AN APPRAISAL OF NUCLEAR WEAPONS UNDER INTERNATIONAL HUMANITARIAN LAW: REVISITING THE INTERNATIONAL COURT OF JUSTICE ADVISORY OINION, 1996

By

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Abstract: *The most humane principles for the protection of human beings and the natural environment during armed conflict are contained in the rich corpus of International Humanitarian Law (IHL). Principles of IHL have set a high standard for acceptable weapons in warfare, hence IHL has been the mechanism through which the international community has prohibited the use and production of several weapons that cause superfluous injury. Nuclear Weapons are the most destructive weapons ever produced, yet they have not been expressly prohibited by law. Nuclear weapon states have for decades maintained the validity of the possession of nuclear weapons upon the doctrine of nuclear deterrence. As the world faces new and imminent security challenges, the question of the continued sustenance of nuclear weapons vis. – a- vis. the need to eliminate them in the interest of preservation of world peace and security assume greater relevance. With its rules on limitation of weapons of war, IHL seems to be the appropriate law to turn to in this context and this position has been upheld by the International Court of Justice.*

Introduction

A Nuclear Weapon is a device that is designed to release energy in an explosive manner as a result of nuclear fission, nuclear fusion or a combination of the two processes.[1] Fission weapons are commonly referred to as atomic bombs while fusion weapons are referred to as thermonuclear bombs or more commonly, hydrogen bombs. [2] The nuclear bomb is a complete assembly in its intended ultimate configuration that, upon completion of the prescribed arming, fusing and firing sequence, is capable of producing the intended nuclear reaction and release of energy.[3] The first nuclear weapons were bombs delivered by aircraft. Later, warheads were developed for strategic ballistic missiles, which have become

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[1] Cochran, T. Encyclopedia Britannica. www.britannica.com/EBchecked/topic/421827/nuclear-weapons (Accessed on 18/01/2013)

[2] Ibid.

[3] U.S. Military Dictionary, The Oxford Essential Dictionary of the U.S. Military © 2001, 2002 by Oxford University Press Inc.

by far the most important nuclear weapons. Smaller tactical nuclear weapons have also been developed.[4]

Nuclear weapons were first produced in the world by the United States of America in 1945.[5] They have been used as weapons of warfare once by the United States against the empire of Japan in 1945 during the Second World War, when it bombed the cities of Hiroshima and Nagasaki in an attempt to compel the Japanese empire to surrender.[6] Presently, nine states of the international community are known to possess nuclear weapons.[7] Although many treaties have been made to limit the proliferation of nuclear weapons with the ultimate goal of eliminating them,[8] nuclear weapon states have failed to completely disarm and there is a hanging threat of nuclear weapons proliferation in the world.[9]

Why the Issue of Nuclear Weapons is Relevant to International Humanitarian Law

International Humanitarian law is a branch of Public International Law which governs situations of armed conflict.[10] In other words, it is the law of war. Its rules are applicable in times of armed conflict. It operates by establishing rules which limit the choice of the weapons used in warfare and rules that guide the belligerents in their conduct towards non-combatant civilians as well as their counterparts who become injured or voluntarily lay down their arms.[11] The basic principles guiding the choice of weapons in war are the principles of Distinction, Proportionality,

[4] These include the ones for artillery projectiles, land mines, antisubmarine depth charges, torpedoes and shorter-range ballistic and cruise missiles. Cochran. Op.cit.

[5] Development and Proliferation of Nuclear weapons http://nobelprize.org/educational_games/peacenuclear_weapons/readmore.html (Accessed on 20/01/2013)

[6] Ibid.

[7] U.S.A, U.K, France, China, Russia, Pakistan, India, Israel and North Korea

[8] The following are the significant treaties on nuclear weapons: Treaty on the Non-Proliferation of Nuclear Weapons, 1968; the Partial Test BanTreaty, 1963; the Seabed Arms Control Treaty, 1971; the Outer Space Treaty, 1967; the Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, 1979; the Treaty of Tlatelolco, 1967; the Rarotonga Treaty, 1985; the Bangkok Treaty, 1995; the Semipalatinsk Treaty, 2006, the Treaty of Pelindaba, 1996, the Comprehensive Test Ban Treaty, 1996; the Treaty between the U.S.A and the U.S.S.R on the Elimination of Their Intermediate-Range and Short-Range Missiles, 1987; the 1991 START I Treaty between U.S.A and Russia, 1993 START II Treaty between U.S.A and Russia, 2010 START III Treaty between U.S.A and U.S.S.R; International Convention for the Suppression of Acts of Nuclear Terrorism, 2005; the Statute of the International Atomic Energy Agency, 1956.

[9] See Kampani, G. "Second-Tier Proliferation: The case of Pakistan and North Korea" *The Nonproliferation Review*, (2002) p.107

[10] See Gasser, H.P. International Humanitarian Law – An Introduction. Paul Haupt Publishers, Berne – Stugaart. Vienna. (1993) p. 3

[11] Ibid.

Necessity and Controllability.[12] The rules and principles regulating the means and methods of warfare prescribe what kinds of weapons are permissible in warfare and those which are not and it is in this respect that the question of the legality of nuclear weapons relates to IHL. The sources of IHL comprise of statutory law, specifically the Four Geneva Conventions of 1949 and their two Additional Protocols of 1977. The rules of International Customary Law constitute another source of IHL. Some of them set forth absolute obligations which are binding on all states (*jus cogens*).[13]

By putting the determination of the legality of nuclear weapons under the threshold of IHL, an assumption is created that the issue of nuclear weapons becomes relevant only in times or situations of armed conflict. While the calculated magnitude of the potential effects of a nuclear attack suggests that the use of nuclear weapons by state actors would most likely be in situations of desperation, namely, in times of armed conflict, it is however not suggested that nuclear weapons would be used only in times of armed conflict. Although it has never occurred, there is a likelihood of nuclear armaments coming under the control of terrorist groups and being used by them against unsuspecting civilians in peacetime.[14] The assertion being made is that nuclear weapons are more likely to be used in situations of conflict escalation. As a matter of fact, the only use of nuclear weapons ever was during World War II, by the United States of America against the empire of Japan.[15] It therefore warrants an examination of the issue under the law that governs armed conflicts.

The Rule on the Choice of Means and Methods of Warfare: Applicability to Nuclear Weapons

The basic principle of IHL pertaining to the means and methods of warfare is that in any armed conflict, the right of the parties to the conflict to choose methods and means of warfare is not unlimited.[16] The core principles regulating the use of weapons in warfare are the principles of distinction and proportionality. The principle of distinction prohibits the use of weapons which have indiscriminate effects; that is, their destructive effects do not distinguish between military and civilian objects.[17] Article 48 of Additional Protocol 1 to the Geneva Conventions

[12] See Moxley, C.J. et al. "Nuclear Weapons and Compliance with International Humanitarian Law and the Nuclear Non-Proliferation Treaty." *Fordham International Law Journal*, Vol. 34 Issue 4 (2011) p.617

[13] Gasser, H. P. Op.cit. p. 18

[14] See generally Bunn, M. "A mathematical model of the risk of nuclear terrorism." *Annals of the American Academy of Political and Social Science*, Vol. 607 (Sept.2006) Published by Sage Publications Inc. in association with the American Academy of Political and Social Science. p.110. Also see Bunn, M and A. Wier. "Terrorist Nuclear Weapon Construction: How Difficult?" *Annals of the American Academy of Political and Social Science*, Ibid. p.147

[15] Development and Proliferation of Nuclear Weapons. Op.cit.

[16] Article 35(1) Protocol 1 (Additional to the Geneva Conventions of 1949)

[17] See Sassoli, M & Bouvier, A. How Does Law Protect In War? International Committee of the Red Cross, Geneva (2006) p.143

provides that, "In order to ensure respect for and protection of the civilian population and civilian objects, the parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives."[18] It follows, therefore, that any weapon which when used, would not only affect military targets but would include the civilian population and civilian objects, lacks distinction quality.

The principle of proportionality prohibits the use of a weapon whose potential collateral effects upon noncombatant persons or objects would likely be disproportionate to the value of the military advantage anticipated by the attack. The notion behind the proportionality rule is balancing military necessity with humanity. Accordingly, disproportionate attacks which would injure civilians would reasonably be unnecessary and devoid of military value. Furthermore, weapons whose effects cannot be controlled do not meet the threshold of proportionality. Consequently, it is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering. It is also prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.[19]

In determining the applicability of these rules and principles to nuclear weapons, it is instructive to analyze the scientific facts pertaining to the potential effects of the detonation of nuclear weapons. Several experts in diverse fields of science have presented detailed analysis of the potential effects of a nuclear attack on humankind and the natural environment. Below is a physician's analysis of the calculated effects of a nuclear attack on humans;

> *A 20-megaton nuclear bomb...would create a fireball 1 1/2 miles in diameter, with temperatures of 20 million to 30 million degrees Fahrenheit...All living things would be vaporized within a radius of 'ground zero.' Six miles from this point, all persons would be instantly killed by a huge silent heat flash travelling at the speed of light...Within a 10-mile radius, the blast wave would slow to 180 mph. In that area, winds and fires would probably kill 50 percent of the population and injure another 40 percent...Within 20 miles*

[18] Also see Article 27 Common to the two Hague Conventions, on prohibition against sieges and bombardments on buildings dedicated to Religion, Art, Science, Charitable purposes, Historic monuments and Hospitals. See also Article 35 of Additional Protocol 1 to the Geneva Conventions prohibiting the use of weapons that cause damage to the natural environment.

[19] See Article 23 Common to the Hague Conventions and Article 35 of Additional Protocol 1 to the Geneva Conventions.

> *of the center, 50 percent of the inhabitants would be killed or injured by the thermal radiation and blast pressures, and tens of thousands would suffer severe burn injuries...Medical "disaster planning" for a nuclear war is meaningless... There is no possible effective medical response. Most hospitals would be destroyed, most medical personnel dead or injured, most supplies unavailable. Most "survivors" would die.*[20]

The foregoing exposition of the potential effects of a nuclear attack on human beings demonstrates the disproportionate tendencies of a nuclear bomb. It hardly depicts a weapon that could successfully focus on a singular military target and spare the civilian population. Regarding the natural environment, a Biologist gave the analysis thus:

> *Species extinction could be expected for most tropical plants and animals, and for most terrestrial vertebrates of north temperate regions, a large number of plants, and numerous freshwater and some marine organisms....Whether any people would be able to persist for long in the face of highly modified biological communities; novel climates; high levels of radiation; shattered agricultural, social and economic systems; extraordinary psychological stresses; and a host of other difficulties is open to question. It is clear that the ecosystem effects alone resulting from a large scale thermonuclear war could be enough to destroy the current civilization in at least the Northern Hemisphere. Coupled with the direct casualties of perhaps two billion people, the combined intermediate and long-term effects of nuclear war suggest that eventually there might be no human survivors in the Northern Hemisphere.*[21]

Such is the estimated magnitude of a nuclear explosion. As a matter of fact, the nuclear attacks on the cities of Hiroshima and Nagasaki in 1945 produced such catastrophic humanitarian disasters. Within the first to four months of the bombings, the acute effects killed 90,000 – 166,000 people in Hiroshima and 60 – 80, 000 people in Nagasaki[22] with roughly half of the deaths in each city occurring on the

[20] International Physicians for the Prevention of Nuclear War. "The Medical Consequences of Nuclear War," as reported by the Associated Press (March 8, 1980)

[21] Paul R. Ehrlich et al. "Long-Term Biological Consequences of Nuclear War." *Science 222* (December 23, 1983) 1299.

[22] Frequently Asked questions No.1."Radiation Effects Research Foundation. http://www.rerf.or.ip/general/qa (Accessed on 14/04/2013)

first day. The Hiroshima Prefectural Health Department estimates that of the people who died on the day of the explosion, 60% died from flash or flame burns, radiation sickness and other injuries, compounded by illness. A plausible estimate of the total immediate and short-term cause of death, 15 - 20% died from radiation sickness, 20 – 30% from flash burns and 50 – 60% from other injuries, compounded by illness.[23] Since then more have died from leukemia and solid cancers attributed to exposure to radiation released by the bombs. In both cities, most of the dead were civilians.[24]

In Nagasaki damage extended 4.7 km from the epicenter, and those who died when the bomb exploded were mainly within a radius of 4 km. At the epicenter, heat rays caused water to evaporate from human organs, the bones of a human hand to stick to a clump of glass and a victim's skull to remain on the inner surface of a steel helmet.[25] A sixteen year-old boy who was 1 km from the epicenter and a twenty-four year-old woman who was 1.5 km away described the instantaneous destruction as follows:

> *A light that was orange and like a camera's flash streaked over my head (I was standing in the shadow of a brick warehouse wall 4 metres high). Then a mother and her children were about 10 metres away from me, together with other children running away from where I was and passing the mother with her children instantaneously disappeared.*[26] *In just an instant, things on the ground blew away and were destroyed. It was a scene where everything was completely in disarray. I thought it was probably the end of the world.*[27]

From the foregoing accounts it is evident that the effects of a nuclear explosion would neither distinguish between military targets and the civilian population nor spare the ecosystem of the planet and that its effects are invariably disproportionate

[23] Harry S. Truman Library and Museum. U.S. Strategic Bombing Survey: The Effects of the Atomic bombings of Hiroshima and Nagasaki, June 19, 1946. President's Secretary's File, Truman Papers. 2. Hiroshima, Page 22/51.
[24] The Spirit of Hiroshima: An Introduction to the Atomic Bomb Tragedy. Hiroshima Peace Memorial Museum, 1999. Mikiso Hane (2001). Modern Japan: A Historical Survey. West View Press.
[25] *Records of the Nagasaki Atomic Bombings*, City of Nagasaki, Nagasaki, (1996) pp. 8-9, 15-32. Culled from N.M Kosuge. "Prompt and Utter Destruction: the Nagasaki disaster and the initial medical relief." *International Review of the Red Cross*, Volume 89, Number 866 (June 2007) p. 284
[26] Nihon Gensuibaku Higaisha Dantai Kyogikai (Japan Confederation of A- and H-Bomb Sufferers Organizations) (ed), *Genbaku Higaisha Chosa: Hiroshima/Nagasaki Shi to sei no shogen* (A survey of the A-bomb sufferers:Hiroshima and Nagasaki, testimonies of death and life), Shinnihon Shuppansha, Tokyo, 1994, p. 255. Culled from N.M Kosunge, Ibid. p.284
[27] Ibid. p.284

to any anticipated military objective. It can be asserted, therefore, that nuclear weapons do not meet the threshold of acceptability of weapons of warfare under international humanitarian law.

The Advisory Opinion of the International Court of Justice (ICJ) on the Legality of the Threat or Use of Nuclear Weapons: Relationship with IHL

On 8 July 1996, the International Court of Justice gave an Advisory Opinion on the question which was put to it by the General Assembly of the United Nations Organization regarding nuclear weapons. The General Assembly had requested the Advisory Opinion of the ICJ thus, "Is the threat or use of nuclear weapons in any circumstance permitted under international law?"[28] The ICJ's Advisory Opinion had since then been regarded as the most authoritative judicial opinion on nuclear weapons.[29]

The court acknowledged foremost and unanimously that there is neither in customary nor conventional international law any specific authorization of the threat or use of nuclear weapons. Conversely, it acknowledged that there is in neither customary nor conventional international law any comprehensive and universal prohibition of the threat or use of nuclear weapons.[30] The court observed that a threat or use of nuclear weapons should 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 treaties and other undertakings which expressly deal with nuclear weapons. Accordingly, the court extensively deliberated and determined the question of both the threat and use of nuclear weapons under the framework of IHL.[31]

Significantly, the court observed that their unique characteristics render 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."[32] To emphasize further on the unnecessary or superfluous injuries potentially caused by nuclear weapons, one of the judges, Judge Shahabuddeen, stated that the effects; "Cause unspeakable sickness followed by painful death, affect the genetic code, damage the unborn, and can render the earth inhabitable. These extended effects may not have military value

[28] See Legality of the Threat or Use of Nuclear Weapons. General List No. 95 (Advisory Opinion of July 8, 1996)
[29] "Nuclear Weapons" – Legal Dictionary – The Free Dictionary. Legal-dictionary.thefreedictionary.com/Nuclear+weapons (Accessed on 20/01/2013)
[30] Summaries of Judgments, Advisory Opinions and Orders of the International Court of Justice: Legality of the Threat or Use of Nuclear Weapons. Advisory Opinion of 8 July, 1996. p.1.
[31] See generally the text of the judgment of the ICJ. Ibid
[32] Legality of the Threat or Use of Nuclear Weapons. Op.cit.

for the user, but this does not lessen their gravity or the fact that they result from the use of nuclear weapons."[33]

After reviewing the evidence brought before it in the form of memoranda or written briefs by several states of the international community, arguing for or against the legality of nuclear weapons, the court opined that the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law. It, however, qualified its opinion by adding that "In view of the current state of international law and the elements of fact at its disposal, the court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence in which the very survival of a state would be at stake"[34]

The Advisory Opinion of the ICJ has been criticized by many, particularly because of the foregoing clause, which seems to create an exception to the unlawfulness of the use or threat to use nuclear weapons. In a very interesting analysis, **Luigi Condorelli**[35] asserted:

> *Although the court recognized that the destructive power of nuclear weapons cannot be contained in either space or time, and that they have the potential to destroy all civilization and the entire ecosystem of the planet; it gave the key role in its reasoning to "the fundamental right of every state to survival, and thus its right to resort to self-defence when its survival is at stake." It would at any rate seem curious that a world court should consider itself compelled by the law to reach the conclusion that a state has the legal right, even in limited circumstances, to put the planet to death.*[36]

In his critique of the Opinion, **Eric David**[37] scorned the reasoning of the court in refusing to treat nuclear weapons as poisoned weapons and accordingly prohibiting them in all circumstances. He asserted that the court's refusal to place nuclear weapons in the same category as chemical or poisoned weapons had no logical justification. Like Condorelli, David questioned the reasoning of the court in making

[33] Ibid.
[34] Ibid.
[35] Condorelli, L. "Nuclear weapons: a weighty matter for the International Court of Justice – *Jura non novit curia*?" *International Review of the Red Cross*, No 316, p.9 (January – February, 1997)
[36] Ibid.
[37] David, E. "The Opinion of the International Court of Justice on the legality of the use of nuclear weapons", Ibid. p.21

an exception to the use of nuclear weapons in self-defence, asking how, after finding that the use of nuclear weapons might bring about the annihilation of mankind, could the court go on to wonder whether the survival of a state under attack might justify the use of a weapon, which could lead to the destruction of its user.[38]

Hisakazu Fujita[39] touched most directly on the inherent contradictions in the Opinion. Fujita's analysis bears absolutely no hypocrisy with regard to the importance of international humanitarian law in deciding whether the use or threat of nuclear weapons is illegal or otherwise. Analyzing the controversial exception of the use of nuclear weapons based on 'self-defence', he stated that:

> *It appears prima facie that humanitarian law should apply to all categories of international armed conflict, and therefore also to those in which self-defence is invoked by one party to the conflict vis-à-vis the aggressor. Accordingly, no reason may be invoked to claim that humanitarian law is not equally applicable in a case of self-defence, or even in an extreme circumstance of self-defence.*[40]

Fujita's assertion is ground-breaking because if the nuclear weapons issue was to be judged on the basis of international humanitarian law alone, then the issue of legality would easily be put to rest. For one vital reason international humanitarian law is made up of the principles of distinction and proportionality, both of which would be impossible to observe in a nuclear-war situation. The question is whether international humanitarian law allows a state to disregard its essential principles in an extreme circumstance of self-defence. Fujita even asked the question, what is meant by an '*extreme circumstance of self-defence, in which the very survival of a state would be at stake*?' And he answered that this must be a new concept, but one which was not defined by the court.[41] He asserted that humanitarian law must be applicable to all means of warfare, and particularly to weapons having uncontrollable effects, which include nuclear weapons. Fujita questioned why the threat or use of nuclear weapons in an extreme circumstance of self-defence is not a case in which the threat or use of such weapons would generally be contrary to the rules of humanitarian law and answered that the court's opinion did not touch on that problem.[42]

[38] Ibid
[39] Fujita, H. "The Advisory Opinion of the International Court of Justice on the legality of nuclear weapons", Ibid.
p.56
[40] Ibid.
[41] Ibid.
[42] Ibid

Although the ICJ's opinion did not give an absolute condemnation of nuclear weapons by ruling that they are prohibited in all circumstances and absolutely, this writer opines that the findings of the court with respect to the unlawfulness of the use of nuclear weapons carries much more weight than the exception clause provided at the end of the ruling. In this regard, it is important to observe that the unanimous language of the court in finding that the threat or use of nuclear weapons would generally be contrary to the principles of IHL is definite and without ambiguity. On the other hand, in expressing hesitation to giving an absolute negation to the use of nuclear weapons, the court did not give a definite opinion. It expressed, rather, that it could not conclude on the question in the circumstance of self-defence in which the very survival of a state would be at stake. In essence, while it appears to have endorsed an exception, what it actually did was decline to conclude on whether or not to endorse an exception to the use of nuclear weapons under international law. Therefore, the court did give an opinion as to the unlawfulness of the use of nuclear weapons, acknowledged that there could be an exception to the use in a specific circumstance, but failed short of concluding on whether or not that exception would be acceptable under international law.

The contribution of the ICJ's Opinion to the framework for nuclear weapons elimination is that it creates a platform and guidance to decision and policy-makers for future legislation outlawing nuclear weapons. This is because the court identified many aspects of the illegality and dangers of nuclear weapons. Although the court came short of making an absolute condemnation of nuclear weapons by identifying a possible exception to its use, it went quite a distance in laying a foundation for elimination of nuclear weapons.

Why Have Nuclear Weapons Not Been Outlawed Yet?

The rules of IHL have been responsible for the promulgation of many treaties which prohibit the use of weapons that cause superfluous and indiscriminate effects. Some of these treaties prohibit the use of chemical and biological weapons.[43] However, no treaty has ever been made through the machinery of IHL to expressly and specifically prohibit nuclear weapons.[44] The question may be put forth why other weapons of mass destruction, which cause disproportionate effects, namely, chemical and biological weapons are specifically prohibited by law and nuclear weapons are not?

[43] The Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, 1972 & The Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, 1993.

[44] For more discussion on this see Gasser, H.P Op.cit. pp. 59-60

Chemical Weapons are weapons containing harmful chemicals such as nerve gas or poison[45] while a biological weapon is a weapon whose destructive effect is based on the pathogenic properties of microorganisms, the causative agents of diseases in man, animal and plants.[46] Many states of the international community had at one time possessed or still possess either or both of these weapons.[47]

The use of chemical and biological weapons in war differs significantly from the use of nuclear weapons. Nuclear weapons have been used only once in war against Nagasaki and Hiroshima while chemical and biological weapons have been used many times in war.[48] The effects of all three weapons are devastating and indiscriminate. It must be noted, however, that the effects of nuclear weapons far outweigh the effects of chemical and biological weapons. In comparison to nuclear weapons, chemical arms have a relatively limited range: they create regional rather than global security problems and slow the tempo of operations and they are militarily more akin to conventional arms than to nuclear weapons.[49] Both chemical and biological weapons have been prohibited through the machinery of IHL. Although the potential destructive effects of nuclear weapons far outweigh those of chemical and biological weapons, and the latter two have been completely prohibited by treaty law, nuclear weapons have not.

An adequate answer to this inquiry must necessarily consider the fact that unlike chemical and biological weapons, nuclear weapons have played a significant role in the power relations between states. The development of nuclear weapons was originally part of the defense strategies of the United States and the former Soviet Union against each other.[50] All through the period of the Cold War,[51] the production

[45] Encarta ® World English Dictionary (North American Edition) © & (p) 2009. Microsoft Corporation. Developed for Microsoft by Bloomsbury Publishing Plc.

[46] The Great Soviet Encyclopedia. 3rd Edition (1970-1979) © 2010. The gale Group. Inc.

[47] The states are U.S.A, Taiwan, Syria, Sudan, South Korea, Russia, Pakistan, North Korea, Libya, Israel, Iraq, Iran, India, Egypt, Cuba, China and Albania. www.armscontrol.org/factsheets/cbwprolif (Accessed on 04/04/2013)

[48] Italians used chemical weapons during the war 1935-36 in Ethiopia, the Japanese in China during World War 2 (1938-42), they were used in Yemen (1966-1973), during the Vietnam War (1961-1973), the U.S was accused of using lachrymatory agents and heavy doses of herbicides in much the same manner as chemical weapons Saddam Hussein used chemical weapons against Iraqi civilians and Iran soldiers between 1980 and 1988.. http://www.waginpeace.org.articles/2007/11/00_harigel_cbw.htm (Accessed on 20/04/2013). On August 21, 2013, chemical weapons were used against civilians in Damascus, Syria, during the conflict between the Syrian government and anti-government terrorist groups. CNN Report, edition.cnn.com/2013/12/12/world/meast/Syria-civil-war (Accessed on 10/08/2014)

[49] Harigel, G. Chemical and Biological Weapons: Use in Warfare, Impact on Society and Environment. (Nov 2001) http://www.waginpeace.org/articles/2001/11/00_harigel_cbw.htm. (Accessed on 20/04/2013)

[50] See Smoke, R. "The "Peace" of Deterrence and the "Peace" of the Antinuclear war movement." *Political Psychology,* Vol.5. No. 4 (Dec 1984) pp.747-748

of nuclear weapons continued between the U.S.A and the Soviet Union. Each of them sought to acquire enough nuclear weapons to deter the other from both conventional and nuclear warfare if tensions became overwhelming. As part of their domestic policies, each acquired thousands of nuclear arsenals which they placed on rockets that could hit targets anywhere in the world.[52] The U.S.A and Soviet Union kept a close eye on each other's nuclear arsenals. Each time one was suspected of having increased its arsenal or acquiring a new kind of nuclear weapon, the other state would soon follow. This led to a mad arms race between them.[53] In 1986, the arms race reached its peak. At that time the two superpowers together had 70,500 nuclear weapons in their arsenals.[54] They developed a strategy of mutually assured destruction which came to be known as the *Doctrine of Nuclear Deterrence.*[55] The theory was to the effect that the greater the threat of mutual destruction, the safer the world would be.[56]

Although the Cold-War ended in 1991, nuclear weapons have already become embroiled in the politics of power and dominance between states and also an integral part of the defense policies of nuclear weapon states. This manifested in the ardent argument of the U.S. counsel before the ICJ during the hearing of the Nuclear Weapons case thus:

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

[51] The open yet restricted rivalry that developed after World War II between the United States of America and the Soviet Union and their respective allies. The Cold War was waged on political, economic and propaganda fronts and had only limited recourse to weapons. It lasted between 1947 and 1991. Encyclopedia Britannica, www.britannica.com/EBchecked/topic/125110/coldwar (Accessed on 01/05/2013)
[52] A brief History of Nuclear Weapons. http://www.icanw.org/history (Accessed on 09/04/2013)
[53] Ibid.
[54] Ibid.
[55] See Waltz, K. "The Spread of Nuclear Weapons: More May Better." *Adelphia Papers,* No 171. London: International Institute for Strategic Studies. (1981)
[56] Ibid.

> *contrary to one of the fundamental premises of the national security policy of each of these many states.*[57]

Apart from the arguments for the legality of the use of nuclear weapons in self-defence, both the U.S.A and U.K argued for the legitimate use of low yield nuclear weapons on the basis that their use would not violate the principles of proportionality[58]

The ICJ did not endorse the arguments of both countries on the basis that conflicts involving the use of low-yield nuclear weapons did not exclude the possibility of escalation whereby the larger and more dangerous nuclear weapons would inevitably be used.[59] Aside from the court's rejection of the arguments on the basis of escalation, more arguments may be put forth to debunk the notion of the permissibility of nuclear weapons based on the lesser effects of low-yield nuclear weapons.

The foremost argument is that even if it were accurate that the use of low-yield nuclear weapons would conform with the principles of proportionality and distinction, that would still not form the basis for the permissibility of nuclear weapons since the larger, more destructive weapons, which have been and remain the core subject of concern about nuclear weapons and the reason for the agitation for their elimination, still exist. In other words, the debate of nuclear weapons had always been about the destructive thermonuclear weapons, although not precluding the smaller, tactical ones. Therefore, any argument to prove the mildness of nuclear weapons merely sidetracks, but does not address the pivotal issue about nuclear weapons. It has been argued even that the U.S argument in this regard lacks substantial merit because while it maintains some low-yield nuclear weapons, the U.S arsenal is made up predominantly of high-yield nuclear weapons.[60]

Secondly, if the use of low-yield nuclear weapons would be permitted on the basis that they do not cause disproportionate and indiscriminate effects, that would facilitate the covert production and sustenance of larger, more destructive nuclear weapons in the military arsenals of states even if they eventually become outlawed, since the means of producing nuclear weapons would not be totally blocked.

[57] ICJ Hearing, NOV 15, 1995. Available at http://www.icj-cij.org/docket/files/95/5947.pdf (Accessed on 20/04/2013)
[58] Written Statement of the Government of the United Kingdom in the ICJ's opinion on the Legality of the Threat and use of Nuclear Weapons (June 16, 1995) Available at http://www.icj-cij.org/docket/files/95/8802 (Accessed on 20/04/2013) Low yield nuclear weapons are simple fission weapons, first described as atomic bombs, which have a nominal explosive power of about 15 kilotons. Starr, S. An Explanation of Nuclear Weapons Terminology, a Publication of Nuclear Age Peace Foundation. Available at www.waginpeace.org (Accessed on 20/04/2013)
[59] Legality of the Threat or Use of Nuclear Weapons. Op.cit.
[60] Moxley, C.J. Op.cit. p.660

New Threats to World Peace and Security: Nuclear Terrorism

It is almost two decades since the ICJ gave its Advisory Opinion on the legality of nuclear weapons. Since then, events have occurred which have put the security of the world in question. On September 11, 2001, terrorists hijacked four commercial planes in the U.S.A and attempted to fly them into several targets. Two successfully crashed into the Twin Towers of the World Trade Center in New York, killing about 3000 people.[61]

The phenomenon of terrorism is steadily taking over the world. In early 2014, Amnesty International reported that 1,500 people were killed in the first three months of the year in North-East Nigeria alone. More than half of these deaths were caused by the terrorist group, *Boko Haram.*[62] Pakistan is another glaring example of a state in which the tide of terrorism is steadily rising. The activities of terrorists have manifested in the territory of its arch rival, India. In 2008, ten gunmen with enough arms and ammunition to kill 5,000 people attacked a big hotel in India, the Taj, the Trident-Oberoi, the main railway station, a popular restaurant and a cinema. It was estimated that 166 people died in those attacks.[63] All the attackers, except one, died in the suicide bombings of the buildings. The only surviving attacker confirmed that he was from Pakistan and his fellow attackers were either from Pakistan or had been trained there.[64]

According to the South Asia Terrorism Portal (SATP), a terrorist database, 8,953 civilians were killed in terrorist violence from January, 2009 to September, 2012 in Pakistan.[65] Pakistan is a home to many rising terrorist groups and this new generation of terrorists is more willing to engage in suicide attacks.[66] Notably, a prominent Indian journalist, Raza Rumi, while commenting on the November 25th 2012 bomb attack on *Shia's* in Dera Ismail Khan, Pakistan, which killed a dozen people, admitted that there is a diminishing capacity of the Pakistan state to handle terrorism.[67]

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[61] Source> About.com.AmericanHistory "*Terrorist Attack: World Trade Center on September 11*" americanhistory.about.com/od/terrorist/p/wtc_september11.htm. (Accessed on 03/05/2013)

[62] Amnesty International. "*More than 1,500 killed in armed conflict in North-East Nigeria in early 2014.*" (March, 2008) reliefweb.int/report/Nigeria/more-1500-killed-armed-conflict-north-eastern-nigeria-early-2014 (Accessed on 10/08/2014)

[63] Ramesh, R. '*Mumbai terror attacks: India fury at Pakistan as bloody siege is crushed.*' The Guardian/the Observer (Sunday 30 November, 2008)

[64] Ibid.

[65] Jayshree B. and Masters, J. "*Pakistan's New Generation of Terrorists*" Council on Foreign Relations (Sept, 26, 2012) Available at www.cfr.org/pakistan/pakistan's-new-generation-terrorists (Accessed on 05/05/2013)

[66] Ibid.

[67] Aljazeera News Live, 25th November, 2012.

Conclusion

There is no doubt that any use of nuclear weapons in warfare or in indiscriminate attacks by non-state actors would result in catastrophic consequences for humankind and the natural environment. Nuclear weapons have no military value and their supposed deterrent value is fast diminishing with the developing prospect of international terrorism. This is because the deterrence notion of "fear of mutual destruction" is completely irrelevant in the activities of terrorist groups. With this disturbing development in international security, the members of the United Nations General Assembly, especially non-nuclear weapon states, have a very big role to play in the realization of a substantive nuclear weapons convention which would provide mandatory laws and timelines on the complete elimination of nuclear weapons. The International Court of Justice also, as the judicial arm of the United Nations Organization, has its own part to play in reviewing its opinion on the legality of nuclear weapons.[68] An absolute condemnation of the use of nuclear weapons would go a long way in depleting the relevance of the doctrine of nuclear deterrence, for the court itself has given judicial backing to the notion that the threat of anything which use is unlawful is equally unlawful.[69]

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[68] Dependant on questions put to it by appropriate bodies, for example, the UN General Assembly.

[69] In its Opinion the ICJ posited that it is unlawful under International law for a state to threaten to do that which it would be unlawful to do. The court stated that "if an envisaged use of nuclear weapons would not meet the requirements of international Humanitarian Law, a threat to engage in such use would also be contrary to that law." Legality of the Threat or Use of Nuclear Weapons. Op.cit.