to satisfy this condition.⁷⁹

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ ICJ, *Legality*, para. 105 sub 2E.

⁷⁹ A further question is whether a State has a legal obligation to maintain its conventional capability so as not to compel a situation where nuclear weapons become a last resort. As with ordinary self-defense, one cannot place oneself in a vulnerable position so as to resort to lethal force. It would seem that the same logic applies to this question.

3. PROPORTIONALITY

The Proportionality requirement is often misunderstood to mean a tit-for-tat or in-kind response; the reality, however, is much more complicated and not well understood.⁸⁰ Frits Kalshoven, an expert on IHL, states:

[The requirement of proportionality] . . . can be clarified to a certain degree. In particular, it can confidently be stated that the proportionality envisaged here is proportionality to the preceding illegality, not to such future illegal acts as the reprisal may (or may not) prevent. Expectations with respect to such future events will obviously play a part in the decision-making process; thus, a prognosis that the enemy, unless checked, will commit increasingly grave breaches of the laws of war, will tend to make the reaction to the breaches already committed still more severe. Whilst, however, this psychological mechanism may be of interest from the point of view of theories of escalation, it cannot influence a legal judgement [sic] of the retaliatory action, which can take account only of its proportionality to the act against which it constitutes retaliation.

Furthermore, it can be stated with equal confidence that proportionality in this context means the absence of obvious disproportionality, as opposed to strict proportionality. In other words, belligerents are left with a certain freedom of appreciation; a freedom which in law is restricted by the requirement of reasonableness, but which in practice can easily lead to arbitrariness and

⁸⁰ See e.g. Gary D. Brown, *Proportionality for Military Leaders*

(April 2000), USAF Air University, Air Command and Staff

College, available at

<http://www.au.af.mil/au/awc/awcgate/acsc/00-208.pdf> ("Despite its preeminent position in just war tradition, the concept of proportionality is not well understood by military leaders.").

excessive reactions . . . But . . . in the absence of a more precise rule . . . there is no alternative but to accept the flexibility and relative vagueness of the requirement of proportionality.⁸¹

This "vagueness" has led some experts to argue for doing away with the proportionality requirement altogether.⁸² Nevertheless, a reasonable definition can be found. The *US Air Force Pamphlet*, for example, states that, "[a]lthough a reprisal need not conform in kind to the same type of acts complained of (bombardment for bombardment, weapon for weapon) it may not significantly exceed the adversary's violation either in violence or effect."⁸³ Adding to this, the *US Naval Handbook* notes that "the reprisal will usually be somewhat greater than the initial violation that gave rise to it . . .

The reprisal action taken may be quite different from the

⁸¹ Frits Kalshoven, *Belligerent Reprisals*, A.W. Sijthof, Leyden (1971), pp. 341-42. See also Christopher Greenwood, *The Twilight of the Law of Belligerent Reprisals*, *Netherlands Yearbook of International Law* (1989), Vol. 20, pp. 43-45, with more references.

⁸² See e.g. Jonathan F. Keiler, *The End of Proportionality*, Parameters (Spring 2009), US Army War College, available at <http://www.carlisle.army.mil/usawc/parameters/Articles/09spring/keiler.pdf>

⁸³ See US Air Force Pamphlet *supra* note 67 at § 10-7(c)(6).

original act which justified it, but should not be excessive or exceed the degree of harm required to deter the enemy from continuance of his initial unlawful conduct.”⁸⁴ It further states that weapons whose design causes 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.”⁸⁵ The Handbook goes on to say that 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.⁸⁶

The rule of proportionality thus requires controllability, because 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.”⁸⁷ This principle, then, poses a serious obstacle for those who argue

⁸⁴ See US Naval Handbook *supra* note 66 at § 6.2.3.1, footnote 43.

⁸⁵ *Id.*

⁸⁶ *Id.* at § 5.3.3.

⁸⁷ See Moxley *supra* note 54 at 613.

for the lawfulness of nuclear weapons. To get around this clear difficulty, the UK and US in *Legality* both argued that the determination of proportionality cannot be answered in the abstract but would depend upon the nature and circumstances of the wrong which prompted the taking of the reprisal action.⁸⁸ The US also attempted to argue that "modern delivery systems" and "the ability of modern weapon designers to tailor the effects of a nuclear weapon to deal with various types of military objectives" makes these weapons capable of distinction and thus proportionality.⁸⁹ According to at least one commentator, though, these were "merely assertions."⁹⁰ The US 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 . . . The radiation and other effects of nuclear weapons simply are not subject to such control or limitation."⁹¹ While this seems

⁸⁸ See United States, Written statement submitted to the ICJ, *Nuclear Weapons case*, (June 16, 1995), p. 30 and United Kingdom, Written statement submitted to the ICJ, *Nuclear Weapons case*, (June 16, 1995), pp. 58-60.

⁸⁹ *Id.* at 23.

⁹⁰ See Moxley *supra* note 54 at 648.

⁹¹ *Id.*

absolutely the case vis-à-vis conventional, high-yield nuclear weapons, tactical, low-yield nuclear weapons (between one to ten kilotons⁹²) may be able to satisfy the proportionality requirement in the limited circumstances discussed above and referenced by Judge Schwebel (i.e. nuclear depth charge against a submarine or a nuclear strike on an adversary's troops in an isolated desert). These limited scenarios, though, would still leave the US, and possibly other powerful conventional armies, with the questionable ability to fulfill the Last Resort condition. Indeed, given the make up of the US nuclear arsenal, which consists predominantly of nuclear weapons with yields between 100 and over 400 kilotons, the US hardly seems capable of fulfilling this requirement.⁹³ Nevertheless, with the Israel or Russia examples mentioned above, the proportionality requirement could most likely be fulfilled with a low-yield nuclear weapon in an isolated theater. For example, the Israeli's have, by several accounts, developed low yield neutron bombs able to destroy troops with minimal damage to property⁹⁴

⁹² Joint Chiefs of Staff, Joint Pub. No. 3-12.1, *Doctrine for Joint Theater Nuclear Operations* (1996), at GL-3.

⁹³ See Moxley *supra* note 54 at 664.

⁹⁴ See Farr *supra* note 78 (citing Hersh, Seymour M., *The Samson Option: Israel's Nuclear Arsenal and American Foreign*

and have other low-yield nuclear weapons.⁹⁵ Assuming that a low-yield nuclear device's radiation does not extend beyond the

Policy (New York: Random House, 1991), 319). A neutron bomb "produces minimal blast and heat but . . . releases large amounts of lethal radiation. The neutron bomb delivers blast and heat effects that are confined to an area of only a few hundred yards in radius. But within a somewhat larger area it throws off a massive wave of neutron and gamma radiation, which can penetrate armour [sic] or several feet of earth." *Encyclopedia Britannica, Neutron Bomb* (2011), retrieved from

<http://www.britannica.com/EBchecked/topic/410967/neutron-bomb>.

But see *Neutron bomb: Why 'clean' is deadly*, BBC NEWS (Jul. 15, 1999), retrieved from

<http://news.bbc.co.uk/2/hi/science/nature/395689.stm> ("William Peden of CND said: 'Whatever has been said about the neutron bomb, its actual effects are known only in theory. In nuclear terms, an explosion is still an explosion. You cannot sanitise [sic] nuclear war.'").

⁹⁵ See Farr *supra* note 78 ("Shortly after the 1973 war, Israel allegedly fielded considerable nuclear artillery consisting of American 175 mm and 203 mm self-propelled artillery pieces, capable of firing nuclear shells. If true, this shows that Dimona had rapidly solved the problems of designing smaller

battlefield,⁹⁶ an Israeli strike on an advancing Egyptian tank column in the Sinai Dessert using one of these low-yield nuclear weapons or neutron bombs could conceivably satisfy the proportionality requirement.

4. Termination

The final condition of the ICRC to be examined is Termination, which requires that the reprisal cease as soon as

weapons since the crude 1967 devices. If true, these low yield, tactical nuclear artillery rounds could reach at least 25 miles.").

⁹⁶ This assumption is based on, *inter alia*, the "Castle Bravo" dry fuel thermonuclear hydrogen bomb test in 1954. While Castle Bravo is an example of how radioactive materials can spread far beyond Ground Zero, the nuclear device used had a yield of fifteen megatons (equivalent to 15,000 kilotons) and was detonated in high-winds. The radiation from the blast spread over one hundred miles. As a high estimate, assume that that radiation spread 300 miles. Each kiloton from the Castle Bravo test then has a radioactive range of .02 miles. If the yield had been in the low kiloton range, it is safe to then assume that the spread of radiation would have been much lower and confined to the battlefield, especially in an open expanse like the Sinai.

the adversary complies with the law. This condition poses an additional, possibly insurmountable, challenge to those who argue that nuclear reprisals are lawful. As at least one commentator has argued, the potential effects of a nuclear reprisal include, *inter alia*, "the electromagnetic and radiation effects" as well as "long-term effects of radioactive fallout."⁹⁷ Radiation is emitted not only at the time of detonation ("initial radiation") but also for long periods of time afterward ("residual radiation").⁹⁸ The Federation of American Scientists ("FAS") states:

A wide range of biological changes may follow the irradiation of an animal, ranging from rapid death following high doses of penetrating whole-body radiation to an essentially normal life for a variable period of time until the development of delayed radiation effects, in a portion of the exposed population, following low dose exposures . . . There are over 300 different fission products that may result from a fission reaction. Many of these are radioactive with widely differing half-lives. Some are very short, i.e., fractions of a second, *while a few are long enough that the materials can be a hazard for months or years.*⁹⁹

⁹⁷ See Moxley *supra* note 54 at 663.

⁹⁸ See Federation of American Scientists, *Nuclear Weapon Radiation Effects*, Special Weapons Primer: Weapons of Mass Destruction (Oct. 21, 1998), *retrieved from* <http://www.fas.org/nuke/intro/nuke/radiation.htm>.

⁹⁹ *Id* (emphasis added).

While there is a distinction in terms of the effects of a land or water surface detonated nuclear device as compared to an air detonated one, both produce long term, residual effects. As the FAS described, an airburst creates very small particles that are thrown into the stratosphere, particularly so if the explosive yield exceeds ten kilotons.¹⁰⁰ These particles are then dispersed by atmospheric winds and will "gradually settle to the earth's surface after weeks, months, and even years as worldwide fallout."¹⁰¹ The resulting radiobiological hazard of worldwide fallout poses a long-term threat due to the potential accumulation of "long-lived radioisotopes in the body as a result of ingestion of foods which had incorporated these radioactive materials."¹⁰² The local fallout is even more dangerous. For land or water surface bursts, the FAS describes how large amounts of earth or water will be vaporized by the heat of the fireball and drawn up into the radioactive cloud.¹⁰³ This too could have global effects, but the local fallout contamination can extend far beyond the blast and thermal effects, particularly in the case of high yield surface

¹⁰⁰ *Id.*

¹⁰¹ *Id* (emphasis added).

¹⁰² *Id.*

¹⁰³ *Id.*

detonations.¹⁰⁴ Any individuals remaining in the contaminated area will be immediately exposed to external radiation "as well as a possible later internal hazard due to inhalation and ingestion of radiocontaminants."¹⁰⁵ Even a one-kiloton neutron bomb used over a battlefield, in the scenario described above, would kill or incapacitate people with its radioactive effects over an area twice as large as the lethal zone of a 10 kiloton standard nuclear weapon - but with a fifth of the blast.¹⁰⁶ In addition, a study done by Japanese scientists and social workers on the lingering medical, social, and psychological damage suffered by the victims of the World War II nuclear bombings of Hiroshima and Nagasaki, showed that long-term health effects were more serious than earlier studies by the UN.¹⁰⁷ Among other things, the study found that "'an irreversible injury' remains in cells, tissues and organs, leading to such blood disorders as leukemia, multiple myeloma, malignant lymphoma," "the mortality

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ See BBC NEWS *supra* note 95.

¹⁰⁷ Herbert Mitgang, *Study of Atom Bomb Victims Stresses Long-Term Damage*, NEW YORK TIMES (Aug. 6, 1981), *retrieved from* <http://www.nytimes.com/1981/08/06/world/study-of-atom-bomb-victims-stresses-long-term-damage.html>.

rate over the years was higher among those most exposed to radiation," and that cataracts developed in the eyes of victims years after the bombing.¹⁰⁸ Given these long-term effects, it is not possible for a nuclear reprisal, even with a low-yield nuclear weapon or neutron bomb, to simply terminate after its initial use. The radiation will be present not only at Ground Zero, but will affect those far away from the isolated battlefield through nuclear fallout; those on the battlefield who did not die from the initial blast, will suffer from radiation-related illnesses for years to come, even after the "termination" of the reprisal; and the site of the detonation can remain radioactive, threatening any future passerby, for as long as the half-life of the isotope, which, in some cases, can extend for many years.¹⁰⁹ Even if a nuclear reprisal can satisfy the three other conditions required by the ICRC, nuclear reprisals are fundamentally incompatible with this final condition, because the effects of a nuclear weapon cannot simply terminate.

III. CONCLUSION

This Note began by analyzing the ICJ's decision in *Legality* pertaining to the legal status of nuclear weapons in

¹⁰⁸ *Id.*

¹⁰⁹ See Federation of American Scientists *supra* note 99.

international law. Because of the Court's ambiguous conclusion and the lack of scholarly attention paid to the issue of nuclear reprisals, this Note took up that task. After first discussing the evolving legal status of reprisals, the ICRC's four conditions for lawful reprisals were then applied to nuclear weapons and were found unable to satisfy the ICRC's conditions. Not only do nuclear reprisals present an obstacle under the Last Resort category, but it also, in most, if not all, instances would fail the Proportionality requirement as well. Even if these two conditions were satisfied, nuclear reprisals would certainly fail the Termination test because of the lingering effects of radiation and radioactive fallout.

Reprisals may have their place in warfare, as this author believes; but nuclear reprisals - and nuclear weapons generally - threaten more than just belligerents partaking in hostilities. Both planet and life, or those who the law of armed conflict were designed to protect, are threatened by the existence of these uncontrollable weapons of mass destruction. William Peden's conclusion is thus inescapable: Nuclear war cannot be sanitized.