

# Justification of Possession and Use of Nuclear Weapons: A Human Rights Perspective

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## Abstract

*Although nuclear weapons have only been used twice in warfare — in the bombings of Hiroshima and Nagasaki in 1945 — about 22,000 nuclear warheads reportedly remain in our world today and there have been over 2,000 nuclear tests conducted to date. and over 2,000 nuclear tests have been conducted till date. The UN Charter exudes a commitment to peace as its principal objective —from the first sentence of the Preamble, ‘We the Peoples of the United Nations determined to save succeeding generations from the scourge of war’, to the prohibition of aggression in Article 2(4) and the mandate for peaceful resolution of conflicts in Article 33 —the right to peace as such is not found in the Universal Declaration of Human Rights, nor in any of the conventions that have evolved from it. The aims and objectives of the present paper is to discuss the implications of legal silence on the legality of nuclear weapons, to find out the relevance of Shimoda case in shaping present international law on possession and use of nuclear weapons, to analyze the contribution of International Court of justice on the issue of possession and use of nuclear weapons, to critically analyze the justification of possession and use of nuclear weapons under International Human Rights Law Regime (hereinafter, ‘IHRLR’), to analyze the justifications relied upon by nuclear powers for possession and use of nuclear weapons, discuss the importance of Nuclear Weapon Free Zone (hereinafter referred to as NWFZ) in achieving complete denuclearization of the world. An attempt has been made to give reasonable and logical answers which are inclined towards the principle of humanity. The paper opens up with a discussion on the implications of legal silence on the possession and use of nuclear weapons under international law. There is a discussion on the decision of Shimoda case and its relevance in shaping the international law on nuclear weapons. Further, the paper peeps into the Advisory Opinion of ICJ on the legality of the threat or use of nuclear weapons and its importance in shaping the international law on the possession and use of nuclear weapons. A critical analysis of justification of possession and use of nuclear weapons on the anvil of IHRR is made in this paper. The researcher has also analyzed the justifications put forward by the permanent members of the Security Council for the possession and use of nuclear weapons. And finally, the relevance of NWFZ in achieving the complete denuclearization of the world has also been discussed.*

**Keywords:** Nuclear weapons, international law, Universal Declaration of Human Rights, human rights perspective, Shimoda Case, International Court of Justice, Non Proliferation Treaty, United Nations Charter.

## I . Introduction

In the era of advanced science and technology, nuclear weapons are the most dangerous weapons on earth. One can destroy a whole city, potentially killing millions, and jeopardizing the natural environment and lives of future generations through its long-term catastrophic effects. The dangers from such weapons arise from their very existence. Although nuclear weapons have only been used twice in warfare—in the bombings of Hiroshima and Nagasaki in 1945—about 22,000 nuclear warheads reportedly remain in our world today and there have been over 2,000 nuclear tests conducted to date. Complete denuclearization of the world is the best protection against such dangers, but achieving this goal has been a tremendously difficult challenge.

A traditional function of international law has been to inhibit the use of certain weapons and tactics in warfare. This function is of great importance in relation to weapons of mass destruction (hereinafter referred to as WMD), especially nuclear weapons which play a central role in superpower strategy.

While the UN Charter exudes a commitment to peace as its principal objective — from the first sentence of the Preamble, ‘We the Peoples of the United Nations determined to save succeeding generations from the scourge of war’,<sup>1</sup> to the prohibition of aggression in Article 2(4) and the mandate for peaceful resolution of conflicts in Article 33 — the right to peace as such is not found in the Universal Declaration of Human Rights, nor in any of the conventions that have evolved from it. The closest the Universal Declaration comes is Article 28, which provides that ‘[e]veryone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.’ However, this omission was cured by General Assembly resolution 39/11, adopted on 12 November 1984, the ‘Declaration on the Right of Peoples to Peace.’ It ‘[s]olemnly proclaims that the peoples of our planet have a sacred right to peace’ and declares that ‘the promotion of its implementation constitute[s] a fundamental obligation of each State.’<sup>2</sup>

The article endeavors to find out the justification of possession and use of nuclear weapons with a human rights perspective. It is pertinent to note that the modern International Human Rights Regime (IHRLR) has developed and taken the present shape from the natural law framework. Therefore, possession and use of nuclear

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1) Peter Weiss and John Burroughs, *Weapons of mass destruction and human rights*, available at [http://www.peacepalacelibrary.nl/ebooks/files/UNIDIR\\_pdf-art2139.pdf](http://www.peacepalacelibrary.nl/ebooks/files/UNIDIR_pdf-art2139.pdf), (last visited Dec.2,2015).

2) John H.E. Fried, *Toward a Right to Peace: Selected Papers*, 81–88 (Aletheia Press 1994).

weapons have a direct bearing upon this natural law framework of international law and modern IHRLR.

The United Nations has sought to eliminate such weapons ever since its establishment. The first resolution adopted by the UN General Assembly in 1946 established a Commission to deal with problems related to the discovery of atomic energy among others. The Commission was to make proposals for, inter alia, the control of atomic energy to the extent necessary to ensure its use only for peaceful purposes. The resolution also decided that the Commission should make proposals for the elimination from national armaments of atomic weapons and of all other major weapons adaptable to mass destruction.

## II . Legal Silence on the Possession and Use of Nuclear Weapons

There is no authoritative international convention or treaty which expressly prohibits the possession and use of nuclear weapons. In absence of an express convention or treaty, the issue of the legality of possession and use of nuclear weapons requires a serious and thorough discussion. Following the demonstration of the unprecedented destructive power of atomic weapons at Hiroshima and Nagasaki, there was some effort whether serious or not remains controversial to internationalize control over all aspects of nuclear technology.<sup>3</sup> The most important effort towards nuclear disarmament was the American offer of nuclear disarmament known popularly as the Baruch Plan. Sadly, this offer was rejected as one-sided by the Soviet Union in late 1946. After that, nuclear disarmament never enjoyed any significant support in the government corridors of nuclear powers. Aside from these disarmament efforts, the international community has not questioned in a serious way the status of nuclear weapons under international law.

The legal silence was further augmented during the post-1945 period when a consensus developed in the United States that the possession of nuclear weapons was the most important counterweight to the expansionist designs and capabilities of Soviet Union.<sup>4</sup> As a result, the legal questions generated by the possession and use of nuclear weapons were never really confronted. It appears to be the consensus of the legal community that any question as to the legality of possession and use of nuclear weapons should be subordinated to considerations of military necessity.<sup>5</sup>

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3) Richard A. Falk, Lee Meyrowitz & Jack Sanderson, *Nuclear Weapons and International Law*, 20 Int'l Journal Innovation & Learning 542 (1980).

4) *Id.* at 543.

However in recent years, especially after the Advisory Opinion of ICJ this topic has started receiving good attention from many states, international lawyers, and academicians. It is unfortunate that international community never made plausible efforts to incorporate into the laws of war an authoritative prohibition upon the use of nuclear weapons. It is a good sign that almost all the member states of United Nation are working towards achieving a complete denuclearization of the world.

There are only nine countries<sup>6</sup> in the world which possess nuclear weapons and these are the countries which strongly put forward the justifications of possession and use of nuclear weapons. In absence of an express prohibition on possession and use of nuclear weapons, one has to involve into a herculean task of finding out the relevant provisions of IHRLR which includes International Bill of Rights, International Humanitarian Law (IHL), International Environmental Law, the law prohibiting genocide etc. The decision in *Shimoda Case*<sup>7</sup> and the Advisory Opinion of ICJ on the legality of the threat or use of nuclear weapons are the most important sources to look into the issues related to possession and use of nuclear weapons. The resolutions passed by the UN General Assembly are also very good sources to fill the legal void on the issue of possession and use of nuclear weapons.

Another important material which can provide some assistance to achieve the objective of complete denuclearization is Non-Proliferation Treaty (hereinafter, NPT). The NPT is a landmark nuclear non-proliferation treaty to prevent the spread dissemination of nuclear weapons and weapons technology, to promote cooperation in the peaceful uses of nuclear energy and to further the goals for achieving nuclear disarmament. The Treaty represents the only binding commitment in a multilateral treaty to the goal of disarmament by the nuclear-weapon States. Opened for signature in 1968, the Treaty entered into force in 1970. On 11 May 1995, the Treaty was extended indefinitely. A total of 190 parties has joined the Treaty, including the five nuclear-weapon States. More countries have ratified the NPT than any other arms limitation and disarmament agreement, a testament to the Treaty's significance.

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5) Josef L. Kunz, *The Chaotic Status of Laws of War and the urgent necessity for their Revision*, 45 Am. J. Int'l L. 37 (1951).

6) United States of America, Russian Federation, China, France, United Kingdom, India, Pakistan, North Korea and Israel.

7) Tokyo Chiho Saibansho [Tokyo Dist. Ct.] Dec. 7, 1963, 355 Hanrei Jiho [Hanji] 17 (Japan).

### III. The Shimoda Case on the Legality of Use of Nuclear Weapons: A Decision in Conformity with the Principle of Humanity

The legality of nuclear weapons under international law was assessed for the first time by a judicial forum in Shimoda case decided by the District Court of Tokyo.<sup>8</sup> It was also for the first time that a judicial forum discussed the general applicability of the laws of war in the nuclear age. In August 1955, five Japanese citizens instituted a legal action against the Japanese Government to recover damages for injuries sustained as a consequence of the atomic bombings of Hiroshima and Nagasaki. Following were the contentions of the plaintiff:<sup>9</sup>

- (i) That the use of atomic weapons violated both conventional and customary international law.
- (ii) That even if the rules of positive international law did not directly condemn the use of atomic weapons the spirit must be said to have the effect of natural or logical international law that would support a finding of illegality.
- (iii) That the use of atomic weapons caused indiscriminate casualties and grotesque pain; that the weapons as used did not distinguish between combatants and non-combatants;
- (iv) That the effects of atomic weapons were known to those American decision makers who ordered the bombing of Hiroshima and Nagasaki.
- (v) That the pain caused by atomic weapons is far more severe than that resulting from weapons which had been previously outlawed as agents of unnecessary suffering to the victim, such as poison gas and dumdum bullets.

It is a noticeable point that the contentions raised by the plaintiff in Shimoda case are still relevant in deciding the legality of possession and use of nuclear weapons. It is important to note that the question addressed by the court was not whether the use of an atomic weapon was generally permitted under international law, but whether the particular atomic bombings of Hiroshima and Nagasaki by the United States of America should be regarded as illegal by positive international law at that time. While the opinion did not attempt to deal with the legality of atomic weapons as such but only with the legality of their use against Japanese cities, the mode of analysis adopted by the court, went beyond the facts of the attacks on Hiroshima and

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8) Richard A. Falk, *The Shimoda Case: A Legal Appraisal of the Atomic Attacks upon Hiroshima and Nagasaki*, 59 Am. J. Int'l L. 7590 (1965).

9) *Id.* at 7598.

Nagasaki to discuss the relevance of international law to the use of nuclear weapons against population centers.<sup>10</sup> After reciting the international legal standards most applicable to the case the court noted as follows:<sup>11</sup>

These standards were developed prior to the creation of the atomic bomb, and as a result, could not be understood as directly prohibiting the use of atomic weapons. However, a prohibition need not be direct or express to be applicable.

Finally, by extrapolating the spirit of the existing international laws of war and by extending their coverage by analogical reasoning, it was possible for the court to conclude that the new weapon was embraced within the prohibitions, even if not expressly proscribed.<sup>12</sup> The Japanese court confirmed the natural law foundations of the basic principles of the laws of war, foundations that cannot possibly stand the weight of the nuclear weaponry. With this decision the court initiated a process of international consensus building in favor of a prohibition of the nuclear weapon under all circumstances. The United Nations Resolution 1653(XVI) of 1961 which prohibited the use of nuclear and thermo-nuclear weapons was not only expressive of the ideas found in Shimoda case, but also of the will of the international community.<sup>13</sup> The decision can be termed as the most important piece of judicial reasoning applied to test the legality of nuclear weapons on the anvil of the law of war or armed conflict existing at that time. This decision can not be neglected while deliberating upon the justification of the possession and use of nuclear weapons at any national or international forum.

The importance of decision was very well explained by Professor Richard Falk in the following words:<sup>14</sup>

By itself Shimoda is unlikely to be taken into account by those entrusted with the formation of military policy in the leading nuclear powers. One wonders whether even legal advisors to these governments will consider Shimoda relevant to their advisory functions. But Shimoda may be a far more significant factor in fostering the creation of a world climate of opinion relating to conditions justifying use of nuclear weapons that may exert influence upon government policy making processes in the future. The extent of this impact will depend to some degree, upon what becomes of Shimoda; how and to what extent it is perceived as a significant source of legal/moral guidance by those with the capacity to shape world opinion in this area.

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10) Richard A. Falk et al., *Supra* note 3, at 573.

11) Richard A. Falk, *Supra* note 8, at 7598.

12) Richard A. Falk et al., *Supra* note 3 at 575.

13) Richard A. Falk et al., *Supra* note 3 at 575.

14) Richard A. Falk, *Supra* note 8, at 7595.

## IV. World Court on the Legality of Nuclear Weapon

Under this head of the paper, the objective of the researcher is to mention the advisory opinion of the ICJ on the legality of the threat or use of nuclear weapons which was given on the request of the United Nations Secretary-General. The advisory opinion given by ICJ is the most authoritative legal material on the legality of nuclear weapons. Any academic work on nuclear weapons and related issues shall not be complete without discussing the advisory opinion of ICJ. However, under this head, the researcher shall not do a critical analysis of the opinion given by ICJ. The same shall be done under the subsequent heads, which contain the discussion on the justification of the possession and use of nuclear weapons under IHRLR, and the justifications relied upon by the permanent members of the Security Council. Before discussing the advisory opinion it is important to discuss the request made by World Health Organization (WHO) to ICJ to give advisory opinion on the legality of threat or use of the nuclear weapons.

WHO requested ICJ to give advisory opinion on the following question:<sup>15</sup>

In view of the health and environmental effects, would the use of nuclear weapons by a state in a war or other armed conflict be a breach of its obligations under international law including the WHO constitution.

On 8<sup>th</sup> July 1996, ICJ ruled that it was unable to comply with a request by the World Health Assembly to give an advisory opinion. The court ruled that although WHO is duly authorized under the UN Charter to request advisory opinions from ICJ and the opinion requested concerned a legal question, the request submitted by WHO did not relate to a question arising within the scope of the activities of the organization.<sup>16</sup>

On December 20<sup>th</sup> 1994, the International Court of Justice received a request from the United Nations Secretary General, made by the United Nation General Assembly through resolution of December 15<sup>th</sup> 1994 for an advisory opinion on the question: Educa Books (Macmillan

Is the threat or use of nuclear weapons in any circumstance permitted under international law?

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15) <http://www.un.org/law/icjsum/9622.htm>.

16) Gurdip Singh, International Law 475 (Educa Books (Macmillan) 2003).



International Court of Justice pronounced its advisory opinion on 8<sup>th</sup> July 1996 and held thus:<sup>17</sup>

- (i) That there is neither customary nor conventional international law any specific authorization of the threat or use of nuclear weapons.
- (ii) That there is neither customary nor conventional international law any comprehensive and universal prohibition of the threat or use of nuclear weapons as such.
- (iii) That a threat or use of force by means of nuclear weapons that is contrary to Article 2 paragraph 4, of the United Nations Charter and that fails to meet all the requirements of Article 51, is unlawful.
- (iv) That a threat or use of nuclear weapon should also be compatible with the requirements of the international law applicable in armed conflict, particularly those of the principles and rules of international humanitarian law, as well as with specific obligations under the treaties and other undertakings which expressly deal with nuclear weapons.
- (v) By seven votes to seven by President's casting vote that it follows from the abovementioned requirements 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 international humanitarian law.  
However, in view of the current state of international law, and of the elements of fact at its disposal, the court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful and unlawful in an extreme circumstance of self defense, in which the very survival of the State is at stake.
- (vi) That there exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international order.

The court lived up to its historic challenge by responsibly addressing the momentous question posed by the General assembly about the legal status of a threat or use of nuclear weapons. The majority of the judges suggested that there remains significant work to be done either through a specific prohibition on possession and use nuclear weapons or through a international treaty on complete nuclear disarmament. Such

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17) *Advisory Opinions: The Legality of the Threat or Use of Nuclear Weapons*, I.C.J., available at <http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=e1&case=95&code=unan&p3=4> (last visited Nov. 5, 2013).

an approach would encourage all those who have struggled since 1945 for the legal prohibition and physical elimination of nuclear weapons.<sup>18</sup> In the advisory opinion, the court has given the impression of applying a large body of law in answering the questions of the legality of the threat or use of nuclear weapons. In fact, the court failed to apply the relevant law in order to arrive at the final conclusion and did not take guidance from several important aspects of international law with a direct bearing upon nuclear weapons.<sup>19</sup> However, the significance of the opinion lies in the fact that it has clearly pronounced a policy in favor of nuclear disarmament and has also urged the international community to translate this policy into a reality in good faith.<sup>20</sup>

## V. The United Nations Charter and the Possession and Use of Nuclear Weapons

United Nations Charter does not contain any provision which prohibits the possession and use of nuclear weapons in an armed conflict or war. Under the Charter, there are provisions which provide for the use of force. However, none of these provisions refer to specific weapons. A simple reading of the provisions of the Charter makes it clear that it neither expressly prohibits, nor permits the use of any specific weapon, including nuclear weapons.<sup>21</sup> The principle of prohibition of force enshrined in Article 2(4) of the Charter and the lawful uses of force is provided under Article 51 and Article 42. Article 2(4) of the Charter prohibits the use of force from which a logical corollary can be drawn that use of any kind of weapon including the nuclear weapon shall violate the principle of prohibition of force enshrined under in the Charter.<sup>22</sup> But at the same time, it must not be forgotten that the Charter does not contain an absolute prohibition and there are exceptional circumstances in which the use of force is justified under the Charter. The most important exception of to the

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18) Richard A. Falk, *Nuclear Weapons, International Law and the World Court: A Historic Encounter*, 37(2) Int'l Journal Innovation & Learning 166 (1997).

19) The decision of the Tokyo district court in Shimoda Case, resolutions of United Nations General Assembly.

20) Yogesh K Tyagi, *Judicial Statesmanship without Political Courage: The ICJ Advisory Opinion on Nuclear Weapons*, 37(2) Int'l Journal Innovation & Learning 200 (1997).

21) Richard A. Falk, *Supra* note 17, at para 39.

22) U.N. Charter art. 2, para. 4 (“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations”).

principle of prohibition of force is provided under Article 51 of the Charter.<sup>23</sup> This Article embodies the customary law right of a state to resort to self-defense, subject to certain conditions, some of which are explicitly laid down in Article 51 itself and some stipulated under international customary law i.e. the rules of proportionality and necessity.<sup>24</sup> The principle of proportionality vis-à-vis use of nuclear weapons was explained by ICJ in the following words:<sup>25</sup>

The proportionality principle may thus not in itself exclude the use of nuclear weapons in self-defense in all circumstances. But at the same time, a use of force that is proportionate under the law of self-defense must, in order to be lawful, also meet the requirements of the law applicable in armed conflict, which comprise in particular the principles and rules of humanitarian law.

The above-mentioned observation of ICJ was further supplemented by equally significant statement that:<sup>26</sup>

The Court notes that the very nature of all nuclear weapons and the profound risks associated therewith are further considerations to be borne in mind by States believing they can exercise a nuclear response in self-defense in accordance with the requirements of proportionality.

ICJ in the aforesaid observations has given due consideration to the nature of nuclear weapons and the profound risks associated therewith while exercising self-defense in accordance with the requirement of the principle of proportionality.

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23) U.N. Charter art. 51 (“Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security”).

24) V. S, Mani, *The Nuclear Weapons and the World Court*, 37 (2) Int’l Journal Innovation & Learning 176 (1997).

25) Richard A. Falk, *Supra* note 17, at para 42.

26) *Id.*

However, the Court missed an opportunity to declare that the use of a nuclear weapon is against the very principle of proportionality. Any use of nuclear weapons while exercising self-defense would hit all the contours of principle of proportionality due to the following reasons:<sup>27</sup>

- (i) To effect reprisal by the use of nuclear weapons is disproportionate to its antecedent provocations or to legitimate military objectives or disrespectful of persons, institutions, and resources otherwise protected by the law of war. Thus the use of the nuclear weapon would inevitably violate the principle of proportionality.
- (ii) The use of nuclear weapons while exercising self-defense violates Article 33 of the Geneva Convention No. 4, relating to the Protection of Civilian Persons in Times of War, prohibits reprisals against protected person and property which includes civilian objects, cultural objects, place of worship etc.
- (iii) The use of a nuclear weapon with its consequent effects is violative of the rule under which an attack by way of reprisal are prohibited against natural environment, works or installations containing dangerous forces namely dams, dikes and nuclear electrical generating stations.
- (iv) The use of nuclear weapons with its consequent effects violates the rule which states that objects indispensable for the survival of civilian population such as foodstuffs, agriculture areas, livestock, drinking water installations and supplies and irrigation work also can not be made the objects of reprisals.

Apart from principle of proportionality, it is the principle of necessity which must be satisfied while exercising the right of self-defense under the Charter. The principle of necessity means that only that destruction necessary, relevant and proportionate to the prompt achievement of lawful military objectives is legal. Not only must such destruction be necessary and relevant to the attainment of military objectives, but must also be proportionately and reasonably related to the military importance of the object of attack. It is pertinent to note that military object during a war is to weaken the military forces of the enemy the use of weapons of mass destruction against the civilian population may weaken the enemy's will to fight but not enemy's military force.<sup>28</sup> While exercising self-defense within the four walls of

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27) Written Statement of Government of India September 1994 submitted with I.C.J., *available at* <http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=e1&case=95&code=unan&p3=1> (last visited Nov. 28, 2013).

28) Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400

the principle of necessity, derogation from certain principles is permitted under the Additional Protocols. No such exceptions are allowed in the customary laws of war or under the Geneva Conventions, 1949.<sup>29</sup> Nuclear weapons cannot be used in self-defense because the principle of military necessity permits a state to apply only that degree and kind of regulated force not otherwise prohibited by the laws of war.<sup>30</sup> The nuclear weapons cause such destruction which far exceeds the measure of proportionality and the object of destruction necessary and relevant to the attainment of military objectives.<sup>31</sup>

Therefore, the use of nuclear weapons while exercising self-defense under Article 51 of the Charter does not fall within the ambit of principle of proportionality and necessity and hence violates the provisions of the Charter.

The member states of United Nations are also under an obligation to report to the Security Council upon exercise of the right of self-defense. ICJ had also taken cognizance of the Security Council Resolution 984 (1995) whereby the Council notes the statements of nuclear weapon states giving assurances against the use of nuclear weapons to non-nuclear weapon state parties to the Nuclear Non-Proliferation Treaty, 1968 and offer of assistance to and defense of such states, should they fall victim of aggression involving the use of nuclear weapons.

## VI. Justification of Possession and Use of Nuclear Weapons under the Existing International Human Rights Law Regime: A Critical Analysis

Under this part of the article, possession and use of nuclear weapons shall be tested on the anvil of IHRLR, which includes; the International Bill of Rights, Genocide Convention, International Environmental Law, International Humanitarian Law etc. States favoring the prohibition on possession and use of nuclear weapons in their written statement submitted to ICJ during the proceedings of Advisory Opinion heavily relied upon the aforesaid areas of international human rights law and

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Grammes Weight, Dec. 11, 1868.

29) Geneva Convention Relative to the Treatment of Prisoners of War, art. 1, Aug. 12, 1949 (enjoining the parties to respect their provisions under all circumstances); art. 3 (providing that persons not taking part in hostilities shall in “all circumstances” be treated humanely and protected from violence to life and person).

30) Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, *Supra* note 26, at 236.

31) *Id.*

advocated for complete denuclearization of the world. Whereas, nuclear power states did not give due importance to the international human rights law and heavily relied upon positive international law, the core of which is formed by state's sovereignty and free consent of the state. However, ICJ in its Advisory Opinion tried to provide a harmonious synthesis of natural law framework and positivist law framework of international law. ICJ decided that the threat or use of nuclear weapons is illegal under international law except in cases of self-defense where survival of the state is at stake. Unhappily, ICJ considered International Humanitarian Law as the most applicable law to decide the legality of nuclear weapon and somehow did not appreciate the importance of provisions of International Covenant on Civil and Political Rights, Genocide Convention and International Environment Law in their true spirit.

Following are the areas of international human rights law which are very important while discussing and deliberating upon the justification of possession and use of nuclear weapons:

### **A. International Covenant on Civil and Political Rights and Possession and Use of Nuclear Weapons**

The proponents of illegality of the use of nuclear weapons argue that such use would violate the right to life guaranteed under Article 6 of the International Covenant on Civil and Political Rights, 1966. Article 6 paragraph 1 of ICCPR reads as "Every human being has the inherent right to life. This right shall be protected by law. No one shall be deprived of his life."

The opponents rebutted the abovementioned argument by stating that the questions relating to unlawful loss of life in hostilities were governed not by the ICCPR but by law applicable in armed conflict. The rebuttal of the opponent was accepted by ICJ in the Advisory Opinion in the following words:<sup>32</sup>

Whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of ICCPR can only be decided by a reference to the law applicable in armed conflict and not deduced from the terms of ICCPR itself.

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32) For detail, see International Covenant on Civil and Political Rights art.6.

Professor Yogesh K Tyagi criticized the reasoning supplied by the court while upholding the rebuttal which had given primacy to the law applicable to armed conflict of the international human rights law in deciding the legality of the use of nuclear weapons. Following are the points of criticism given by him:<sup>33</sup>

- (i) By giving primacy to the law applicable to the armed conflict over Article 6 of ICCPR in deciding the legality of the use of nuclear weapons, the court subordinated human rights law to the law of armed conflict and ignored the interpretation of Article 6 as given by the UN Human Rights Committee,<sup>34</sup> and consequently, it undermined the integrity of the Covenant system.
- (ii) By excluding Article 6 from the purview of ICCPR during wartime, and by subjecting human rights law to the law of armed conflict, the court has come out with an imaginative interpretation of treaty law.
- (iii) With the abovementioned observation the court has neglected the relevant laws and practice of the most celebrated human rights bodies, both global<sup>35</sup> and regional<sup>36</sup> (e.g.), which are entrusted with the application of human rights treaties under international law.
- (iv) There is no law that could forbid the application of human rights treaty during wartime. States may or may not survive but their human rights obligations never die. Even the disintegration of states does not obliterate their obligations in respect of human rights.
- (v) There is no treaty provisions, no customary norm, no case law, no juristic opinion, certainly no principles of natural justice which could allow any interpretation of Article 6 of ICCPR not in accordance with the terms of the same instrument.

Apart from the aforesaid criticisms of the observation of ICJ, it is pertinent to mention the judgment of the European Commission of Human Rights in the case of *Cyprus v Turkey*, where the Commission had categorically held that a violation of Article 5 of the European Convention on Human Rights (right to liberty and security of person) in the case of person missing during and after an armed conflict, the provision can not be interpreted in the light of relevant provisions of the Geneva Conventions. In another important judgment by the European Court of Human

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33) Richard A. Falk, *Supra* note 19, at 186.

34) Created by the state parties to ICCPR in 1977, the committee consists of eighteen experts in the field of human rights with rich experience of the law and/or diplomacy. It is not only the guardian of ICCPR but also the flagship of the UN human rights treaty bodies.

35) UN Human Rights Committee.

36) the European Commission and the European Court of Human Rights.

Rights in the case of *Loizidou v Turkey*, the court found the violation of the right to property and did not consider the equivalent provisions of the Fourth Geneva Convention although it based the responsibility of Turkey under the European Convention on its military occupation of northern Cyprus.

Another striking problem with the observation of the ICJ is that while determining the legality of the use of nuclear weapon on the anvil of the right to life, it ignored the most authoritative expression on the subject i.e. General Comment 14(23) on Article 6 of the covenant which provides that the right to life is “the supreme right” from which no derogation is permitted even in time of public emergency and that this right is the basis of all human rights. In the view of the Committee it is “the supreme duty” of states to prevent wars.[k6] Recognizing that the designing, testing, manufacture, possession and deployment of nuclear weapons are amongst the greatest threats to the right to life, the Committee concludes that “the production, testing, possession, deployment and use of nuclear weapons should be prohibited and recognized as crimes against humanity.” This comment was unanimously adopted in 1984 by eighteen eminent experts in the field of human rights with legal experience representing all regions, all ideologies, and all forms of civilization and principal legal systems. Unfortunately, the comment did not find a place in the Advisory Opinion of ICJ and the observation of the court reflected the indifference of the court towards the human rights jurisprudence which has resulted in an indefensible assessment of the legality of the use of nuclear weapons on the anvil of human rights.

The possession and use of a nuclear weapon can also be tested on the provision of Article 7 of the ICCPR. Article 7 of the ICCPR elaborated first in the 1975 Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment and later in the 1984 Conventions on the same subject. Article 1(1) of the Declaration reads as follow:<sup>37</sup>

For the purpose of this Declaration, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed or intimidating him or other persons. It does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners.

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37) See Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, art 1. para. 1, Dec. 9, 1975.



As for the exclusionary effect of the last sentence of this definition of “torture,” one can point out that any act of war which may inflict pain or suffering on non-combatants or even wounded/sick combatants does not fall within the purview of “inherent in or incidental to lawful sanctions.”<sup>38</sup> The suffering of the survivors of the nuclear attacks on Hiroshima and Nagasaki could testify that the use of nuclear weapons may inflict torture not only upon those who die but also on those who survive nuclear attack. There are conclusive scientific projections that a nuclear attack would not only inflict immediate and indiscriminate death and destruction but it would also make the survivors envy those who dies in that attack.<sup>39</sup> Unfortunately, the proponents of illegality of use of nuclear weapons did not raise the preceding argument before the Court, especially when the prohibition of torture and other cruel, inhuman or degrading treatment is not only regarded as a customary norm of international law<sup>40</sup> but also enforced by domestic courts of civilized countries like the United States.<sup>41</sup>

## **B. Prohibition against Genocide and Possession and Use of Nuclear Weapons**

Another relevant international legal instrument to examine the justification of possession and use of nuclear weapons on the anvil of human rights is the Convention on the Prevention and Punishment of the Crime of Genocide 1949, which contains the prohibition against Genocide.

In Article II of the 1949 Convention genocide is defined as:

Any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) Killing members of the group;

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38) Richard A. Falk, *Supra* note 19, at 190.

39) Owen Green & Ian Percival and Irene Ridge, *Nuclear Winter* 26 (Cambridge Univ. Press 1985).

40) Theodor Meron, *Human Rights and Humanitarian Norms as a Customary Law* 145 (Oxford University Press 1989).

41) *Filartiga v Pena Irala*, 630 F.2d 876 (2d Cir. 1980) (Where the U.S. Federal Court of Appeal for the Second Circuit in New York Referred to the Covenant and also to some other international instruments as evidence that customary international law against torture existed and was binding on the United States even though United States had not ratified the treaties in reference at that time).

- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to being about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

Keeping in mind the ingredients of the abovementioned definition it can fairly be concluded that the number of deaths occasioned by the use of nuclear weapons would be enormous; that the victims could, in certain cases, include persons of a particular national, ethnic, racial or religious group and that the intention to destroy such groups could be inferred from the fact that the user of the nuclear weapon would have omitted to take account of the well-known effects of the use of such weapons.<sup>42</sup> However, as far as the possession of nuclear weapons is concerned it can be argued that if the use of these weapons is prohibited so shall be their possession.

ICJ in its Advisory Opinion accepted the validity of the abovementioned argument and reached the following conclusion:<sup>43</sup>

The prohibition of genocide would be pertinent in this case if the recourse to nuclear weapons did not indeed entail the element of intent, towards a group as such, required by the provision (Article 1) ...in the view of the court, it would only be possible to arrive at such a conclusion after having taken due account of the specific circumstances of the case.

This dictum implies that the use of nuclear weapons as such is not an act of “genocide” in general. In the view of the court, the intent of the user of nuclear weapons, rather than the impact of these weapons, will determine whether there was an act of genocide.<sup>44</sup>

Since the intent of an accused can be ascertained only after the occurrence of an incident, the court implied that no abstract opinion could be expressed in the matter.<sup>45</sup> The aforesaid observation of the court can be criticized on the following counts:<sup>46</sup>

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42) Richard A. Falk, *Supra* note 17, at para 26.

43) *Id.*

44) Richard A. Falk, *Supra* note 19, at 189.

45) *Id.*

46) *Id.*

- (i) The court had given a very technical interpretation to the question of use of nuclear weapons with reference to the Crime of genocide, and had made it impossible to prove use of nuclear weapon in an armed conflict or war as amounting to the Crime of genocide.
- (ii) There is a legally recognized belief that not only actual violations but even some policies and legislation *in abstracto* can constitute violations of human rights. That is why the policy of “ethnic cleansing”, irrespective of its arguable advantages and objectives, is abhorred in international law.
- (iii) Some acts include within themselves the intent of their perpetrators. In other words, some acts speak for themselves.
- (iv) The intent may be a relevant element to distinguish the use of nuclear weapons in a war from their use through human or mechanical error or failure; but not otherwise.
- (v) In international law, there is a strong opinion in favour of the principle of absolute liability for ultra-hazardous activities and substances.<sup>47</sup>

Keeping in view the above-mentioned criticisms, it can safely be argued that while the court was reasonable in recognizing the requirement of intent, it was unreasonable in ignoring the knowledge of the devastating effects of the use of nuclear weapons. At this juncture, a very important question arises that how the use of nuclear weapons, with the knowledge of its effects, leaves a benefit of doubt with its perpetrators on account of his good intentions?

### **C. International Environmental Law and Possession and Use of Nuclear Weapons**

Protection of the environment has received a very serious attention from the international community. United Nations has played an instrumental role in the development of international environmental law. The conventional, as well as customary international environmental law has become a very important part of international law and this branch of international law has been successful in achieving a consensus of member states of United Nations on many important issues. Before moving forward towards discussing the justification of possession and use of nuclear weapons by reference to international environmental law, it is pertinent to decide the questions which the researcher is going to address under this head.

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47) The opinion first finds expression in the km on the transboundary movements of hazardous wastes.

Following are the issues to be dealt under this head:

- (i) Whether the existing International Environmental Law for the protection of environment would be applicable during peace as well as wartime.
- (ii) Whether the possession and use of nuclear weapons would be unlawful or illegal by reference to existing conventional and customary international environmental law

In order to reach a reasonable and proper conclusion on the above-mentioned issues, it is indispensable to make specific reference to various existing norms relating to the safeguarding and protection of the environment. Following are the important provisions of existing international treaties and instruments which prohibit the use of such methods in warfare which has the potential to cause widespread, long-term and severe damage to the natural environment:

- (i) Article 35, paragraph 3 of the Additional Protocol I of 1977 to the Geneva Conventions of 1949, which prohibits the employment of “methods or means of warfare which are intended or may be expected, to cause widespread, long-term and severe damage to the natural environment;”
- (ii) Article 1 of the Convention on the Prohibition of Military or Any Other Hostile Use of Environment Modification Techniques, which prohibits the use of weapons which have widespread, long-lasting or severe effects on the environment.
- (iii) Principle 21 of Stockholm Declaration of 1972 which express the common conviction of the states concerned that they have a duty to ensure that activities within their jurisdiction and control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction.
- (iv) Principle 2 of the Rio Declaration of 1992 reiterates the common conviction of the states concerned under Principle 21 of Stockholm Declaration of 1972.

Moreover, the Court in its Advisory Opinion had also taken into account certain unique characteristics of nuclear weapons and made the following observation:<sup>48</sup>

The court has noted the definitions of nuclear weapons contained in various treaties and accords. It also notes that nuclear weapons are explosives devices whose energy results from the fusion or fission of the

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48) Richard A. Falk, *Supra* note 17, at para 35.

atom. By its very nature, that process in nuclear weapons as they exist today releases not only immense quantities of heat and energy but also powerful and prolonged radiation. According to the material before the court, the first two causes of damage are vastly more powerful than the damage caused by other weapons, while the phenomena of radiation are said to be peculiar to nuclear weapons. These characteristics render the nuclear weapons potentially catastrophic. The destructive power of nuclear weapons cannot be contained in either space or time. They have the potential to destroy all civilization and the entire ecosystem of the planet. The radiation released by the nuclear explosion would affect health, agriculture, natural resources and demography over a very wide area. Further, the use of nuclear weapons would be a serious danger to the future environment, food, and marine ecosystem and to cause genetic defect and illness in future generations.

From the afore-mentioned provisions for the protection of the environment from some specific methods of warfare and the observation of the court, it is clear that the use of a nuclear weapon cannot be justified keeping in mind the unique characteristics of these weapons. The international environmental law does not make any express provision for its non application during wartime; therefore it applies during peace as well as wartime. Moreover, the human rights obligation of states stays intact during wartime or any other emergency situation. The Court has also supported this view and had stated that the treaties relating to the protection of the environment are applicable during peace as well as war time.

Any use of the nuclear weapon would violate the aforesaid provisions of the International environment law corpus and could constitute a catastrophe for the environment. The environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. Therefore, any possession or use of nuclear weapons would be unlawful under the existing conventional and customary international environment law regime and hence cannot be justified on any count. However, the opponents of the above-mentioned conclusion make following arguments:

- (i) The entire corpus of international environment law made no mention of nuclear weapons.
- (ii) The warfare in general and nuclear warfare, in particular, were not mentioned anywhere under international environment law treaties and instruments and any other interpretation of these treaties and instruments would be destabilizing to the rule of law and to confidence in international negotiations

if those treaties were now interpreted in such a way as to prohibit the use of nuclear weapons.

- (iii) The states cannot be deprived of the exercise of its right to self-defense under international law because of its obligation to protect the environment.

The above arguments of the opponents can be rebutted in the following manner:

- (i) It is true the entire corpus of international environment law made no mention of nuclear weapon but one should not lose sight of this fact that the corpus does contain several provisions which prohibit the employment of methods or means of warfare which are intended or may be expected, to cause widespread, long-term and severe damage to the natural environment. Therefore, it can safely be concluded that the corpus of international environment law prohibits the use of nuclear weapons in an armed conflict or war.
- (ii) It is not the pro-environment and anti-nuclear weapon interpretation but an anti-environment and pro-nuclear weapon interpretation of the corpus of international environment law would destabilize the rule of law and a complete prohibition on the possession, manufacturing, testing, deployment and use of nuclear weapons would be a boon for a clean safe and secure environment.
- (iii) By any stretch of the imagination, a prohibition on the possession and use of nuclear weapons cannot be interpreted as a prohibition on the exercise of its right to self-defense under international law. It is quite illogical to argue that a prohibition on the possession and use of nuclear weapons shall deprive a state of exercising its right to self-defense and such an argument seems to be wrapped in a belief that use of a nuclear weapon is the only medium of self-defense.

After going through the applicable provisions of international environmental law, observation of the ICJ, the arguments of opponents as well as the advocates of prohibition on the possession and use of nuclear weapons, researcher comes to the conclusion that possession and use of nuclear weapons are unlawful and violative of various provisions of international environment law and hence is not justified.

## **D. International Humanitarian Law and the Possession and Use of Nuclear Weapons**

Under the modern international law, the branch which deals with rules and principles

applicable in armed conflict is known as the international humanitarian law. International humanitarian law and international human rights law are complementary. Both strive to protect the lives, health, and dignity of individuals, albeit from a different angle. Humanitarian law applies in situations of armed conflict, whereas human rights, or at least some of them, protect the individual at all times, in war and peace alike. Since the humanitarian law applies precisely to the exceptional situations which constitute armed conflicts, the content of human rights law that States must respect in all circumstances (i.e. the hardcore) tends to converge with the fundamental and legal guarantees provided by humanitarian law, e.g. the prohibition of torture and summary executions.<sup>49</sup> Therefore, in order to put forward a human rights perspective of the possession and use of nuclear weapons, it becomes mandatory to trace the justifications, if any, available under the existing international humanitarian law, for their possession and use. ICJ in its advisory opinion identifies the law applicable in the armed conflict i.e. international humanitarian law to be the “most relevant applicable law” to answer the question of the legality of the use of nuclear weapons. The scope of the present paper is not only restricted to the use of nuclear weapons but also deals with the justification of possession of nuclear weapons.

It should be noted at the outset of the discussion that neither the customary nor the conventional international humanitarian law contains any specific prescription authorizing the possession and use of nuclear weapons.<sup>50</sup> At the same time, international humanitarian law does not contain any express provision prohibiting the possession and use of the nuclear weapons.<sup>51</sup> In such situation, it is a debatable issue whether the possession or use of nuclear weapons is justified under the international humanitarian law. To settle this debate it is pertinent to mention that ICJ observed that:<sup>52</sup>

State practice shows that illegality of the use of certain weapons as such does not result from an absence of authorization but, on the contrary, is formulated in terms of the prohibition.

Undoubtedly, there is no express prohibition on the possession and use of nuclear

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49) Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 75, June 8, 1977; (Protocol II), art. 6.

50) Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, *Supra* note 26.

51) Richard A. Falk, *Supra* note 17, at para 57.

52) *Id.* para 52.

weapons under international humanitarian law. However, under customary as well as the conventional law of armed conflict, the use of such weapons which cause indiscriminate pain and suffering and which treats combatants and non-combatants alike are prohibited. Taking into consideration the unique potential of nuclear weapons to cause unimaginable destruction to human civilization and the entire ecosystem of the planet, the researcher is of the view that possession and use of nuclear weapons cannot be justified under the international humanitarian law.

Following are the provisions of customary and conventional international humanitarian law which can reasonably be applied to declare any possession and use of nuclear weapon as unlawful and hence cannot be justified:

- (i) Prohibition on the use of poison and poisoned<sup>53</sup>
- (ii) prohibitions on the use of weapons calculated to cause unnecessary suffering;<sup>54</sup>
- (iii) the Gas Protocol of 1925 which prohibits the use not only of poisonous and other gasses but also of analogous liquids, material or devices;
- (iv) the 1868 Declaration of St. Petersburg which lists as contrary to humanity those weapons which “needlessly aggravate the suffering of disabled men or render their death inevitable”;
- (v) Prohibition on the use of weapons that fail to discriminate between military and civilian personnel.<sup>55</sup> The effect of the today’s nuclear weapons cannot ensure the distinction between combatants and non-combatants. Even nuclear weapons of very low yield are capable of harming non combatants virtually inevitably whether intended or not;
- (vi) Prohibition of attacks against the civilian population. This obligation is repeated and further elaborated in different forms in the following international

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53) Hague Convention (IV) Respecting the Laws and Customs of War on Land and its annex: Regulations Concerning the Laws and Customs of War on Land, art. 23(a), Oct. 18, 1907; Hague Declaration Concerning Asphyxiating Gases, 1899; A Treaty in Relation to the Use of Submarines and Noxious Gases in Warfare, Feb. 6, 1922; Geneva Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925.

54) Hague Convention (IV) Respecting the Laws and Customs of War on Land and its annex: Regulations Concerning the Laws and Customs of War on Land, *supra* note 49, at art. 23(c).

55) Draft Rules of Aerial Warfare, art. 24, 1923; Hague Convention (IX) Concerning Bombardment by Naval Forces in Time of War, art. 1, Oct. 18, 1907; Hague Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, art. 25, Oct. 18, 1907.



humanitarian law instruments:

- (a) Article 26 of the Regulations annexed to the 1907 Hague Convention IV Respecting the Laws and Customs of War on Land and Article 1 of the 1907 Hague Convention IX Concerning Bombardment by Naval Forces in Times of War, to the extent that these provisions prohibit attacks on undefended areas and undefended building.
- (b) The resolution of 30<sup>th</sup> September 1928, whereby the Assembly of the League of Nations forbade the civilian population from being considered a military objective.
- (c) The 1949 Geneva Conventions prohibiting attacks on military establishments and health transports<sup>56</sup>

Thus, the use of a nuclear weapon against civilian targets or of a weapon having incidental effects on civilians in any circumstances is rendered illegal by virtue of the most elementary rules of international law of armed conflict.

- (vii) The use of a nuclear weapon against a civilian target would constitute a crime against humanity.<sup>57</sup>

Therefore, the researcher is of the opinion that possession and use of nuclear weapons are in flagrant violation of international human rights regime and hence can not be justified in any extreme circumstances. These weapons are a shame on human civilization and any justification forwarded for their possession and their use would result in a complete ignorance of natural law framework of international law. There is no principle under international law which is above the principle of humanity and same cannot be compromised to achieve some geo-political and strategic objectives.

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56) Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 19, Aug. 12, 1949; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; art. 22, Aug. 12, 1949; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, art. 14, 15, 18, 21, 22, Aug. 12, 1949.

57) Charter of the International Military Tribunal – Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, art. 6(c), Aug. 8, 1945; Convention on the Prevention and Punishment of the Crime of Genocide, art. 2, Dec. 9, 1948.

## VII. Justification of Possession and Use of Nuclear Weapons as relied by Permanent Members of the Security Council: A Critical Analysis

To justify the possession and use of nuclear weapons the permanent members of the Security Council have relied upon justifications which were a part of the traditional law of war and one or two of them are still a part of the modern law of armed conflict. They have not even talked about international human rights law regime which is playing the most important role in the development of the human civilization after World War II. These states subscribe to the positivist law framework of international law and give maximum importance to state sovereignty and free consent. Relying upon this framework these states maintain that till the time there is no express prohibition on the possession and use of nuclear weapons, the same is absolutely legal under customary as well as conventional international law. It has already been discussed in the previous part that this argument does not stand if the issue of possession and use of nuclear weapons is approached with a human rights perspective. Therefore, it becomes necessary to discuss the other justifications relied upon by permanent members of the Security Council on the issue of possession and use of nuclear weapons which are as follows:

### A. Justification of Possession and Use of Nuclear Weapons in Cases of Self Defense

As mentioned in the paper that the right to exercise self-defense is recognized under the customary and conventional international law. The importance of this right can be understood with the fact that it has been expressly provided under Article 51 of the Charter. Article 51 is an express exception to Article 2, paragraph 4 which prohibits the use of force and it permits the use of force in self-defense if an armed attack occurs against a member state. In *Nicaragua v United States of America* ICJ has unequivocally stated that Article 51 constitutes an exception to Article 2, paragraph 4. Article 51 of the Charter reads as follows:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed conflict occurs against a member of United Nations until the Security Council has taken measures to maintain international peace and security. Measures taken by members in the exercise of right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and the

responsibility of the Security Council under the present Charter to take at any time such actions as it deems necessary in order to maintain or resort international peace and security.

The expression 'inherent right' in the afore-mentioned text is not creative in nature and it does not create the right of individual and collective self defense which already exists in customary international law.<sup>58</sup> The literal interpretation of Article 51 is that right of self-defense is available only in case of an actual armed attack against a Member State. The another view is that Article 51 merely declares 'nothing in the Charter shall impair the right of individual or collective self-defense if an armed attack occurs.'<sup>59</sup> Since customary international law goes beyond cases of armed attack Article 51 should not be construed by implication to eliminate that right.<sup>60</sup>

After giving a brief overview of the right of self-defense, the issue arises whether the possession and use of nuclear weapons are justified under the canons of international law in cases of self-defense. It is pertinent to note that the justification for using nuclear weapons is frequently founded on the right of self-defense as provided under the Charter. Such a foundation suggests that the first nuclear strike is obviously and unquestionably illegal. ICJ in its Advisory opinion decided by seven votes to seven by President's casting vote 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 the rules of humanitarian law.<sup>61</sup> The question which is required to be answered in order to settle this issue is whether the second retaliatory strike is also prohibited. Should a nation be entitled to use nuclear weapons in retaliation if it is attacked?

Before reaching to this question, it is important to take note of the advisory opinion of ICJ on this issue where it was decided by seven votes to seven by President's casting vote which reads as follows:<sup>62</sup>

However, in view of the current state of international law, and of the elements of fact at its disposal, the court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful and

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58) *Advisory Opinions, Supra* note 16.

59) *Id.*

60) *Id.*

61) Richard A. Falk, *Supra* note 17, at para 105.

62) *Id.* para 105.

unlawful in an extreme circumstance of self defense, in which the very survival of the State is at stake.

A very important issue which arises from the above observation is that whether the refusal of the court to pronounce on the legality of the use of nuclear weapons in case of extreme self-defense threatening the survival of the user implies a *non-liquet*. And what are its implications on the legality of the threat or use of nuclear weapons? A leading international law academician settled the afore-stated issue in a very apt and impressive manner in the following words:<sup>63</sup>

In sum, in spite of the doubts raised by virtue of Court's response in the second part of paragraph 2E of the *dispositif*, there is no finding of *non-liquet* on the question of the legality of the threat or use of nuclear weapons. The Court's replies in paragraphs C, D and the first part of paragraph 2E of the *dispositif*, as regards "non-permissibility" of threat or use of nuclear weapons, amount to a refutation *non-liquet*. The General Assembly must ignore as "extraneous" the Court's observation in the second part of paragraph 2E.

Yet another baffling question which arises from the second part of paragraph 2E of the *dispositif* is: "what does the term survival mean?" The opinion of the court does not provide any guidance to interpret the term 'survival'. It is not clear whether survival refers to the political survival of the government of the state, the survival of the state as an independent entity, or the physical survival of the population. Even if, the court would have expressed the nature of survival, the obiter dictum expressed in second part of paragraph 2E of the *dispositif* can in no circumstances be invoked to claim authorization for threat or use of nuclear weapons even on the pretext of "survival of the state."<sup>64</sup> Such an interpretation would be contrary to the law of the Charter and other *corpus juris* on the matter and indeed to the totality of international law.

One should also keep in mind the potential of a nuclear weapon to cause unprecedented destruction to human civilization and the ecosystem of the planet, and even a limited and a small nuclear strike will exceed several times the havoc caused by the use of nuclear weapons at Hiroshima and Nagasaki. In short, even a limited first nuclear strike will blast many Hiroshima out of existence. In such an event, the

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63) Bharat H. Desai, *Non Liquet and the ICJ Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons: Some Reflections*, 37(2) Int'l Journal Innovation & Learning 217 (1997).

64) *Id.* at 218.

concept of self-defense will lose all its justification because there will not be any occasion left for self-defense by resorting to retaliatory measures and such an act would be total irrationality.<sup>65</sup> Furthermore, even a strike in self-defense shall not be justified because only those weapons may be used in self-defense whose use is otherwise permitted under international law. Recourse to nuclear weapons in the exercise of the right of self-defense would attract the illegalities of the destruction of the environment, annihilation of non-combatants, commission of war crimes and a violation of other humanitarian rules of warfare and can not be justified.<sup>66</sup>

### **B. Justification of Use of Nuclear Weapons in Cases of Reprisals**

If a state commits an international wrong against another state which results in a difference between them, then, the latter state can resort to measures which are otherwise illegal but are exceptionally permitted by international law for the purpose of compelling the former state to settle the difference. In the modern sense, 'reprisal' denotes any kind of forcible or coercive measures whereby one state seeks to exercise a deterrent effect or to obtain redress or satisfaction, directly or indirectly, for the consequence of the illegal acts of another state, which has refused to make amends for such conduct.<sup>67</sup>

Here, the issue is whether the use of nuclear weapons is justified in cases of reprisals. In order to address this, it must be kept in mind that reprisals against non-combatants and non-military targets are prohibited. It is also forbidden to resort to reprisals against medical installations; transportations and units; the injured; the infirm; civilian populations and property and various categories of civilian populations subject to protection. Taking into consideration the highly destructive characteristics of nuclear weapons, their use is not justified in cases of reprisals. The prohibition of reprisals against combatants and military targets are not specifically provided in any legal instrument, but the prohibition of the use of nuclear weapons against them is certain because it violates the other principles of laws of armed conflict like causing unnecessary suffering and rendering death inevitable.

The International Law Commission in its Draft Articles of Responsibility of States stresses under Article 30 on counter measures that:

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65) Richard A. Falk, *Supra* note 17, at 471.

66) See part IV and V.

67) Julius Stone, *Legal Controls of International Conflict* 289 (Rinehart & Co 1954).

Even when the internationally wrongful act in question would justify a reaction involving the use of force ...action taken in this guise certainly can not include, for instance a breach of obligations of international humanitarian law. Such a step could never be legitimate and such conduct would remain wrongful.

In practice, the very nature of nuclear weapons would necessarily violate prohibitions for which reprisals attacking civilian populations or their property.

### **C. Justification of Possession and Use of Nuclear Weapon in Cases of Necessity**

The law of armed conflict does not recognize the principle of necessity except in those circumstances where it is expressly provided for. The International Law Commission has stated that this exception does not authorize a state to ignore the prescriptions of humanitarian law as:<sup>68</sup>

It would be absurd to invoke the idea of military necessity or necessity of war in order to evade the duty to comply with obligations designed precisely to prevent the necessities of war from causing suffering which it was desired to prescribe once and for all.

Necessity is sometimes referred as a ground on which the rules of international law can be overridden. However C. G. Weeramantry argues against such a reference to necessity and according to him,<sup>69</sup> this is not, however, a generally accepted rule for it were to be accepted without limitation, most of the other rules of international law relating to war would be reduced to a cipher. In this regard, the question which arises is: Can a nuclear weapon be used in 'supreme emergency'? If yes, can one proceed in such manner as to annihilate civilians far in excess of Hiroshima attacks, certain that death of millions of one's own people as well? It may be opined here that by all stretch of the imagination, the defense of 'supreme emergency' is insufficient justification for the deliberate act of killing millions of innocent people. Moreover, the rules of international law do not admit the possibility of invoking military

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68) Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, *Supra* note 26.

69) C.G. Weeramantry, *Nuclear Weaponry and Scientific Responsibility*, 27 Int'l Journal Innovation & Learning 363 (1985).

necessity as a justification for state conduct not in conformity with the obligations they impose. These rules apply equally in relation to nuclear weapons and hence their possession use can not be justified in cases of necessity.

#### **D. Justification of Possession of Nuclear Weapon as Deterrents**

The justification for the production of nuclear weapons is generally founded on the theories of deterrence and Mutually Assured Destruction (MAD). The theory of deterrence maintains that the potential aggressor is permanently terrified into inaction by the possession of nuclear capability. The thrust of the theory is that mere possession of nuclear weapons, without their actual use has a deterrent effect on the potential aggressor.<sup>70</sup>

The theory, however, has following limitations:<sup>71</sup>

- (a) One might, if one does not want to use these weapons, deceive the enemy for some of the time into the belief that one means to use them.
- (b) One cannot expect to deceive him for all of the time from now to eternity the deterrence cannot be achieved by empty threats.
- (c) Deterrence in the true sense is not achieved by the storage of weapons with intent to terrify but a stockpiling with intent to use.

Another question which arises in relation to the theory of deterrence is whether the keeping of peace or the prevention of war is to be made dependent on the threat of horrific, indiscriminate destruction which justifies stockpiling such weapons at an enormous expense, in the hope that they will merely act as a deterrent but will not, in fact be, used.<sup>72</sup> This theory is responsible, to a greater extent, for the continued existence of nuclear weapons. It has also pushed the world to a situation, where those states, which do not have such weapons would, all the time, be racing to build them and those who already have nuclear weapons would continue to develop even more destructive weapons to maintain the superiority necessary for deterrence. Such trend would keep humanity in perpetual fear of destruction. The doctrine of Mutually Assured destruction (MAD) has been outdated by the contemporary technological breakthroughs. The nuclear weapon can now be targeted much more accurately.

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70) Richard A. Falk et al., *Supra* note 3, at 552.

71) *Advisory Opinions*, *Supra* note 16, at 472.

72) Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, *Supra* note 26, at 242.

Hence, the 'war-winning' strategy is replacing the MAD strategy. Because of such reasons, both the theory of deterrence and MAD fall to the ground; and we can conclude that the possession of nuclear weapons can not be justified by these theories.

## VIII. Nuclear Weapon Free Zones: A Ray of Hope for Complete Denuclearization of the World

The establishment of Nuclear-Weapon-Free Zones (NWFZ) is a regional approach to strengthen global nuclear non-proliferation and disarmament norms and consolidate international efforts towards complete denuclearization of the World. Under Non-Proliferation Treaty (NPT) specifically saves the right of any group of states to conclude regional treaties in order to assure the total absence of nuclear weapons in their respective territories.<sup>73</sup>

The General Assembly resolution 3472 B (1975) defines a Nuclear-Weapon-Free Zone as:<sup>74</sup>

...any zone recognized as such by the General Assembly of the United Nations, which any group of States, in the free exercises of their sovereignty, has established by virtue of a treaty or convention whereby:

- (a) The statute of total absence of nuclear weapons, to which the zone shall be subject, including the procedure for the delimitation of the zone, is defined;
- (b) An international system of verification and control is established to guarantee compliance with the obligations deriving from that statute.

It is clear from the definition that states are free to enter into a treaty or convention to establish an NWFZ. Following are the treaties by which NWFZ have been established in almost all the continents of the world:<sup>75</sup>

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73) Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, *Supra* note 26, at 242.

74) GA Res 3472 B (1975), available at: [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/RES/3472\(XXX\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/3472(XXX)) (last visited Nov.21, 2016). (*I have changed the footnote, please check*) G.A. Res. 3472 B, 30th Sess. (Dec. 11, 1975), available at [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/RES/3472\(XXX\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/3472(XXX)).

75) Available at: <https://www.un.org/disarmament/wmd/nuclear/nwzf/> (last visited on Nov. 21, 2016).(*As suggested , I have made necessary changes in the footnote, please check*).



- (i) Treaty of Tlatelolco — Treaty for the Prohibition of Nuclear Weapons in Latin America and the Caribbean
- (ii) Treaty of Rarotonga — South Pacific Nuclear Free Zone Treaty
- (iii) Treaty of Bangkok — Treaty on the Southeast Asia Nuclear-Weapon-Free Zone
- (iv) Treaty of Pelindaba — African Nuclear-Weapon-Free Zone Treaty
- (v) Treaty on a Nuclear-Weapon-Free Zone in Central Asia
- (vi) Resolution on the Establishment of an NWFZ in the region of the Middle East (67th Session) A/RES/67/28
- (vii) Mongolia's self-declared nuclear-weapon-free status has been recognized internationally through the adoption of UN General Assembly resolution 55/33S on "Mongolia's international security and nuclear weapon free status."

It is a positive sign that more and more states are willing to establish a NWFZ in their region and some of the states have established an NWFZ through UN General Assembly resolutions. The initiative to establish a nuclear-weapon-free zone should emanate exclusively from States within the region concerned and be pursued by all States of that region. The nuclear-weapon States should be consulted during the negotiations of each treaty and its relevant protocol(s) establishing a nuclear-weapon-free zone in order to facilitate their signature to and ratification of the relevant protocol(s) to the treaty, through which they undertake legally binding commitments to the status of the zone and not to use or threaten to use nuclear weapons against States parties to the treaty.<sup>76</sup> It is high time that the states which possess nuclear arsenal should come forward to establish NWFZ in their respective region. Once all the nuclear powers join the club of NWFZ, it would be very convenient to achieve a complete denuclearization of the world.

## IX. Conclusion and Suggestions

The possession and use of nuclear weapons is not expressly prohibited under customary as well as conventional international law. However, in the present era when international human rights regime enjoys an overwhelming support of the world community the possession and use of nuclear weapons can not be justified. Their possession and use are a flagrant violation of the international human rights regime to which almost all the nations including the nuclear powers have committed

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76) *Id.*

themselves. The future of whole human civilization and the ecosystem of the planet cannot be put at stake to preserve the sovereignty of a state and to accord too much respect to its free consent. The world has become a global village and the interests of all the countries are interwoven. Under such circumstances, any use of nuclear weapon has the potential to push the world community to the primitive era. The existence of nuclear weapons acts as a question mark on the future of human civilization.

There is no doubt there is no justification for possession and use of nuclear weapons under customary and conventional international law. The justifications discussed in the length of the paper seem to be rooted in an inhumane approach of “might is right” which is in complete ignorance of the approach that in a civilized and human world only “just is right”. Last but not the least the following are some suggestions which might be helpful in achieving complete denuclearization of the world:

- (i) The countries around the world should look forward to making their region an NWFZ by entering into a treaty or convention on the lines of existing NWFZ, which are proving to be a standard for other countries to follow.
- (ii) The international legal community should come forward and evaluate seriously the implication of possession and use of nuclear weapons on international human rights law regime, which would certainly be made after a major use of nuclear weapons in future.
- (iii) The member states of United Nations, especially the permanent members of the Security Council should take seriously the unanimous opinion of ICJ in its Advisory opinion that there exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.
- (iv) The world community, especially the nuclear powers should take seriously the Secretary General’s five-point proposal on nuclear disarmament and should start negotiations to implement the proposal.
- (v) The Security Council’s permanent members should commence discussions, perhaps within its Military Staff Committee, on security issues in the nuclear disarmament process

Taking guidance from the decision in Shimoda Case and the Advisory Opinion of ICJ the world community, especially the nuclear powers should come forward to negotiate a treaty to prohibit the possession, stockpiling, testing, manufacture and use of nuclear weapons.

## **Bibliography**

### **Primary Sources:**

#### **International Legal Instruments:**

1. Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, Dec. 11, 1868.
2. Hague Declaration Concerning Asphyxiating Gases, 1899; Hague Convention (IV) Respecting the Laws and Customs of War on Land and its annex: Regulations Concerning the Laws and Customs of War on Land, Oct. 18, 1907.
3. Geneva Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925.
4. Geneva Convention Relative to the Treatment of Prisoners of War, art. 1, Aug. 12, 1949
5. U.N. Charter, 1945
6. Universal Declaration of Human Rights, Dec. 10, 1948.
7. International Covenant for Civil and Political Rights, Dec. 16, 1966.
8. Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968.
9. Comprehensive Test Ban Treaty, Sep, 10, 1996

### **Secondary Sources:**

#### **Books:**

- Andrews, L., *New Conceptions: A Consumer's Guide to the Newest Infertility Treatments, Including In Vitro Fertilization, Artificial Insemination, and Surrogate Motherhood* (St. Martin's Press 1984).
- Borrie, J., & Caughley, T., *How Are Humanitarian Approaches Relevant to Achieving Progress on Nuclear Disarmament?*, in *Decline or Transform: Nuclear Disarmament and Security Beyond the NPT Review Process*

(Acronym Institute 2012) (Digital St. Martin's Press 1984).

Avner Cohen & Steven Lee, *Nuclear Weapons and the Future of Humanity* (A. Cohen and S. Lee eds., Rowman & AllanheId, Totowa 1986).

Lawrence Freedman, *The Evolution of Nuclear Strategy* (St. Martin's Press 1981).

Gurdip Singh, *International Law 475* (Educa Books (Macmillan) 2003).

Robert Jastrow, *How To Make Nuclear Weapons Obsolete* (Little Brown & Co. 1985).

Julius Stone, *Legal Controls of International Conflict* (Rinehart 1954).

Charles W. Kegley, *The Nuclear Reader* (Eugene R. Wittkopf eds., St. Martin's Press 1985).

Owen Green & Ian Percival and Irene Ridge, *Nuclear Winter* (Cambridge Univ. Press 1985).

Theodor Meron, *Human Rights and Humanitarian Norms as a Customary Law* (Oxford Univ. Press 1989).

Union of Concerned Scientists, *The Fallacy of Star Wars* (Vintage Books 1984).

Michael Waltzer, *Just and Unjust Wars* (Basic Books 1977).

### **Articles:**

1. Bharat H. Desai, *Non Liquet and the ICJ Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons: Some Reflections*, 37(2) Int'l Journal Innovation & Learning 217 (1997).

2. Josef L. Kunz, *The Chaotic Status of Laws of War and the urgent necessity for their Revision*, 45 Am. J. Int'l L. 37 (1951).

3. Ramesh Thakur, *Nuclear Deterrence is Overrated*, <http://www.thehindu.com/opinion/lead/nuclear-deterrenceis-overrated/article5049435.ece?homepage=true> (last visited Nov. 23, 2013).

4. Richard A. Falk, Lee Meyrowitz & Jack Sanderson, *Nuclear Weapons and*

*International Law*, 20 Int'l Journal Innovation & Learning 542 (1980).

5. Richard A. Falk, *The Shimoda Case: A Legal Appraisal of the Atomic Attacks upon Hiroshima and Nagasaki*, 59 Am. J. Int'l L. 7590 (1965).

6. Richard A. Falk, *Nuclear Weapons, International Law and the World Court: A Historic Encounter*, 37(2) Int'l Journal Innovation & Learning 166 (1997).

There is a discrepancy between here and note 17, which states: Richard A. Falk, *Nuclear Weapons, International Law and the World Court: A Historic Encounter*, 37(2) Int'l Journal Innovation & Learning 166 (1997). Please check which one is right. (I had mentioned the first page number of his article. The page number under note 17 is correct. I have made the necessary changes)

7. C.G. Weeramantry, *Nuclear Weaponry and Scientific Responsibility*, 27 Int'l Journal Innovation & Learning 363 (1985).

8. V. S, Mani, *The Nuclear Weapons and the World Court*, 37(2) Int'l Journal Innovation & Learning 176 (1997).

There is a discrepancy between here and note 22, which states: V. S, Mani, *The Nuclear Weapons and the World Court*, 37 (2) Int'l Journal Innovation & Learning 176 (1997). (I have made the necessary changes)

9. Yogesh K Tyagi, *Judicial Statesmanship without Political Courage: The ICJ Advisory Opinion on Nuclear Weapons*, 37(2) Int'l Journal Innovation & Learning 200 (1997).

There is a discrepancy between here and note 18, which states: Yogesh K Tyagi, *Judicial Statesmanship without Political Courage: The ICJ Advisory Opinion on Nuclear Weapons*, 37(2) Int'l Journal Innovation & Learning 200 (1997).

### **Webliography :**

1. <http://www.un.org/disarmament/>
2. <http://www.icj-cij.org/homepage/>
3. <http://www.un.org/>
4. <http://www.thehindu.com/>
5. <http://cnnd.anu.edu.au/>