

**THE LAWFULNESS OF A POLICY OF DETERRENCE IN LIGHT OF THE  
INTERNATIONAL COURT OF JUSTICE'S ADVISORY OPINION**

***I. INTRODUCTION***

In 1996, the International Court of Justice (hereinafter "ICJ") was asked by the General Assembly of the United Nations ("General Assembly") to issue an advisory opinion as to whether "the threat or use of nuclear weapons in any circumstance [is] permitted under international law."<sup>1</sup>

Although some international conventional law and treaties address nuclear weapons directly or peripherally, many of these sources seek to regulate possession only and not lawfulness of use and threat of use<sup>2</sup>. Moreover, until the ICJ Advisory Opinion ("ICJ Opinion), there had been no definitive, universal, modern statement as to nuclear weapons in totality. In reality, the Court declined to address the question with any level of specificity and thus left the world questioning the force, power and applicability of the opinion. The United States anticipated this problem in its oral argument, in which it communicated its belief that it was "inappropriate and unwise" to issue an advisory opinion because

*the nature of the question presented...is so hypothetical-so dependent upon facts not now ascertainable-that the Court could not, consistent with its judicial function, reasonably provide an answer that would afford guidance to the General Assembly.*<sup>3</sup>

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<sup>1</sup> *Legality of the Threat or Use of Nuclear Weapons*, International Court of Justice, Advisory Opinion, 1996 I.C.J. Reports 226, ¶20 (July 8, 1996), available at <http://www.icj-cij.org/docket/files/95/7495.pdf> [hereinafter, "The ICJ Advisory Opinion"]

<sup>2</sup> Fix citation: Nuclear Proliferation Treaty

<sup>3</sup> ICJ Hearing, November 15, 1995 at 56, available at <<http://www.icj-cij.org/docket/files/95/5947.pdf>>.

The Court considers the authority of the body issuing the request<sup>4</sup>; that the question presented relates to a “legal question”<sup>5</sup>; distinguishes the “requirements governing contentious procedure and those applicable to advisory opinions;<sup>6</sup>” and ensures that the issuing of an opinion would not extend beyond the scope of judiciary duties<sup>7</sup> (rejecting the idea that the Court would be acting in a legislative capacity); and ultimately concludes that it has the jurisdiction to issue an advisory opinion on this matter. The Court noted “the purpose of the advisory function is not to settle – at least directly – disputes between States, but to offer legal advice to the organs and institutions requesting the opinion.<sup>8</sup>” The advisory opinion subsequently issued, while incomplete and problematic, remains the most decisive international statement on the use and threat of use of nuclear weapons at present.

Despite the Court’s initial statement that it “did not intend to pronounce here upon the practice known as “the policy of deterrence<sup>9</sup>, it subsequently becomes clear that any discussion of the use and threat of use of nuclear weapons is inextricably linked to the lawfulness of deterrence policy. Though the opinion provides a framework against which to evaluate deterrence, the lack of specificity in the facts prevents the Court from definitively answering whether a policy of deterrence is lawful in any or all circumstances. This paper will attempt to apply this framework to evaluate whether a State’s policy of deterrence is lawful in light of the ICJ opinion, international customary

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<sup>4</sup> The ICJ Advisory Opinion, *supra* note 1, at ¶ 10.

<sup>5</sup> *Id.* at ¶ 13.

<sup>6</sup> *Id.* at ¶ 15.

<sup>7</sup> *Id.* at ¶ 11.

<sup>8</sup> *Id.* at ¶ 15.

<sup>9</sup> *Id.* at ¶ 67.

law, and international conventional law. For the purposes of this paper, I am working under the assumption that actual use is unlawful in all circumstances.

*A. Definitions*

One of the problems in determining the lawfulness of nuclear deterrence is the Court's failure to define key terms. Ironically, and perhaps confusingly, the absence of specific definitions comes not from the absence of sources, but rather the plethora of them. While US and international case law (including the ICJ opinion), US federal and state law, laws of other countries, and innumerable secondary sources all purport to define "threat," these definitions often vary widely from each other, and are often in conflict.

*1. What is a policy of deterrence?*

Black's Law Dictionary defines deterrence, generally, as "the act or process of discouraging certain behavior, particularly by fear."<sup>10</sup> In the context of nuclear weapons, deterrence is a policy by which a State publicizes both its willingness and capacity to use said weapons to the extent that the consequences of the proposed action would be so formidable as to cause the aggressor to refrain from attack for fear of said consequences. In practice, it is a policy composed of any number of threats, of varying degrees of specificity. As we will see, one significant challenge in determining the lawfulness of nuclear weapons deterrence policy is the lack of international agreement in defining "threat." In any case, for a deterrence policy to have the

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<sup>10</sup> *Black's Law Dictionary* (9<sup>th</sup> ed. 2009).

desired effect, the elements of the deterrence policy must be extreme enough to warrant such a reaction. Additionally, as noted by the majority in the ICJ Opinion, the threatened state must believe that the threat is credible.<sup>11</sup>

In the Zelter case (decided five years after the ICJ issued the advisory opinion), the Scots High Court noted

*deterrence is a policy of threatening overwhelming, disproportionate, and indiscriminate damage...that, to be effective, must be credible, backed up by weapons procurement, personnel training, contingency planning, pre-targeting, and weapons placement and alertness evidencing the resolve...to actually use these weapons.*<sup>12</sup>

This characterization is problematic because it appears to on its face to violate the rules of armed conflict, by specifying that deterrence is by definition disproportionate and indiscriminate, which is a concept I will address in subsequent sections.

As to the specific elements that may constitute a policy of deterrence, Justice Schwabel notes that nuclear states

*have threatened [nuclear weapons] use by the hard facts and inexorable implications of the possession and deployment of nuclear weapons; by a posture of readiness to launch nuclear weapons 365 days a year, 24 hours of every day; by the military plans, strategic and tactical, developed and sometimes publicly revealed by them; and, in a very few international crises, by threatening the use of nuclear weapons*

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<sup>11</sup> The ICJ Advisory Opinion, *supra* note 1 at ¶ 48.

<sup>12</sup> Charles J. Moxley, Jr., *Unlawfulness of the United Kingdom's Policy of Nuclear Deterrence – Invalidity of the Scots High Court's Decision in Zelter* [hereinafter "Unlawfulness of the United Kingdom's Policy of Nuclear Deterrence"], *Disarmament Diplomacy* No. 58, June 2001 at p. 17.

It is important to note further that while a policy of deterrence may at times involve dormant possession of nuclear weapons, deterrence policy and non-use of nuclear weapons are not in every instance synonymous concepts; the mere fact that a situation has not arisen that has necessitated use in no way speaks to the legality of the policy of deterrence in general, because it neglects to consider that during this era there were threats to use the weapons, and does nothing to evaluate the legality of those threats; nor does it address whether other elements of the deterrence policy, including the state practice of possessing these weapons, stored with delivery vehicles, and ready to launch in minutes, constituted unlawful threats.

## 2. *What is a threat?*

There is disagreement even among the nuclear states as to what constitutes a threat. In the 1996 ICJ opinion, the Court defined an illegal threat by citing Article 2, Paragraph 4 of the United Nations Charter which states, “all members shall refrain in their international relations from the threat ...against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.”<sup>13</sup> Judge Schwabel, who dissented from the majority opinion, noted “the policy of deterrence differs from that of the threat to use nuclear weapons by its generality.”<sup>14</sup>

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<sup>13</sup> The ICJ Advisory Opinion, *supra* note 1 at ¶ 47.

<sup>14</sup> Dissenting opinion of Judge Schwabel at 314, 35 I.L.M 809 (1996) [hereinafter Judge Schwabel’s dissent] available at <http://www.icj-cij.org/docket/files/95/7515.pdf>.

A mere five years later, and in direct conflict with the ICJ definition, the Scots High Court in Zelter determined that Trident missiles, that are stored with their delivery vehicles, are manned around the clock, have computer programs prepared to launch specific attacks and specific targets, and are ready to launch in a matter of minutes, do not constitute a threat. In arriving at this conclusion, the Court had to first consider the definition of a threat. The Scots High Court concluded

*broadly deterrent conduct, with no specific target and no immediate demands, is familiarly seen as something quite different from a particular threat of practicable violence, made to a specific target, perhaps coupled with some specific demand or perhaps simply as the precursor of actual attack.*<sup>15</sup>

Lord Murray, who was quoted in the Zelter decision, believes that in this context, a threat means a practical warning against a specific opponent.<sup>16</sup>

The decision goes on to distinguish a threat from a mere statement by comparing the former to “a youngster brandishing a knife at another a foot away from him, and perhaps indicting by word and action that he intends to stab him there and then,” and noting that other, less immediate and specific statements would fall into the latter category.<sup>17</sup>

In arriving at this definition, the Scots High Court disregards completely the ICJ opinion, as the “particular use of force envisaged would be directed against the territorial integrity...of another state,” and is also most likely “against the

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<sup>15</sup> *Lord Advocate’s Reference No. 1 of 2000* [March 30, 2001] Misc 11/00 H.C.J. (Scot.).

<sup>16</sup> *Id.* at ¶98, quoting Lord Murray, *supra* note 1.

<sup>17</sup> *Unlawfulness of the United Kingdom’s Policy of Nuclear Deterrence* at 5.

purposes of the United Nations.<sup>18</sup> Among those purposes listed are the maintenance of peace and security and to suppress acts of aggression.<sup>19</sup>

Inconsistencies persist even among various American interpretations. Black's Law Dictionary provides perhaps the broadest interpretation, defining threat as "a communicated intent to inflict harm or loss on another or on one's property, especially one that might diminish a person's freedom to act voluntarily or with lawful consent."<sup>20</sup> Webster's New World Law Dictionary has a similar definition but goes on to note "a threat may be made by innuendo or suggestion, as well as by explicit language."<sup>21</sup> The language of "innuendo or suggestion" may become relevant in regard to those States who have or are suspected to have nuclear weapons but have stopped short of formally declaring as a matter of policy that they possess them or plan to use them.

Much of the case law regarding threat in the United States has revolved around the First Amendment and has sought to distinguish mere threatening language from a "true threat," the latter of which is not protected speech. Although the Supreme Court was not speaking as to nuclear weapons specifically, the "true threat" definition set forth in Virginia v. Black may still be helpful in this context:

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<sup>18</sup> The ICJ Advisory Opinion, *supra* note 1 at ¶48.

<sup>19</sup> U.N. Charter art. 1, para 1.

<sup>20</sup> *Black's Law Dictionary*, (9<sup>th</sup> ed. 2009).

<sup>21</sup> Webster's New World Law Dictionary, <http://law.yourdictionary.com/threat>

*“true threats” encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals...the speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats protects individuals from the fear of violence and...from the possibility that the threatened violence will occur.<sup>22</sup>*

Laird v. Tatum defines threat more succinctly (although with the same general idea) as “specific present objective harm or a threat of specific future harm.<sup>23</sup>” That a threat is not unlawful if it is too general seems to be a common theme; the inconsistent result stems more from disagreement over what is “general” rather than the specificity requirement in and of itself.

Interesting, the New York Penal Law defines a terroristic threat as one made

*with intent to...influence the policy of a unit of government by intimidation or coercion, or affect the conduct of a unit of government by murder, assassination or kidnapping, he or she threatens to commit or cause to be committed a special offense and thereby causes a reasonable expectation or fear of the imminent commission of such offense,<sup>24</sup>*

which essentially seems to describe the purpose of nuclear weapons policy and the policy of deterrence: to coerce the government of another state to change their policy or to refrain from doing what it had previously planned on doing by threatening to use extreme and often irreparable force, so that said government backs down to avoid the dire consequences. Interestingly, the United States maintains “the most immediate and extreme threat today

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<sup>22</sup> Virginia v. Black, 538 US 343 (2003) at

<sup>23</sup> Laird v. Tatum, 408 U.S. 1 (1972) at

<sup>24</sup> N.Y. <Penal> Law §490.20 (McKinney 2001).



is nuclear terrorism,<sup>25</sup>” and cites this threat as a justification for US retention of a strong nuclear arsenal and maintenance of an active deterrence policy. But Al Qaeda is apparently still seeking nuclear materials and does not yet possess any nuclear weapons, the United States has a formalized policy that “nuclear forces will continue to play an essential role in deterring potential adversaries.<sup>26</sup>” Under the New York Penal Code definition, at least, it seems that the NPT signatory, nuclear States are the ones most capable of and willing to making a terroristic nuclear threat than those groups that have been deemed terrorists.

## **II. GENERAL LAWFULNESS/UNLAWFULNESS OF A POLICY OF DETERRENCE IN LIGHT OF THE ICJ DECISION**

### **A. Pro-Nuclear States Arguments for the Legality of Deterrence Policy**

The arguments raised by those States that argued for the lawfulness of nuclear weapons generally and for the lawfulness of deterrence were essentially threefold: (1) there are multiple treaties that recognized the possession of nuclear weapons by the five Nuclear States; (2) a policy of deterrence is legal because each State had always maintained one; (3) deterrence is legal because they have not consented to any customary or conventional laws stating otherwise<sup>27</sup>.

The Nuclear States point to the Treaty on Non-Proliferation of Nuclear Weapons as evidence that a policy of deterrence is legal. The States argue that the NPT’s acceptance that those States are in possession of nuclear weapons is “tantamount to

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<sup>25</sup> U.S. Dep’t of Defense, *Nuclear Posture Review* Report (2010), available at <<http://www.defense.gov/npr/docs/2010%20nuclear%20posture%20review%20report.pdf>> at 3 [hereinafter “Nuclear Posture Review”].

<sup>26</sup> *Id.* at v.

<sup>27</sup> The ICJ Advisory Opinion, *supra* note 1 at ¶61, 66-67.

recognizing that such weapons may be used in certain circumstances.<sup>28</sup> The counter-argument, however, is that while the NPT does acknowledge the States' lawful possession, the focus of the Treaty was to stop the acquisition of any new weapons and contemplates the reduction of existing nuclear weapons over the course of time.<sup>29</sup> The NPT expressly mentions a treaty in the future that would eliminate nuclear weapons altogether.<sup>30</sup> In this light, then, the NPT may be viewed as endorsing the exact opposite point as argued by the Nuclear states: namely, that the international community recognizes the undesirability of a state's possession of nuclear weapons due to the potential danger of use or threat of use and seeks to eradicate their presence over time.

As to the second point, it is certainly true that States have maintained a policy of deterrence over the last fifty years, though that has no bearing on the ICJ's analysis. The Court is not attempting to apply laws retroactively to punish States' past behavior. The inquiry is merely whether, from this point forward and under current law, a policy of deterrence is lawful.

The third point is based on the ICJ's opinion in North Sea Continental Shelf that in order for a rule to become customary international law, it must be first be generally practiced by the international community and must "include that of States whose interest are specially affected."<sup>31</sup> The United States in oral argument a

*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."*

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<sup>28</sup> Id. at ¶61

<sup>29</sup> Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968, 729 U.N.T.S. 161, available at <http://www.state.gov/t/isn/trty/16281.htm>.

<sup>30</sup> Id.

<sup>31</sup> North Sea Continental Shelf, I.C.J. Reports 1969, p. 3.

Thus, as those in favor of nuclear weapons have not recognized a ban, it cannot exist in customary law. This point is difficult to refute, especially as it incorporates the Court's own language from a previous ruling. The ICJ does concede that there is no applicable general rule against threat or use of nuclear weapons *per se*, but goes on to consider other sources of law that directly or tangentially affect the discussion of nuclear weapons.

***B. The ICJ: Use and Threat of Use Must Conform to Applicable Principles of International Law***

The ICJ opinion explicitly states “if the envisaged use of force is itself unlawful, the stated readiness to use it would be a threat prohibited under Article 2, Paragraph 4 [of the UN Charter].<sup>32</sup>” In his dissent, Judge Weeramantry observed “the United Nations Charter draws no distinction between the use of force and the threat of force. Both equally lie outside the pale action within the law.<sup>33</sup>” As Article 2, Paragraph 4 requires that “all members shall refrain...from the threat or use of force against the territorial integrity or political independence of any state,<sup>34</sup>” any threat against a state of this nature would thus be illegal.

Even if a threat endangers neither the territorial integrity nor the political independence of a state, the threat may still be unlawful because the inquiry does not end with Article 2. The Court goes on to consider the legality of a threat under the rules of armed conflict, and emphatically concludes that “there can be no doubt as to the applicability of humanitarian law to nuclear weapons.<sup>35</sup>”

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<sup>32</sup> The ICJ Advisory Opinion, *supra* note 1, at ¶47.

<sup>33</sup> Dissenting opinion of Judge Weeramantry at 525, 35 I.L.M 809 (1996) available at <http://www.icj-cij.org/docket/files/95/7515.pdf>. [hereinafter Judge Weeramantry's dissent].

<sup>34</sup> U.N. Charter, art. 2, para.4.

<sup>35</sup> The ICJ Advisory Opinion *supra* note 1, at ¶85.

One of the relevant bodies of legislation includes the Martens Clause from Hague Convention II, which maintains

*humanitarian law...prohibited certain types of weapons either because of their indiscriminate effect on combatants and civilians or because of the unnecessary suffering caused to combatants...if an envisaged use of weapons would not meet the requirements of humanitarian law, a threat to engage in such use would be contrary to that law*<sup>36</sup>.

It is not difficult to imagine, however, that even a policy of deterrence featuring low-yield nuclear weapons only would still violate international humanitarian law. Although a low-yield weapon could theoretically be used without violating the law of discrimination or proportionality, the question then arises as to whether the use or threat of use would violate the rule of necessity; that is, whether conventional weapons could sufficiently accomplish the same purpose so that the use of the nuclear weapon is unnecessary.

Because the ICJ declined to comment on specific types of degrees of nuclear weapons, while also failing to establish a *per se* ban, it seems that the only way to evaluate the legality of such low-yield weapons is on a case by case basis. Justice Koroma in his dissent noted that this is “an option fraught with serious danger, both for the States that may be directly involved in conflict, and for those nations not involved, but may also suggest that such an option is not legally reprehensible.<sup>37</sup>” This is especially problematic for two reasons. First, it provides little or no guidance to those commanders who make the ultimate decision to launch said weapons; and second, by nature of the first issue, essentially guarantees that we will only truly be able to evaluate the lawfulness of an attack

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<sup>36</sup> Hague Convention No. II of 1899, Martens Clause

<sup>37</sup> Dissenting opinion of Judge Koroma at 337, 35 I.L.M 809 (1996) available at <http://www.icj-cij.org/docket/files/95/7523.pdf> [hereinafter Judge Koroma’s dissent].

retrospectively, after the damage (and perhaps, catastrophic and irreversible damage) has already been done.

### C. *Self Defense*

The Zelter court concluded that in extreme situations of self defense, the rules of armed conflict do not apply. However, this conclusion was reached as a result of incorrect legal analysis.<sup>38</sup> In fact, any primary act of aggression towards the territorial integrity or political independence would violate, at the very least, the UN Charter.<sup>39</sup> Thus, threat of use of nuclear weapons that is relevant in the ICJ opinion and here is that which would be made in self-defense, and as the Court made clear, it must conform to international humanitarian laws.<sup>40</sup>

A State's right to self-defense, whether by conventional or nuclear attack, must still conform to the laws of armed conflict. The majority of sources agree that an aggressor's ability to disregard the laws when they see fit would render the laws of armed conflict impotent and meaningless, which could not have been the intent of lawmakers. In Nicaragua v. US, the ICJ noted "there is a specific rule whereby self-defense would warrant only measures which are proportional to the armed attack and necessary to respond to it,<sup>41</sup>" thus confirming the applicability of customary international law to acts of self-defense. Although the Court was not referring especially to nuclear weapon, there is nothing exculpatory in the language of the decision and no reason why it would not apply;

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<sup>38</sup> Unlawfulness of the United Kingdom's Policy of Nuclear Deterrence, *supra* note 12 at. 7.

<sup>39</sup> *Id.*

<sup>40</sup> The ICJ Advisory Opinion *supra* note 1, at ¶85.

<sup>41</sup> Nicaragua v. US, 1986 I.C.J. 14.

arguably, the uniquely devastating quality of nuclear weapons should reinforce the importance of applicability.

The concept that the law cannot be suspended during acts of self-defense is deeply rooted in history of the laws of armed conflict. During the Krupp trials, it was noted that “to claim [the rules and customs of warfare] 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.”<sup>42</sup> The widely accepted fact that nuclear weapons are of a uniquely destructive quality should lead any reasonable person to conclude that it is all the more reason as to why these weapons should be subject to the laws of armed conflict.

Lastly, the “savings clause” in the ICJ opinion that all parts of the decision should be read in light of each other rather than as separate and distinct parts reinforces the idea that the rules of armed conflict do apply even (or especially) when states are responding in self defense in situations of extreme peril.<sup>43</sup>

**C. *What is the Difference, Legally Speaking, Between an Implicit and an Explicit Threat?***

Although the ICJ acknowledges “possession....may indeed justify an inference of preparedness to use them,”<sup>44</sup> the type of vague threat that is being made by suspected possession is unlikely to contain even the minimum degree of specificity required to be characterized as unlawful. Each States’

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<sup>42</sup> United States of America vs. Alfred Krupp, et al. accessed at <http://www.mazal.org/archive/nmt/09/NMT09-C001.htm>.

<sup>43</sup> The ICJ Advisory Opinion, *supra* note 1 at ¶104.

<sup>44</sup> *Id.* at ¶48.

threats to use nuclear force falls somewhere along a spectrum ranging from mere possession to explicit threats as a matter of formal policy. Due to the specificity requirements of the legal definitions of “threat, “ discussed previously, it is reasonable to assume that not all points along this spectrum rise to the level of an unlawful threat. This analysis is complicated further by a given State’s often cryptic policy that makes it difficult to decipher what it is actually threatening to do. Judge Weeramantry notes that a policy of deterrence goes beyond mere possession because it implies a readiness to act.<sup>45</sup>

For the last five decades, Israel has maintained an official policy of “nuclear ambiguity,” which is described as “refraining from overt admissions that it possesses nuclear weapons...or threats to its adversaries that explicitly involve nuclear weapons.<sup>46</sup>” Presently, however, Israel is suspected to have surpassed Britain in terms of its nuclear arsenal,<sup>47</sup> and “although it maintains an official policy of nuclear ambiguity - neither acknowledging nor denying possession...- Israel is universally recognized as a major nuclear power.<sup>48</sup>” The state of Israel’s nuclear arsenal has been deduced from “whistle blowers, unguarded comments by political leaders, and analysis of evidence by scientists and arms control experts.<sup>49</sup>”

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<sup>45</sup> Judge Weeramantry’s dissent, *supra* note 33 at 318.

<sup>46</sup> <http://www.nti.org/country-profiles/israel/nuclear/>

<sup>47</sup> John Steinbach, *The Israeli Nuclear Weapons Program, in Nuclear Energy in the Gulf, The Mirates Center for Strategic Studies and Research*, June 2010 at p. 325.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 326.

Although Israel does not acknowledge possession or make threats in any official capacity, “the Israeli nuclear arsenal clearly dwarfs the actual or potential arsenal of all the other Middle Eastern states combined and is much greater than any conceivable need for defensive deterrence.<sup>50</sup>” Further, a former Israeli Prime Minister has suggested twice (in 1983 and 2003) that Israel join forces with India to attack Pakistani nuclear facilities.<sup>51</sup>”

Even so, Israel’s policy probably does not rise to the level of an unlawful threat because it lacks specificity. First, although a specific target was suggested by the former Prime Minister, it wasn’t made in any official capacity. Further, the fact that Israel as a matter of policy has not admitted to even mere possession makes it difficult to conclude that there is any “communicated intent to inflict harm or loss on another or on one’s property,<sup>52</sup>” since there has been no communication. Although a country in this type of situation is probably in violation of other international laws and treaties, it does not enter into the realm of deterrence policy due to its generality; it recalls Judge Schwabel’s dissent in which he wrote, as mentioned above, “the policy of deterrence differs from that of the threat to use nuclear weapons by its generality.<sup>53</sup>”

Further along this spectrum is China, the only signatory of the Nuclear Non-Proliferation Treaty to give an unqualified security assurance to non-nuclear weapon states.<sup>54</sup> It also maintains a policy of no-first-use.<sup>55</sup> Because China will

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<sup>50</sup> Id. at 337.

<sup>51</sup> Id. at 348.

<sup>52</sup> *Black’s Law Dictionary* (9<sup>th</sup> ed. 2009).

<sup>53</sup> Judge Schwabel’s Dissent at 314.

<sup>54</sup> Letter dated 6 April 1995 from the Permanent Representative of China to the United Nations t265.pdf

<sup>55</sup> Id.



not be the first to use nuclear weapons, there is probably not sufficient specificity of target to constitute an unlawful threat.

Prior to 2003, India had also stated that as a matter of policy, it would not be first to use nuclear weapons against non-nuclear weapon states.<sup>56</sup> In a revised statement, however, India allowed for the possibility that it would use nuclear weapons “in response to a ‘major attack’ ... with chemical or biological weapons.<sup>57</sup>” Among the suspected potential targets in light of this revised statement are Pakistan and Bangladesh<sup>58</sup>, although India has not specifically said as much. While those with general knowledge of any given state’s political climate might be able to hazard a guess as to who the potential targets might be, a policy like India’s lacks the specificity of target to rise to the level of an actual, unlawful threat.

The United States currently possesses the most nuclear weapons in the world, and has at explicitly cited certain targets that could be subject to the US nuclear weapons attack.

### ***III. UNITED STATES POLICY OF DETERRENCE***

In the 2010 Nuclear Posture Review (“NPR”), the Obama Administration publicly declared “as long as nuclear weapons exist, the United States will sustain safe, secure, and effective nuclear forces. These nuclear forces will continue to play an essential role in deterring potential adversaries and reassuring allies and partners around

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<sup>56</sup> Rajesh Rajagopalan, “India’s Nuclear Policy,” *in* Major Powers’ Nuclear Policies and International Order in the 21<sup>st</sup> Century, pp. 95-111 (2010).

<sup>57</sup> *Id.* at 100.

<sup>58</sup> *Id.*

the world.<sup>59</sup>” The NPR went on to say that in fact, “the fundamental role of U.S. nuclear weapons...is to deter nuclear attack on the United States, our allies, and partners.<sup>60</sup>” By noting, however, At the time the NPR was published, the United States retained a nuclear arsenal of 5, 113 warheads, which included both active and inactive weapons.<sup>61</sup> By its own admission, the United States retains many more nuclear weapons than deterrence requires.<sup>62</sup> The United States’ deterrence policy involves “military contingency plans, weapons procurement policies and decisions, weapons placement, educational and training processes...[and] training exercises.<sup>63</sup>” As recently as 2010, the United States renewed its commitment to maintaining ICBMs on alert and SSBNS at sea at all times.<sup>64</sup> As a matter of policy “the United States will continue to ensure that, in the calculation of any potential opponent, the perceived gains of attacking the United States or its allies and partners would be far outweighed by the unacceptable costs of the response.<sup>65</sup>”

**A. *The US Policy is a Threat to Use Nuclear Weapons***

One of the key conclusions of the Nuclear Posture Review is “the United States would only consider the use of nuclear weapons in extreme circumstances to defend the vital interests of the United States or its allies and partners.<sup>66</sup>” While the potential targets of US nuclear force are thus limited, the aforementioned statement certainly contemplates use. The Joint Chief of Staff Doctrine for Joint

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<sup>59</sup> Nuclear Posture Review, *supra* note 25 at v.

<sup>60</sup> *Id.* at vii.

<sup>61</sup> Mike Mount, *U.S. Reveals it has 5, 113 Nuclear Warheads*, CNN (May 03, 2010) <[http://articles.cnn.com/2010-0503/politics/us.nuclear.warhead.count\\_1\\_nuclear-warheads-nuclear-nonproliferation-treaty-pentagon?\\_s=PM:POLITICS](http://articles.cnn.com/2010-0503/politics/us.nuclear.warhead.count_1_nuclear-warheads-nuclear-nonproliferation-treaty-pentagon?_s=PM:POLITICS)>.

<sup>62</sup> Nuclear Posture Review, *supra* note 25 at vii.

<sup>63</sup> Charles J. Moxley, Jr., *Nuclear Weapons and International Law in the Post Cold War World* (2000) at 467.

<sup>64</sup> Nuclear Posture Review, *supra* note 25 at x.

<sup>65</sup> *Id.* at xi.

<sup>66</sup> *Id.* at ix.

Theater Nuclear Operations advises “nuclear weapons have many purposes, but should only be used after deterrence has failed.<sup>67</sup>” This statement again reinforces two important points of US nuclear weapons policy: (1) that the US is extremely reluctant to use nuclear weapons against another state, but (2) that use remains a viable option in certain circumstances.

The overarching “official” policy of the United States indicates that the primary purpose of our nuclear weapons possession is to deter against the unlikely eventuality that we would need to threaten another state, namely North Korea or Iran, for the preservation of the United States and our allies; but significantly – a complete disavowal to use nuclear weapons is conspicuously absent from the United States policy.

***B. Legality of US Policy***

In the United States’ oral argument before the ICJ, Michael Matheson, Principal Deputy Legal Adviser of the US Department of States, argued that the use of nuclear weapons (and therefore the threat to use nuclear weapons) is not unlawful because there is no general prohibition under conventional law accepted by the United States or in customary law established by the community of nations.<sup>68</sup> This argument is essentially correct: there is no general prohibition that speaks specifically to the use or threat of use of nuclear weapons. What it fails to acknowledge, however, is that the United States currently possesses thousands of weapons whose force and magnitude would undoubtedly violate, at the very least,

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<sup>67</sup> Joint Chiefs of Staff, Joint Pub 3012.1 Doctrine for Joint Theater Nuclear Operations (Feb. 9, 1996) available at <[http://www.dtic.mil/doctrine/jel/new\\_pubs/jp3\\_12\\_1.pdf](http://www.dtic.mil/doctrine/jel/new_pubs/jp3_12_1.pdf)>

<sup>68</sup> United States of America, Oral Statement, CR 95/34 at 57.

the laws of proportionality and discrimination. The United States has itself recognized that there can be no guarantee of controllability.<sup>69</sup>

The United States publicly declared in the 2010 Nuclear Posture Review that the US will not use or threaten to use nuclear weapons against non-nuclear weapons states that are party to the NPT<sup>70</sup>” but “in the case of countries not covered by this assurance – states that possess nuclear weapons and states not in compliance with their nuclear non-proliferation obligations – there remains a narrow range of contingencies in which U.S. nuclear weapons may still play a role in deterring a convention or CBW attack against the United States or its allies and partners.<sup>71</sup>” As there are a finite amount of States that currently fit this description, whose identities are ascertainable, its possible that this statement in some ways could rise to the specificity of target required to constitute one aspect of an illegal threat.

The United States policy of deterrence is unlawful because it threatens force that is not lawful to use. The Obama administration has specifically stated that it reserves the right to use the weapons if necessary.<sup>72</sup> The high yield weapons in the US nuclear arsenal (and arguably, even the less powerful weapons) violate the laws of armed conflict. The nuclear weapons , by their very nature, violate Article 2, Paragraph 4 of the UN Charter; it is nearly impossible to imagine a use of such powerful weapons that would not threaten the territorial integrity or political independence of a State. The United States has named

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<sup>69</sup> *Unlawfulness of the United Kingdom's Policy of Nuclear Deterrence*, *supra* note 12 at 14.

<sup>70</sup> Nuclear Posture Review at viii.

<sup>71</sup> *Id.*

<sup>72</sup> *Obama Promotes Nuclear-Free World*, BBC News, <http://news.bbc.co.uk/2/hi/7983963.stm> (accessed November 10, 2012).

specific targets, including North Korea and Iran. All of these elements combine to constitute a threat according to the ICJ advisory opinion, which quoted Lord Murray’s definition of “a practical warning directed against a specific opponent.”<sup>73</sup>

#### **IV. PUBLIC POLICY CONSIDERATIONS**

##### **A. Pro-Deterrence**

Unsurprisingly, the five nuclear states, their allies, and those States protected under the nuclear umbrella advocate for the legality of the use and threat of use of nuclear weapons. The United States maintains that its policy of deterrence is a key component of national security, without which a State would lose the ability to warn away potential aggressors without engaging in actual conflict. Conrad Harper of the United States argued “in the view of the United States, nuclear deterrence has contributed substantially during the past 50 years to the enhancement of strategic stability, the avoidance of global conflict and the maintenance of international peace and security.”<sup>74</sup> Former Defense Secretary Arthur Schlesinger believes that U.S. needs to retain a policy of deterrence in regards to Russia and China.<sup>75</sup> Interestingly, Mr. Schlesinger does not believe that North Korea or Iran, or non-state actors will be “deterred by the possibility of a nuclear response to actions that they might take,”<sup>76</sup> despite the three aforementioned targets being the very reason the Obama Administration cited for

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<sup>74</sup> US Oral Statement, CR 95/27 at 55.

<sup>75</sup> Melanie Kirkpatrick, *The Former Defense Secretary on the U.S. Deterrent and the Terrorist Threat*, Wall Street Journal, July 13, 2009 at <http://online.wsj.com/article/SB124726489588925407.html>.

<sup>76</sup> Id.

the United State's need to retain an active nuclear policy. Regardless, the United States believes that it has a responsibility to its allies and every country protected by the nuclear umbrella to maintain an active deterrence policy.

The most effective example of the United States' characterization of deterrence was Saddam Hussein's abandonment of his plan to use chemical and biological weapons after President Bush threatened him with nuclear attack during the Gulf War.<sup>77</sup>

### ***B. Anti-Deterrence***

But what would have happened if Saddam Hussein decided not to back down from his threat to use biological weapons? Judge Weeramantry makes this point in his dissent, "one of the problems with deterrence...is that actions perceived by one side as defensive can all too easily be perceived by the other side as threatening. Such a situation is the classic backdrop to the traditional arms race."<sup>78</sup> Even the United States acknowledged in the NPR that the world is "approaching a nuclear tipping point – that unless today's dangerous trends are arrested and reversed, before very long we will be living in a world with a steadily growing number of nuclear-armed states and an increasing likelihood of terrorists getting their hands on nuclear weapons."<sup>79</sup>

Another counterargument to US deterrence policy in the Gulf War is "nuclear weapons failed to prevent wars, including the Korean conflict, Vietnam

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<sup>77</sup> Barry R. Schneider, *Deterrence and Saddam Hussein: Lessons from the 1990-1991 Gulf War*, The Counterproliferation Papers Future Warfare Series No. 47, USAF Counterproliferation Center (August 2009) at 216 available at <http://cpc.au.af.mil/PDF/book/chapter7.pdf>.

<sup>78</sup> Judge Weeramantry's dissent, *supra* note 33 at 317.

<sup>79</sup> Nuclear Posture Review, *supra* note 25 at vii.

war, and Iraq's invasion of Kuwait.<sup>80</sup> This reinforces the idea of those who stand against deterrence that if the policy is to be evaluated by a balancing test, the proverbial elephant in the room representing apocalyptic destruction needs to be afforded its actual weight; and that to proceed with this analysis in a realistic way will inevitably lead to the conclusion that the risks greatly outweigh the gains, the potential for catastrophes outweigh the successes. Even the United States has acknowledged the potential of nuclear weapons to create irreversible consequences. The President himself has noted "one terrorist with a nuclear weapon could unleash massive destruction."

Lastly, critics of the use and threat of use of nuclear weapons point to the technological advances that have been made in the intervening decades between World War II and the present that have resulted in nuclear weapons that exceed the power of the bombs dropped on Hiroshima and Nagasaki by up to 700 times.<sup>81</sup> Even the United States has acknowledged "operational policy and planning – the entire military mindset – are entirely different [from US formal declaratory policy]...what we are threatening by the policy of deterrence is 'unacceptable damage and disproportionate loss'.<sup>82</sup>"

## ***V. CONCLUSION***

The United States policy of deterrence is unlawful in light of the International Court of Justice Advisory Opinion. The ICJ clearly ruled "if the envisaged use of force is itself unlawful, the stated readiness to use it would be a threat prohibited under Article 2,

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<sup>80</sup> Nauru, Oral Argument at 56.

<sup>81</sup> Judge Weeramantry's dissent, *supra* note 25 at 225.

<sup>82</sup> *Unlawfulness of the United Kingdom's Policy of Nuclear Deterrence*, *supra* note 12 at 7.

Paragraph 4” of the United Nations Charter.<sup>83</sup> The Court went on to determine that in addition to the UN Charter, any use (and therefore threat of use) must comply with applicable international conventional and customary law, including the rules of armed conflict. Under these laws, any high-yield weapons would undoubtedly violate the UN Charter either by threatening the territorial integrity of a State, threatening the political independence of a state, or by its indiscriminate and disproportional effect on the targeted State; low-yield weapons would likely fail the rule of necessity, and quite possibly also violate other rules of armed conflict and the UN Charter. The United States currently possesses both high yield and low yield weapons, has expressed readiness and willingness to use said weapons should it become necessary, and has explicitly named certain targets against whom force would potentially be used against if those States or non-state actors act in a manner the United States deems unacceptable. The United States is publicly and as a matter of policy making unlawful threats to use nuclear weapons that violate the laws of armed conflict and the United Nations Charter; the US policy of deterrence is unlawful in light of the International Court of Justice Advisory Opinion.

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<sup>83</sup> The ICJ Advisory Opinion, *supra* note 1 at ¶47.