A Faustain Bargain? Nuclear Weapons, Negative Security Assurances, and Belligerent Reprisal[1]

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"Great and grand wars were now a thing of the past. There were two super powers in the world, each capable of raining total destruction. Therefore, future wars would have to be fought in compact and limited boundaries and under stringent rules."

— LEON URIS, QB VII

INTRODUCTION

Since the end of the Cold War, the duty of protecting America's national security has changed as new and more diverse dangers emerge from regional instability.[2] Although the risk of global conflict has decreased, there remains the possibility that weapons of mass destruction (WMD) will be used as long as they exist. And consequently, as international actors continue to work to acquire these weapons, the possibility of a WMD attack is amplified. To combat this menace, the U.S. maintains a nuclear force. The goal of U.S. nuclear strategy is to pursue U.S. national policy initiatives and to counter potential threats to American national security interests. The U.S. accomplishes this objective through deterrence. Department of Defense guidance discusses the purpose of nuclear weapons as it relates to U.S. national security interests:

> The permanent security interest of the United States is its survival as a free and independent nation, with its fundamental values and its institutions and people secure. This is best achieved by a defense posture that makes possible war outcomes so uncertain and dangerous, as calculated by potential enemies, as to remove all incentive for initiating attack under any circumstance. Thus, *the fundamental purpose of U.S. nuclear forces is to deter the use of weapons of mass destruction (WMD), particularly nuclear weapons, and to serve as a hedge against the emergence of an overwhelming conventional threat.*[3] (emphasis in original)

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The deterrence policy of the U.S. provides a number of benefits, but primary among them is WMD non-proliferation.

As the argument goes, the U.S. must sustain a credible nuclear deterrent against WMD because it lacks the ability for an in-kind response to a chemical or biological weapon attack. In the 1996 International Court of Justice (ICJ) case regarding nuclear weapons,[4] Judge Stephen M. Schwebel's dissent cited Iraq's perception of a U.S. threat to use nuclear weapons during Desert Storm as an example of the effectiveness (and lawfulness) of using, or threatening to use, nuclear weapons.[5]

Deterrence is aimed at creating a certain state of mind in a potential aggressor where the punitive costs of a certain action outweigh its potential benefit. In effect, deterrence is aimed at preventing an adversary from engaging in an act that may prove more harmful in its outcome to them. For deterrence to be effective in protecting U.S. national interests, potential aggressors must believe that the U.S. is capable of inflicting such damage as to effectively deny them recourse to military action. It also requires that they think the U.S. possesses both the ability and the will to use nuclear weapons.[6] If they do not believe that these tools will be used, there will be no deterrent value to nuclear weapons.

Deterrence assumes an opponent's leadership will act logically out of a sense of national self-interest. However the possibility exists that an opponent may nevertheless risk massive destruction based on perceptions that may or may not be objectively rational.[7] In that case, deterrence may fail. If it does, "It is the objective of the United States to repel or defeat a military attack and terminate the conflict on terms favorable to the United States and its allies."[8] Accomplishing this objective "requires the capability for a measured and effective response to any level of aggression while seeking to control the intensity and scope of conflict and destruction."[9] Currently, U.S. policy toward using nuclear weapons in response to a WMD attack is purposely vague. Presidential administrations hesitate to expand upon the preconditions that would prompt the U.S. to use, or not use, nuclear force. As a result, an adversary cannot assume one way or another what the U.S. response to their act of aggression will be, effectively "letting nuclear weapons speak for themselves."

This paper will analyze and evaluate the legality of using nuclear weapons against a state initiating biological or chemical warfare against the U.S. or its allies. We will first explore specific and general treaty prohibitions and customary international law regarding their use. Particular attention will be paid to the impact of the 1996 ICJ advisory opinion requested by the U.N. General Assembly on the subject. While the ICJ indicated that the use of nuclear weapons would be impermissible in most circumstances, it did not resolve whether it was permissible to use nuclear weapons in belligerent reprisal. What is the normative import of this holding? Does the opinion articulate binding norms or simply

aspirational aims? How might the opinion affect nuclear options? The study will also address the effect of other prohibitions, such as the pledge not to use nuclear weapons against non-nuclear members of the Treaty for the Non-Proliferation of Nuclear Weapons (negative security assurances), on nuclear strategies. Finally, assuming solely for the sake of analysis that the use of nuclear weapons is illegal, we will consider the legality of their use in the limited circumstance of belligerent reprisal, specifically in response to an illegal chemical or biological attack.

INTERNATIONAL LAW AND NUCLEAR WEAPONS

In the past, ancient customs protected certain categories of victims of armed conflict and restricted the means and methods of warfare. For instance, Pope Innocent II proposed a ban on explosive shells, and in the thirteenth century, Pope Innocentius III forbade the use of the "cross bow and arch as deadly weapons and odious to God."[10] A prohibition against poison wells was common in African traditional law.[11] The principle "that war was resorted to as a method of overpowering the armed might of the enemy, but not to destroy the entire population, was established beyond doubt even with the dawn of civilization in the ancient Indian world."[12] In 1859, Henri Dunant, a businessman from Geneva, assisted victims of the Battle of Solferino in Northern Italy. Three years later, he published a short book, *A Memory of Solferino,* suggesting solutions for avoiding the carnage he witnessed.[13] During the American Civil War, Francis Lieber wrote the first comprehensive code for soldiers in the field. Article 70 of the Lieber Code declared that "the use of poison in any manner, be it poison wells, or arms, is wholly excluded from modern warfare. He that uses it puts himself out of the pale of the law and usages of war."[14]

Humanitarian considerations also found a voice in the preamble to the Declaration of St. Petersburg of 1868 (one of the earliest law of war efforts) and were the inspiration for the prohibition of the use of "arms, projectiles, or material calculated to cause unnecessary suffering."[15] In 1899 and 1907, the Hague Conventions codified many of the rules concerning weapons and lawful uses of those weapons. Much of the basic law of warfare laid down by these conventions remains in force today. After World War I, the 1925 Gas Protocol prohibiting the use of asphyxiating gases was adopted. Subsequent to World War II, the principles derived from the Nuremberg war crimes trials, along with the four 1949 Geneva Conventions became and continue to be the world's guides for the conduct of war. Along with them, the two 1977 Additional Protocols to the 1949 Geneva Conventions play a significant role in establishing international law on the conduct of war.

Presently, many international actors—nuclear weapon states (the U.S., England, China, Russia, and France), international and non-governmental organizations (such as the World Court Project, Greenpeace International, the International

Peace Bureau, the International Physicians for the Prevention of Nuclear War, and the International Association of Lawyers Against Nuclear Arms), and other influential non-nuclear weapon states (such as Japan, Mexico, Egypt, and India)—are still grappling with the matter of the legality of the use of nuclear weapons in international law. Meaningful arguments both for and against nuclear weapons have been presented based on the sources of international law.[16]

International Conventions Specifically Addressing Nuclear Weapons. No treaty has been adopted universally to prohibit the use of nuclear weapons. Those treaties dealing expressly with nuclear weapons do not address the problem of whether they are unlawful *per se* but concentrate on other aspects (e.g., testing, transfer of technology, and possession). In contrast, there are numerous treaties banning or restricting the use of other specific weapons.[17]

The Treaty for the Non-Proliferation of Nuclear Weapons (NPT)[18] and regional treaties, such as the Treaty for the Prohibition of Nuclear Weapons in Latin America,[19] the African Nuclear Weapon Free Zone Treaty,[20] the South Pacific Nuclear Free Zone Treaty,[21] and the Treaty on the Southeast Asia Nuclear Weapon Free Zone[22] require parties not to manufacture or acquire nuclear weapons.[23] The deployment of nuclear weapons is prohibited in Antarctica,[24] in outer space,[25] and on the seabed.[26] The regional nuclear weapon free zone (NWFZ) treaties also prohibit the use of nuclear weapons within the areas covered by each particular treaty.[27] The Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space, and Underwater[28] proscribes atmospheric nuclear tests. Other documents that expressly refer to the legality of the use of nuclear weapons are certain U.N. General Assembly resolutions, discussed below.

The nuclear weapon states regard these treaties as demonstrating that the international community confronts nuclear weapons through disarmament and non-proliferation as opposed to a complete ban on their use.[29] Neither, they argue, is the use of nuclear weapons outlawed by a provision of more general application. The non-nuclear weapon states and NGOs believe that the spirit of the treaties specifically addressing nuclear weapons is, indeed, to outlaw their use (i.e. the use of nuclear weapons is inconsistent with the general purposes and goals of the treaties).[30] Thus, a specific prohibition of the use of nuclear weapons is not required as one can be inferred or analogized from existing conventions.[31]

U.N. Charter. Article 2(4) of the U.N. Charter states that, "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." This provision applies to all uses of force (*jus ad bellum*—when a state can resort to force), regardless of the weapons used, but it does not restrict the right of nations to act in self-defense pursuant to Article 51 of the Charter.[32] The contrary argument is that use of nuclear weapons directly contrasts with U.N. Charter purposes "to maintain international

peace and security and to that end: to take effective collective measures for the prevention and removal of threats to the peace...and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace..."[33]

International Humanitarian Law. International humanitarian law is derived from international conventions and customary international law, and is the law that governs how force can be used *(jus in bello).* There are a number of principles contained in this body of law arguably restricting the use of nuclear weapons. The first is the principle of proportionality—whether the use of nuclear weapons causes collateral damage to civilian objects or incidental injury to civilians disproportionate to the military advantage sought.[34] The second is the principle prohibiting unnecessary suffering—whether the use of a nuclear weapon causes useless suffering with no direct and concrete military advantage.[35] The third is the duty to discriminate between combatants and non-combatants—whether a nuclear weapon, once launched, can distinguish between lawful and unlawful targets and between non-combatants and combatants.[36] Fourth is the duty to protect the environment in armed conflict—whether environmental damage caused by the fallout from a nuclear weapon is excessive in relation to military objectives.[37] And fifth is the principle of neutrality—whether the effects of nuclear weapons would spread into inviolable neutral territory.[38]

The nuclear weapons states argue that international humanitarian law principles cannot be applied in a vacuum; these concepts relate to nuclear weapons as they would the use of any weapon. Given the specific facts of the situation in a particular circumstance, one must use these principles to evaluate the legality or illegality of the use of nuclear weapons. Others, such as NGOs, argue that it is the very nature of nuclear weapons, because of their effects on human health and the environment, which provides the basis for their inherent illegality. Also, Additional Protocol I, if reasonably construed, appears to be applicable to the debate surrounding nuclear weapons. However, the diplomatic conference met with the understanding that any convention adopted would not apply to nuclear, chemical, or biological weapons. In the introduction to the draft protocols submitted to the Conference in 1974, the International Committee of the Red Cross (ICRC) stated that:

> Problems relating to atomic, bacteriological, and chemical warfare are subjects of international agreements or negotiations by governments, and in submitting these draft Additional Protocols the ICRC does not intend to broach those problems. It should be borne in mind that the Red Cross as a whole, at several International Red Cross Conferences, has clearly made known its condemnation of weapons of mass destruction and has urged governments to reach agreements for the banning of their use.[39]

The nuclear weapons states point out that a number of the countries participating in the conference put on record their understanding that the Protocol would apply only to conventional weapons.[40] Arguably, however, Additional Protocol I would apply to nuclear weapons insofar as they set out general principles or rules of international humanitarian law that codify customary international law. Non-nuclear weapons states assert that the lack of consensus on the express exclusion of nuclear weapons means that Additional Protocol I does pertain to their use.[41]

Customary International Law. Customary international law comes from the general consent and widespread practice of states and *opinio juris sive necessitatis ("opinio juris"),* a conviction that the practice is legally obligatory.[42] As mentioned above, the only documents claiming to treat nuclear weapons as unlawful *per se* are certain U.N. General Assembly resolutions. Beginning with the Declaration on the Prohibition of the Use of Nuclear and Thermo-Nuclear Weapons, the U.N. General Assembly has adopted a number of resolutions declaring nuclear weapons contrary to the U.N. Charter and international law. That resolution states:

> (a) The use of nuclear and thermonuclear weapons is contrary to the spirit, letter, and aims of the United Nations and, as such, a direct violation of the Charter of the United Nations;
> (b) The use of nuclear and thermonuclear weapons would exceed even the scope of war and cause indiscriminate suffering and destruction to mankind and civilization and, as such, is contrary to the rules of international law and to the laws of humanity;
> (c) The use of nuclear and thermonuclear weapons is a war directed not against an enemy or enemies alone but also against mankind in general, since the peoples of the world not involved in such a war will be subjected to all the evils generated by the use of such weapons;
> (d) Any State using nuclear and thermonuclear weapons is to be considered as violating the Charter of the United Nations, as acting contrary to the laws of humanity, and as committing a crime against mankind and civilization.[43]

Are General Assembly resolutions hopeful aspirations or the initial stage of a rule of customary international law? Erik Suy, the former legal counsel to the U.N. wrote, "solemn declarations adopted either unanimously or by consensus have no different status, although their moral and political impact will be an important factor guiding national policies."[44] The U.S. views General Assembly resolutions as non-legally binding instruments, and argues that while they may reflect the opinion of some states, they do not represent the coordination of wills of all U.N. members suggesting that they are expressive of a rule of customary international law. The U.N. General Assembly is not a legislative body and cannot create legally binding obligations on its members except in respect to certain matters concerning the functioning of the organization. Furthermore, resolutions lack the characteristics of a treaty, which

requires ratification, and cannot be termed "law-making."[45] On the other hand, there may be a trend favoring consensus as a way for resolutions to create legally binding commitments. For instance, an ostensibly created new rule of customary international law is established when a resolution is approved by an overwhelming majority of the members of the General Assembly and is then accepted in practice by those members as representing a compulsory international legal obligation.

Nuclear weapon states view the General Assembly resolutions addressing nuclear weapons as non-binding. The voting figures reveal controversy, not consensus,[46] and the effect of the resolutions must be evaluated in light of state practice as a whole. The mere presence of nuclear weapon states weakens the argument that there is sufficient generality to make them obligatory. Add to that the states failing to object to the declarations and assurances of the nuclear weapons states in various treaties, as well as those states which voted against, or abstained from voting, on the various resolutions regarding the outlawing of nuclear weapons, and there is no real evidence of an *opinio juris* shared by the generality of states to establish a customary rule of international law prohibiting the use of nuclear weapons.

Non-nuclear weapons states (such as the Solomon Islands, Nauru, and India) believe that the backing of the General Assembly resolutions regarding nuclear weapons and the subsequent acceptance into practice of the resolutions by those states voting in favor of them evidences the type of consistent support by a majority of members of the U.N. to make these resolutions a source of law and a binding international obligation. Furthermore, they assert that these resolutions relate to questions in the competence of the General Assembly, according to article 11(1) of the Charter, and are therefore legislative acts.[47]

Judicial Decisions. Other than the *Nuclear Weapons Case* (discussed below), only one other court has confronted the legality of using nuclear weapons. In the *Shimoda Case,*[48] the plaintiffs sought recovery against the Japanese government in a Japanese court for the injuries they or their family members sustained during the atomic bombings of Hiroshima and Nagasaki. While the court concluded that the U.S. violated international law by dropping the bombs, it ultimately held that because of Japan's waiver of claims against the U.S. in the Peace Treaty between the Allied Powers and Japan, and for jurisdictional reasons, the claimants had no legal basis to recover damages from the Japanese government. The international legal principles applied by the court to support the finding that the U.S. illegally used nuclear weapons were: the principle forbidding indiscriminate attacks, the principle that belligerents have a duty to refrain from using means of warfare that cause unnecessary suffering, and the prohibitions placed upon the use of poison gas.[49] Although the *Shimoda* court decided that the use of nuclear weapons in that particular case was unlawful, the precedential value of the opinion in international law is limited because of its specific circumstances and the fact that it was issued by a domestic court with little experience in international law issues.

Opinions of Scholars. Predictably, the opinions of scholars on the issue of the legality of nuclear weapons vary dramatically. According to two observers, scholarly opinion ranges across a spectrum of views divisible into four general categories: the illegalists, the criminalists, the permissivists, and the legalists.[50] All groups use the same body of international law to justify their respective positions. Illegalists, although acknowledging that there are no specific treaties or conventions prohibiting the use of nuclear weapons, maintain there are sufficient applicable provisions of international law to support the position that the use of nuclear weapons is illegal.[51] Criminalists interpret various treaties, conventions, and U.N. General Assembly resolutions as clear and unequivocal prohibitions against nuclear weapons.[52] Permissivists contend that in the absence of any rule in international law abolishing the use of nuclear weapons, a state is free to do that which is not prohibited, including using nuclear weapons.[53] This is, and has been, the position of the United States for a number of years.[54] This assertion is based on the classical interpretation regarding sovereign prerogative as enunciated in the *S.S. Lotus* case in which the Permanent Court of International Justice stated that "the rules of law binding upon states emanate from their own free will as expressed in conventions or usages generally accepted as expressing principles of law."[55] Finally, legalists acknowledge the existence of laws prohibiting the use of nuclear weapons, such as the NWFZ treaties, but argue that it is legal to carry out research and development on nuclear devices for peaceful purposes.[56]

NUCLEAR WEAPONS CASE

In 1996, the ICJ tackled the issue of the legality of nuclear weapons amidst the firestorm of these diverse arguments based on these sources of international law, and the positions of various international actors for or against nuclear weapons.

On July 8, 1996, the ICJ announced its decision answering the question put to it by the U.N. General Assembly: "Is the threat or use of nuclear weapons in any circumstances permitted under international law?"[57] In its six paragraph response in the *dispositif,* or holding, four of the Court's conclusions were unanimous: first, that neither customary nor conventional international law specifically authorizes the threat or use of nuclear weapons; second, that a threat or use of nuclear weapons should be compatible with international law applicable in armed conflict including treaties and obligations dealing with nuclear weapons; third, a threat or use of nuclear weapons is unlawful if it is contrary to Article 2(4) of the U.N. Charter and fails to meet the requirements of Article 51 regarding self-defense; and fourth, that there is an obligation for states to "conclude negotiations leading to nuclear disarmament." The more contentious conclusions were contained in the remaining two paragraphs: that neither customary nor conventional international law universally prohibits the threat or use of nuclear

weapons; and even more controversially, that the threat or use of nuclear weapons would "generally be contrary to the rules of international law applicable in armed conflict," although the Court could not definitively conclude whether such use "would be lawful or unlawful in an extreme circumstance of self-defense, in which the very survival of a State would be at stake." [58]

In its reasoning, the Court first examined the U.N. Charter, specifically Articles 2(4) and 51.[59] The Court announced that Article 2(4) applied to any use of force, not authorizing or prohibiting any weapon, including nuclear weapons.[60] Second, the court moved to an analysis of the law applicable in armed conflict, remarking that there is no specific authorization for the threat or use of any weapon in international law. On the contrary, state practice shows that illegality of the use of weapons "is formulated in terms of prohibition." [61] Third, the court looked at the treaties particularly dealing with nuclear weapons, commenting that the close of these treaties pointed to "an increasing concern in the international community with these weapons; the Court concludes from this that these treaties could therefore be seen as foreshadowing a future general prohibition on the use of such weapons, but they do not constitute such a prohibition by themselves." [62]

Fourth, the Court turned to the question of whether there exists a rule of customary international law proscribing nuclear weapons. It specifically addressed the role of U.N. General Assembly resolutions on nuclear weapons use, and whether or not the resolutions are binding or provide evidence of an emerging rule or *opinio juris.* To establish if the resolutions provide such evidence, the Court indicated that the content and conditions under which a particular resolution was adopted must be evaluated. With regard to the resolutions on the use of nuclear weapons, the Court noted the number of abstentions and negative votes and stated, "Although these resolutions are a clear sign of deep concern regarding the problem of nuclear weapons, they still fall short of establishing the existence of an *opinio juris* on the illegality of the use of such weapons." [63] The court also observed the adherence by a number of States to the policy of deterrence in finding that the emergence of a customary rule of international law has not yet evolved.

The last part of the Court's analysis entailed an examination of international humanitarian law and the law of neutrality.[64] Although it is universally agreed that these principles apply to nuclear weapons, the conclusions to be drawn from their application are controversial, and the Court conceded that it was unable to provide any concrete guidance in this regard. It could not find any validity to the view that nuclear weapons could lawfully be used in circumstances involving the use of tactical, low yield nuclear weapons because of a lack of precise circumstances before it justifying such use. On the other hand, the Court also could not determine "the validity of the view that the recourse to nuclear weapons would be illegal in any circumstance..." [65]; although it did find that any

method or means of warfare violating the "cardinal" principles of international humanitarian law and the law of neutrality is prohibited. The final observation made by the Court, considering the unique characteristics of nuclear weapons, "in particular their destructive capacity, their capacity to cause untold human suffering, and their ability to cause damage to generations to come,"[66] was that:

> The use of such weapons in fact seems scarcely reconcilable with respect for such requirements [international humanitarian law]. Nevertheless, the Court considers that it does not have sufficient elements to enable it to conclude with certainty that the use of nuclear weapons would necessarily be at variance with the principles and rules of law applicable in armed conflict in any circumstance.[67]

What is the effect of the Court's judgment? The ICJ has jurisdiction in both advisory and contentious cases. With regard to the former, "the Court's reply is only of an advisory character; as such, it has no binding force;" even in contentious cases, the opinion is only binding on the parties.[68] Although not binding, this opinion is an influential statement on what the Court believes the law to be. However, the voting, declarations, separate opinions, and dissents of the judges, as well as the Court's non-decision on whether the threat or use of nuclear weapons would be lawful in "an extreme circumstance of self-defense" affects its ultimate persuasiveness.

The declarations, separate opinions, and dissents are an accurate reflection of the range of views in the international legal community regarding nuclear weapons. As Professor Roger Clark has pointed out, while all the judges agreed that the principles of international humanitarian law pertain to nuclear weapons, there was a variance of opinion regarding its application.[69] The dissent by seven judges[70] in the fifth paragraph of the *dispositif* comprised two groups. Judges Weeramantry, Koroma, and Shahabuddeen voted against it because it did not go far enough; the rules of armed conflict proscribe nuclear weapons in all circumstances. They rejected the position that there needs to be a specific prohibition against nuclear weapons and discarded the nuclear weapons states' arguments that there cannot be a customary rule of international law against the use or threat of use of nuclear weapons without the acquiescence of the states most affected (i.e. the nuclear weapon states). These judges instead argued that the states most affected are those that might be impacted by a nuclear explosion, thus putting human survival before the practices of the nuclear weapon states.[71] The second group, Judges Schwebel, Oda, Guillaume, and Higgins, voted against that part of the *dispositif* in a broad sense because according to them, each use, or threat of use, of nuclear weapons must be judged individually or on a case-by-case basis.

Some detractors of the Court's judgment have criticized the shallow legal analysis,[72] although this superficiality may have been due to the absence of detailed

information provided to the Court about the characteristics of modern nuclear weapons. The bottom line is the Court failed to present a decision that offers clear guidance on how to reconcile the opposing views of the law applicable to nuclear weapons.

Realistically speaking, the opinion probably has little concrete import with regard to how nations will manage nuclear weapons, and will at the very least, permit states to maintain their nuclear arsenals for an "extreme circumstance of self-defense, in which the very survival of a State would be at stake." [73] It has certainly been the U.S. position to minimize the decision's significance,[74] but the *dispositif* is probably consistent with the reality of when the U.S., or any other nuclear weapon state, would use nuclear weapons. Not surprisingly, the non-nuclear weapon states pointed out that the Court could not find any specific threat or use of nuclear weapons to be lawful,[75] and argue that the opinion dramatically limits the legitimacy of using or threatening to use such weapons.[76]

Nuclear weapons continue to make the evening news broadcasts. In the years since the decision was announced, the Comprehensive Nuclear Test Ban Treaty (CTBT) was adopted by the U.N. General Assembly and signed in New York shortly thereafter.[77] The U.N. General Assembly cited the *Nuclear Weapons Case* in subsequent resolutions calling for a legally binding prohibition of the development, production, testing, deployment, stockpiling, threat, or use of nuclear weapons.[78] On March 22, 2000, on his last trip to Southeast Asia as President, Bill Clinton addressed the Indian Joint Session of Parliament in New Delhi. During his speech, he discussed the danger of the spread of WMD:

> Another danger we face is the spread of weapons of mass destruction to those who might have no reservations about using them. I still believe this is the greatest potential threat to the security we all face in the twenty-first century. It is why we must be vigilant in fighting the spread of chemical and biological weapons. And it is why we must both keep working closely to resolve our remaining differences on nuclear proliferation.[79]

At an NPT review conference in New York City in May 2000, the five nuclear powers gave an "unequivocal" undertaking to scrap their nuclear arsenals if every other nuclear weapon state agreed to the same action. Although no timetable for their destruction was set, U.N. Secretary–General Kofi Annan regarded the deal as a "significant step forward in humanity's pursuit of a more peaceful world free of nuclear dangers." [80] Britain's Defense Secretary said of the pledge: "What we have agreed there...is that in principle we would like to see the end of nuclear weapons." [81] The review also called upon Israel to sign the NPT and denounced underground nuclear tests by India and Pakistan in 1998.

During his campaign for president at a speech at the National Press Club in May 2000, George W. Bush commented on the U.S. nuclear arsenal saying, "We

should not keep weapons that our military planners do not need...these unneeded weapons are the expensive relics of dead conflicts" and called for reductions of nuclear weapons to the "lowest possible number consistent with our national security."[82] On February 9, 2001, in a White House press briefing, press secretary Ari Fleischer announced that President Bush was considering a unilateral reduction of the number of U.S. strategic nuclear weapons.[83] While these comments may be nothing more than an attempt to soften opposition to the U.S. plans for a strategic missile defense system, or a reaffirmation in the U.S.'s deterrence policy that sets "nuclear levels of deterrence at a level that we would set, not as a result of treaties, but as the result of a decision that the United States makes, that is the level appropriate to protect our national defenses;"[84] they could also be construed as reflecting an increasing opposition to nuclear weapons themselves.

It is interesting to note that many of the same arguments today posited as outlawing the use or threat of use of nuclear weapons were made hundreds of years ago with regard to the use of poison in warfare.[85] Is this a forecast of things to come, or will international law regarding nuclear weapons continue to evolve bit by bit with no clear pronouncement on the subject one way or the other? While nuclear weapons are the only WMD not expressly subject to a general prohibition, it is indisputable that international law relevant to nuclear weapons has steadily developed. Maybe this reflects an acknowledgment that nuclear weapons, like other weapons of mass destruction, pose a particular risk to humanity, and that a special regime and norms should apply to them. In the end, whether international law will in fact develop a blanket prohibition on nuclear weapons, and in accordance with the Court's advice to disarm, remains to be seen and depends in large part on current global conditions: political, military, economic, and social.

NEGATIVE SECURITY ASSURANCES

One of the most interesting issues raised by the Court in the *Nuclear Weapons Case* regards the impact of the negative security assurances and the regional NWFZ treaties on the legality of nuclear weapons. In its analysis, the ICJ particularly highlighted the Treaty of Tlatelolco, the Treaty of Rarotonga, and the negative security assurances given by the nuclear weapon states in connection with the indefinite extension of the NPT, as those instruments directly addressed the recourse to nuclear weapons. However, the Court held with respect to these instruments that although there is a "growing awareness of the need to liberate the community of States and the international public from the dangers resulting from the existence of nuclear weapons...It does not...view these elements as amounting to a comprehensive and universal conventional prohibition on the use, or threat of use, of those weapons as such."[86]

The NPT is the primary agreement controlling possession and transfer of nuclear weapon technology. Signed in 1968, the bulk of the NPT obligations rest

with the non-nuclear powers never to acquire nuclear weapons. As an incentive to agree to its terms, the nuclear weapon states offered positive assurances to assist an NPT non-nuclear state if it were attacked or threatened with nuclear weapons. Subsequently, the nuclear weapon states offered negative assurances, including the 1978 U.S. pledge not to use nuclear weapons against a non-nuclear party to the NPT or comparable agreement except in the case of an attack in association with a nuclear weapon state on the U.S., its territories, or its allies. Presidents Reagan and Bush reaffirmed the U.S. assurances.

In 1995, the treaty was reviewed and indefinitely extended, but only after each of the five nuclear weapon states re-issued their positive and negative assurances to the non-nuclear weapon states party to the NPT.[87] Secretary of State Warren Christopher announced the U.S.'s security assurances on behalf of President Clinton. Essentially the same as the prior assurances, the U.S. promised to assist in the event a state was "the victim of an act of, or object of a threat of aggression in which nuclear weapons are used."[88] The negative assurance pledges not to use nuclear weapons against those non-nuclear weapon states party to the treaty "except in the case of an invasion or any other attack on the United States, its territories, its armed forces or other troops, its allies, or on a State towards which it has a security commitment, carried out or sustained by such a non-nuclear weapon State in association or alliance with a nuclear weapon State."[89] Four of the five nuclear power assurances were nearly identical and all were subsequently referenced and preserved in U.N. Security Council Resolution 984/1995. The U.S. negative and positive assurances also extend to states that are party to the NWFZ treaties, as comparable agreements to the NPT. Furthermore, the U.S. ratified Protocol II of the Treaty of Tlatelolco, a legally binding treaty form of the negative assurance.[90]

Other than the NWFZ protocols, the negative assurances have not become the basis of a multilateral treaty. Codifying the promises in a treaty is unlikely to happen since of the five nuclear powers, only China extended the assurance to all non-nuclear states, regardless of status in the NPT, and only China made a "no first use or threat of use" promise.[91] In contrast, according to Robert Bell, former special assistant to the president and senior director for defense policy and arms control at the National Security Council, the U.S. has a "negative security assurance policy; that is, the policy of the United States...[is] not to use nuclear weapons first in a conflict unless the state attacking us or our allies or our military forces is nuclear-capable or not in good standing under the NPT or an equivalent regime, or third, is attacking us in alliance with a nuclear capability."[92] Given the unlikelihood of the five nuclear weapon states concluding a multilateral negative assurance treaty, the critical question becomes whether the NPT and NWFZ treaty policies are legally binding on the U.S.

The ICJ considered a similar issue in the *Nuclear Test Case,* where it analyzed the legal status of public statements made by the French government that

France no longer intended to conduct atmospheric nuclear tests in the South Pacific. There, the Court stated:

> It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. Nothing in the nature of a *quid pro quo,* nor any subsequent acceptance, nor even any reaction from other States is required for such declaration to take effect. Neither is the question of form decisive. The intention of being bound is to be ascertained by an interpretation of the act. The binding character of the undertaking results from the terms of the act and is based on good faith interested States are entitled to require that the obligation be respected.[93]

While no *quid pro quo* or acceptance is required for a unilateral declaration to be binding, an analysis of the facts surrounding the making of the NPT pledges indicate they are indeed unavoidable obligations. They were concluded in good faith with non-nuclear countries as an incentive for them to give up the legal right to develop or acquire nuclear weapons, and they had the desired effect on the treaty's entry into force and subsequent extension. The Secretary of State, on behalf of the President, presented the U.S. assurances, which fall squarely within the President's constitutional powers as Commander-in-Chief. Also persuasive is the fact that the assurances are accepted as binding on an international level.

In an editorial, Professor George Bunn commented on the effect of U.N. Security Council Resolution 984/1995 and an acknowledgement by Robert Bell that the assurances had been "codified in a U.N. Security Council resolution:"[94]

> Recognizing the U.S. promise was "codified" by the Security Council and insisting that there are only these three exceptions, Bell's statement suggests that the administration has now accepted that the U.S. promise is, for practical purposes, legally binding.[95]

Professor Bunn also found it significant that the ICJ discussed these assurances in the *Nuclear Weapons Case.* The court held that any use of nuclear weapons "should...be compatible with the requirements of international law...as well as specific obligations under treaties and other undertakings..."[96] Bunn concludes that the Court's reference to "treaties and other undertakings" is a reference to the nuclear weapon free zone treaties and the NPT negative security assurances. Since treaties are legally binding, Bunn concludes that the Court "must have meant that the NPT negative assurance should also be regarded as legally binding."[97]

The bottom line is that the U.S. assurances are promises made *quid pro quo* to encourage participation and compliance with the NPT. As such, they are objectively binding—whether "legally" or "politically."[98] As Mr. Bell observed, "[To say that] if you attack us in any fashion—conventional, chemical, biological—we will

use nuclear weapons, that would be a categorical threat that would maximize your deterrence. Unfortunately, it would derail your non-proliferation policy and your non-proliferation agenda."[99] In fact, the U.S. came under criticism for making statements perceived as contrary to their obligations under the assurances.

In 1996, Secretary of Defense William Perry issued a statement indicating that the U.S. would consider "all options" in response to a chemical weapons attack against the U.S., its forces, or allies, and that the response would be "absolute, overwhelming, and devastating."[100] That same month, *Newsday* reported that the new Presidential Decision Directive (PDD) 60 allowed U.S. forces to target nuclear weapons against "rogue" states, including Iraq, in retaliation for use of weapons of mass destruction.[101] This announcement led to press reports that the U.S. had expanded its nuclear options despite its commitment made to the NPT and NWFZ parties.[102] Robert Bell dispelled these reports stating, "This PDD reaffirms explicitly, virtually verbatim, the policy of this administration as we stated it the last four or five years, including during any extension of the Non-Proliferation Treaty [NPT], the negotiation of the CTB [Comprehensive Test Ban], and the ratification of the Chemical Weapons Convention."[103] He clarified that it is U.S. policy not to use nuclear weapons first against a state except in the three cases.[104] "For states that are identified in those exceptions, we do not forswear any options."[105] Bell's statement is further evidence that the U.S. intends to respect those assurances as long as the benefactor of the pledge remains in compliance with its terms and with their obligations under the NPT or applicable NWFZ treaty.

Revoking the non-use commitment—in the limited circumstances when a party has materially breached its treaty obligations—is lawful under international law. The NPT does not provide for specific sanctions for breach of its terms. Nevertheless, parties may rely on sanctions provided for under customary international law. These remedies have been substantially codified in the Vienna Convention on the Law of Treaties (hereinafter Vienna Convention).[106] Under Article 60 of the Vienna Convention, a material breach permits the non-breaching party the right to suspend operation of the treaty in whole or in part. Since the NPT assurances were made to encourage commitment and compliance to the NPT, a breach of the treaty would, under customary international law, provide the U.S. with "permission" to suspend any protection provided by the assurances. Under the NPT, a material violation of the treaty might include transferring or receiving nuclear weapons technology, refusal to accept the safeguards of the International Atomic Energy Agency (IAEA), and transferring nuclear materials for peaceful purposes which have not been subject to the safeguards of the IAEA. Using Iraq as an example, its threat or use of chemical or other non-nuclear WMD against the U.S. or its allies would not violate the provisions of the NPT, unless Iraq were acting with a country with nuclear weapon capability. However,

if Iraq were in violation of its NPT obligations, then it could not benefit from the negative security assurances, thereby leaving open any options by the U.S. in response to the attack.

The assurances made under the protocols to the NWFZ treaties are not as easy to overcome. The protocols to the NWFZ treaties are open for ratification to each of the five eligible nuclear powers. Each treaty includes an additional protocol that precludes the nuclear powers from using nuclear weapons against non-nuclear parties to the treaty. The protocols do not permit reservations or conditions. The U.S. signed, but has yet to ratify the additional Protocols of the Treaty of Rarotonga and Treaty of Pelindaba. Currently, the only NWFZ protocols ratified by the U.S. are the Additional Protocols to the Treaty of Tlatelolco. At the time of ratification of those protocols, the U.S. deposited President Nixon's proclamation, which expressed that the U.S. "would have to consider that an armed attack by a Contracting Party, in which it was assisted by a nuclear-weapon state, would be incompatible with the Contracting Party's corresponding obligations under Article I of the Treaty." [107] Similarly, upon signing the additional Protocols of the Treaty of Pelindaba, the U.S. submitted a declaration that it would not be bound in case of invasion or attack upon it with any treaty party in alliance with a nuclear state.[108] The U.S. did not submit any additional documents when it signed the Treaty of Rarotonga.

Unlike the NPT assurances, the language of the regional treaties does not foreclose protection when a non-nuclear party acts in alliance with a nuclear party. However, an attack in conjunction with a nuclear power would indicate the ability to utilize nuclear force, and could be perceived as a threat of nuclear attack in violation of the terms of the NWFZ treaty. Consequently a party acting in alliance with a nuclear party would lose the protection of the assurances, while that same party acting alone by attacking the U.S. or its allies with any other type of WMD would not violate the party's obligations under the NWFZ treaty.

More problematic is that the regional NWFZ Protocols are indefinitely binding and may be denounced only after the passage of a specified period of time, and upon the occurrence of certain conditions. The Treaty of Tlatelolco permits withdrawal, upon notification and a three-month waiting period, when events "affect its supreme interest or the peace and security of one or more parties." [109] Similarly, the Treaty of Pelindaba permits withdrawal on the occurrence of an "extraordinary event" twelve months after notification.[110] The Treaty of Raratonga is more restrictive, requiring a material breach in addition to twelve months notification.[111] Thus, even a material breach would not allow the U.S. to avoid the notification and waiting periods agreed to in the regional NWFZ Protocols, even in the case of a WMD attack affecting "its supreme interest" or "peace and security." The U.S. could rely on its declarations regarding the Protocols to the Treaty of Tlatelolco and the Treaty of Pelindaba, but these

understandings only help to determine when a material breach has occurred—they have no effect on the notification and waiting periods.

The U.S. position on the obligations imposed by the NPT negative assurance and NWFZ treaties has not always been clear. After the U.S. signed the Protocols to the Treaty of Pelindaba, Robert Bell made the statement at a White House press briefing that "each party pledges not to use or threaten to use nuclear weapons against any ANFZ [African Nuclear Weapons Free Zone Treaty] party. However, Protocol I will not limit options available to the United States in response to an attack by an ANFZ party using weapons of mass destruction." [112] In response to remarks that the U.S. had changed its negative assurance policy, Bell later clarified that his remarks were intended to refer to the doctrine of belligerent reprisal. Lt. Col. (ret.) Burrus Carnahan interprets Bell's statements as an endorsement of continued legality of belligerent reprisal in the U.S., but notes that "the U.S. regards nuclear weapons as lawful in principle, and that the doctrine of belligerent reprisals would only be relevant to their use where the U.S. had accepted a legally binding non-use obligation such as that in Protocol I to the African Nuclear Weapons Free Zone Treaty." [113]

The quandary created by the negative assurances and NWFZ Protocols can be considered "Faustian bargains"—agreements made by the U.S. done for present gain without regard for future cost or consequences. The effect of the assurances could mean the U.S.—or any nuclear state—would be obligated to refrain from using nuclear weapons in response to a chemical or biological weapons attack. The U.S. bargain only requires that non-nuclear countries commit and abide by the relevant treaty (the NPT or NWFZ) in order to benefit from the U.S. negative assurances. An additional requirement that these states also forgo all other WMD is essentially forcing a non-nuclear state to agree, even though not a party to, the NPT, any relevant NWFZ treaty, the Chemical Weapons Convention, and the Biological Weapons Convention. This goes beyond the original offer of assurances to the non-nuclear states, causing the unintended effect of limiting U.S. use of nuclear weapons when faced with a non-nuclear WMD attack by a party to the NPT or regional nuclear free zone treaties. Therefore, the U.S. refers to and relies on the doctrine of belligerent reprisal.

The topic of belligerent reprisal was left open by the ICJ in the *Nuclear Weapons Case* with its statement: "Nor [do we] have to pronounce on the question of belligerent reprisals save to observe that in any case any right of recourse to such reprisals would, like self-defense, be governed *inter alia* by the principle of proportionality." [114] Assuming *arguendo* that international law imposes a blanket prohibition of the use of nuclear weapons, or their use is forbidden by a binding agreement, the doctrine of belligerent reprisal might provide the necessary sanction of an otherwise illegal use of force.[115]

BELLIGERENT REPRISALS

The term "belligerent reprisal" presupposes the existence of hostilities, which are subject to the laws of armed conflict, *jus in bello.* That body of law permits only those acts that are necessary to defeat the enemy. It specifically prohibits the targeting of civilians and civilian objects, protects *hors de combat,* and limits the weaponry available to the belligerent to achieve its military objectives. While *jus in bello* serves the purpose of minimizing the effects of war on the innocent, these protections may be compromised under the doctrine of belligerent reprisal.

Belligerent reprisal is where a party to a conflict resorts to what is normally an unlawful act in response to another belligerent's unlawful violation of the laws of armed conflict.[116] The purpose of belligerent reprisal is not revenge, but a "clear indication by the belligerent against which the illegalities have been directed that it will not tolerate such abuses, will not be placed at a disadvantage by the enemy's use of illegal methods, and that it would be to the benefit of both sides if the war were conducted according to international law." [117] The objective is to use coercion to bring both parties back to an even playing field governed by the laws of armed conflict. As Professor Fritz Kalshoven observed:

> This element of coercion on behalf of the law of armed conflict distinguishes the belligerent reprisal from mere retaliation, or from the merely vengeful reaction to an injury suffered. As a coercive measure it enters into the category of the sanctions of the law of armed conflicts. Another conclusion follows too: recourse to belligerent reprisals makes sense (and can be justified) only as long as the adversary has not abandoned his unlawful policy.[118]

Reprisals are, in effect, a warning to the adversary that it should comply with the laws of war or face continued retaliatory penalties. Belligerents have historically used reprisals as justification to injure individuals and destroy targets that likely had no relationship to the illegal act warranting the reprisal,[119] effectively creating "loopholes" for complying with the laws of war.

A significant body of international law developed to ban the use of "loophole reprisals" by limiting a belligerent's recourse to them, and reducing the likelihood that they will be used against innocent persons. For instance, the 1949 Geneva Convention excluded prisoners of war (POWs) as lawful objects of reprisal.[120] The following example illustrates the purpose of limiting reprisals:

> Suppose that my adversary maltreats the prisoners of war in his hands, in violation of the rules in force: if I take recourse to a reprisal consisting in a similar maltreatment of the prisoners of war which I hold captured, my action, as a reprisal, is directed against the adversary...but the effect of my action is felt directly and in fact exclusively by the prisoners of war, who not

> only are without defense, but who have had nothing to do with the original maltreatment inflicted on the prisoners on the other (their own) side.[121]

Despite that barrier, Adolf Hitler ordered the summary execution of allied soldiers in 1942 in response to allied bombing of non-military targets. He justified the retaliation as a reprisal stating that: "For some time now, our opponents have been using in the prosecution of war, methods which do not conform with the international agreements of Geneva;" however, the allied bombing campaign was itself a reprisal to Hitler's tactics.[122] Civilians also were often the targets of reprisals. Until the end of World War II, it was common for a belligerent to take hostages, particularly civilians in an occupied territory, threatening that they would be killed unless the opposing party complied with its demands.[123] This practice and others resulted in a number of additional prohibitions governing the use of reprisals.[124]

The reprisals of World War II had a significant impact on international law governing their use, particularly in the drafting of the 1949 Geneva Conventions. Those treaties expressly prohibited reprisals against certain protected objects and persons in the course of an international armed conflict. They extended protection to civilians in an occupied territory and to the wounded, sick, and shipwrecked members of the armed forces.[125] The 1954 Cultural Property Convention[126] provided that the parties "shall refrain from any act directed by way of reprisals against cultural property." To prevent the escalation of reprisal to counter-reprisal and so forth, Article 60 of the Vienna Convention restates customary law by providing that treaty provisions of a humanitarian nature are not subject to suspension even if the enemy has materially breached a treaty by violating its fundamental protections. Thus, for example, a party to the third Geneva Convention could not kill POWs in reprisal, even if the adversary had violated the convention in the same way.

After the formation of the 1949 Geneva Conventions, only civilians in enemy territory could lawfully be the subjects of reprisals. In 1977, Additional Protocol I significantly expanded the prohibitions on reprisals by prohibiting "all attacks against the civilian population or civilians by way of reprisal..." [127] The conferees considered, but rejected, the idea of an absolute prohibition on all reprisals.[128] Furthermore, Additional Protocol I prohibits means of warfare that are "intended or expected to cause widespread, long-term, and severe damage to the natural environment," [129] and Article 55 specifies, "attacks against the natural environment by way of reprisals are prohibited." Reprisal against civilians, civilian objects, and cultural objects are prohibited, as are reprisals against "objects indispensable for sustenance of civilian population" and "works and installations containing dangerous forces." [130]

As can be seen, Additional Protocol I significantly curtails the lawful objects of reprisals, but "the sweeping proscription of reprisals against civilians is by no

means declaratory or customary international law." [131] In its submission to the ICJ in the *Nuclear Weapons Case,* the U.S. asserted that the "provisions on reprisals and the protection of the environment are new rules that have not been incorporated into customary law." [132] While it remains to be seen what effect Additional Protocol I will have on the law of reprisals, it is clear that humanitarian law has developed to the point that the resort to belligerent reprisal is strictly limited.

In addition to treaty law, other generally accepted principles of international law regulate the use of reprisals. Although there is no single statement of these principles, there is general agreement on the basic requirements of necessity and proportionality.

Necessity. Military necessity normally means that an act is necessary to bring about the surrender of the enemy. In the context of reprisals, the coercive action must be necessary—a last resort—to compel the adversary to comply with international law. To determine necessity, the belligerent must firmly establish that the enemy violated the law of war, and then must exhaust other methods prior to resorting to reprisal.[133] The opponent should be warned and given an opportunity to cease the illegal behavior.[134] Finally, the belligerent must evaluate whether adherence to the laws of war are more likely to bring the enemy back to compliance than a reprisal. A reprisal taken only after peaceful or lawful solutions have failed would establish the necessity of the reprisal.[135] If justified, a reprisal does not create a right of counter-reprisal in the enemy.[136] Because of the magnitude and consequences of a reprisal, only the highest commanders should have the authority to issue such an order.[137]

Proportionality. The ICJ in the *Nuclear Weapons Case* agreed that the recourse to belligerent reprisals is subject to the principle of proportionality. In oral arguments before the Court, the British Attorney General, speaking of self-defense principles, stated: "If one is to speak of 'disproportionality,' the question arises: disproportionate to what? The answer must be 'to the threat posed to the victim State.'" [138]

An illustration of the principle of proportionality as it relates to belligerent reprisal is found in the 1928 *Naulilaa* incident.[139] During World War I, over a period of several weeks in 1914, while Portugal was still a neutral country, Germany attacked a number of Portuguese installations in Angola. Germany was responding in reprisal to the deaths of one German civilian and two German army officers on the border of Portugal and the German colony of South-West Africa. The parties agreed to arbitration on Portugal's claim for damages. The arbitral tribunal ruled that Germany had failed to observe the rule of proportionality by bombing an excessive number of targets in response to the deaths of the three Germans.[140] While that reprisal was deemed excessive, there is not a one-for-one standard. Professor Kalshoven states that, "This standard of proportionality cannot mean exact equality; it is generally held that a reprisal will be justified as long as it is not manifestly disproportionate to the wrong retaliated against." [141]

USE OF NUCLEAR WEAPONS IN BELLIGERENT REPRISALS TO NON-NUCLEAR WMD ATTACK

In order for the use of chemical or biological weapons to give rise to a reprisal, those weapons must be illegal under international law. The 1925 Gas Protocol prohibits the use of chemical weapons in an international armed conflict, although most parties to the convention reserved the right to use these weapons in response to an attack of the same. The Biological Weapons Convention prohibits the development, production, stockpiling, and acquisition of bacteriological weapons, but has no enforcement provisions. The Chemical Weapons Convention has the most sweeping prohibition of chemical weapons by prohibiting their use, development, production, and stockpiling and requiring their destruction. Furthermore, the first use of chemical and biological weapons is universally accepted as prohibited under international law regardless of whether a state is a party to the relevant treaty.[142] The Appellate Chamber for the International Criminal Tribunal for the Former Yugoslavia considered this issue in depth, and concluded that use of chemical weapons—even in internal armed conflict—is prohibited by customary international law.[143]

The first use of chemical or biological weapons, unlawful under international conventions and customary international law, therefore satisfies the initial "illegal act" requirement for belligerent reprisal, subject to the requirements of necessity and proportionality. While a number of parties to the 1925 Gas Protocol reserved the right to use chemical weapons in reprisal, the Biological Weapons Convention and the Chemical Weapons Convention prohibit development and possession of chemical and biological weapons, and require destruction of stockpiles. Thus, even if a party to the conventions contemplated using these weapons in response to a chemical or biological weapons attack, there should be no stockpiles available to use in belligerent reprisal, or otherwise.

As a result, an in-kind response to chemical or biological weapons is not feasible. Although the doctrine of belligerent reprisal does not require an in-kind response, the act may not be excessive in relation to the original unlawful act.[144] Specifically, belligerent reprisal does not justify annihilation of the enemy.[145] In that scenario, when an in-kind response is not possible, could nuclear weapons be used in reprisal and be considered a proportionate response? Most opponents of nuclear weapons argue that a nuclear weapon can never be a proportionate response to anything but a nuclear attack.[146] However, there is no universal agreement on the issue. In 1959, Judge Nagendra Singh commented that:

> One could visualize resort to nuclear arms as a measure of retaliation in the event of the enemy using chemical and bacteriological weapons of war. This

> would, however, amount to a measure of retaliation almost in kind and nuclear weapons have been categorized by the United States as something equivalent to the chemical and bacteriological warfare.[147]

In his dissent in the *Nuclear Weapons Case,* Judge Schwebel mentioned that:

> To assume that any defensive use of nuclear weapons must be disproportionate, no matter how serious the threat to the safety and the very survival of the State resorting to such use, is wholly unfounded....[I]t suggests an overbearing assumption by the critics of nuclear weapons that they can determine in advance that no threat, including a nuclear, chemical, or biological threat, is ever worth the use of any nuclear weapon.[148]

So, when might a nuclear weapon be necessary? Judge Schwebel described what he perceived as a necessary use of a tactical nuclear weapon to destroy a stolen nuclear submarine *en route* to the eastern coast of the U.S.:

> The submarine's destruction by a nuclear weapon would produce radiation in the sea, but far less than the radiation that firing of its missiles would produce on and over land. Nor is it certain that the use of a conventional depth-charge would discharge the mission successfully; the far greater force of a nuclear weapon could ensure destruction of the submarine whereas a conventional depth-charge might not.[149]

Consider also a threat from the continuing use of chemical or biological weapons, with the only weapon capable of destroying the offending party's buried chemical bunkers being a tactical nuclear weapon. Could the threat or use of a nuclear weapon be necessary to coerce the opponent to stop using its chemical weapons? Say, for example, Iraq had used chemical or biological weapons during the Gulf War. That use would have been a violation of international law. Professor Ved Nanda of the University of Denver and David Krieger of the Nuclear Age Peace Foundation discuss this scenario in their book on the use of nuclear weapons. Nanda and Krieger conclude that the U.S. would not have been able to justify the use of nuclear weapons as necessary for a legitimate reprisal:

> The U.S. clearly had sufficient conventional force at its disposal to carry out its threat to eliminate the Iraqi regime in the event of the illegal use of chemical or biological weapons by Iraq. It would neither have been necessary nor, one could argue, appropriate, for the U.S. to have responded to such an Iraqi transgression of the law by itself violating humanitarian law by the use of nuclear weapons. The use of nuclear weapons by the U.S. would have been illegal under existing international humanitarian law, even under the circumstances described.[150]

This argument is persuasive. If conventional weapons can accomplish the task—in this case by eliminating the regime as opposed to the storage facility, then nuclear weapons could never be justified. But bear in mind that destruction of the facility might be a more proportionate response than elimination of the regime. Regardless, if conventional weapons were not likely to be successful, then the belligerent would be in a position to justify the use of a nuclear weapon and evaluate whether the response would be proportionate to the impending use of chemical or biological weapons.

In the final analysis, the use of belligerent reprisal as justification for using nuclear weapons merits exacting consideration because of the inability to control their indiscriminate effects and the ensuing potentially devastating destruction. Reprisals are likely to produce an escalation of hostilities and illegalities, rather than a return to compliance. Recognizing that the use of nuclear weapons in reprisal may be inevitable given the right situation, it should be highly scrutinized,[151] for deployment of nuclear weapons may result in counter-reprisal with nuclear weapons and an escalation to all-out nuclear warfare. Thus aside from the legality of nuclear weapons *in bello*, conventional weapons may still be the more prudent choice for a response to a non-nuclear WMD attack. ■

APPENDIX

STATES OF INTEREST WITH NBC WEAPONS[152]

States of Interest	NPT Party	Nuclear Weapons	Biological Weapons	Chemical Weapons
Afghanistan	Yes			Probable
Burma	Yes			Probable
Chile	Yes			Suspected
China	Yes	Confirmed	Probable	Confirmed
Cuba	No			Suspected
Egypt	Yes		Suspected	Probable
Ethiopia	Yes			Probable
France	Yes	Confirmed	Destroyed	Suspected
India	No	Confirmed	Probable	
Iran	Yes		Probable	Confirmed
Iraq	Yes			Confirmed
Israel	No	Confirmed	Suspected	Probable
Libya	Yes	Probable		Suspected
North Korea	Yes	Probable	Probable	Probable
Pakistan	No	Confirmed	Probable	Suspected
Russia	Yes	Confirmed	Probable[153]	Confirmed
Somalia	Yes		Probable	Suspected
South Africa	Yes	Suspended		Suspected
South Korea	Yes	Probable		Suspected
Switzerland	Yes	Suspended		Probable
Syria	Yes			Probable
Taiwan	Yes	Suspended	Probable	Probable
Thailand	Yes	Suspended		Suspected
United Kingdom	Yes	Confirmed	Destroyed	Probable
Vietnam, Socialist Republic	Yes			Probable

NOTES

1 The views expressed in this paper are the authors' and do not necessarily reflect the policy of the Air Force, the Department of Defense, or of the Government of the United States.

2 For instance, the CIA reported that North Korea and Iran are likely to establish themselves as long-range nuclear missile threats by 2015, and that Iraq may have the same capability sometime after 2015. *Denver Rocky Mountain News*, "N. Korea, Iran may have ICBM Nukes by 2015, CIA Says," September 10, 1999, 42A. At his confirmation hearing for NATO Supreme Commander in front of the Senate Armed Services Committee, General Joseph Ralston testified that Russia creates a threat to allies in Europe and that worsening economic conditions "pose the added dilemma that as conventional capabilities erode, they will rely more on their nuclear forces." *Denver Rocky Mountain News*, "Air Force General says Russia Poses Threat," October 28, 1999, 56A.

3 *Doctrine for Joint Nuclear Operations*, Joint Pub 3-12, December 15, 1995, I-1. (Hereinafter referred to as Joint Pub 3-12).

4 *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 1, reprinted in *International Legal Materials* 35 (809) (1996). (Hereinafter referred to as *Nuclear Weapons Case*).

5 Iraq had demonstrated that it was prepared to use WMD. It has used gas against the military of Iran as well as against its own Kurdish citizens. *Nuclear Weapons Case*, Judge Schwebel dissent, *International Legal Materials* 35: 840. It had also acquired the means to produce uranium and had engaged in efforts to acquire or make long-range missiles potentially in violation of its obligations under the Treaty for the Non-Proliferation of Nuclear Weapons. 21 U.S.T. 483, T.I.A.S. No. 6839, 729 U.N.T.S. 161, *International Legal Materials* 7 (811) (1968). (Hereinafter referred to as the NPT). See Warren H. Donnelly, "Iraq and Nuclear Weapons," *CRS Issue Brief* (December 21, 1990): 2, 11. In a last ditch effort to avoid war and get Iraq to leave Kuwait, then-Secretary of State James Baker met in Geneva with Tariq Aziz, the Iraqi Foreign Minister. During that meeting, Secretary of State Baker stated:

> I then made a point "on the dark side of this issue" that Colin Powell had specifically asked me to deliver in the bluntest possible terms. "If the conflict involves your use of chemical or biological weapons against our forces," I warned, "the American people will demand vengeance. We have the means to exact it. With regard to this part of my presentation, that is not a threat, it is a promise. If there is any use of weapons like that our objective won't just be the liberation of Kuwait, but the elimination of the current Iraqi regime, and anyone responsible for using those weapons would be held accountable." The President had decided, at Camp David in December, that the best deterrent of the use of weapons of mass destruction by Iraq would be a threat to go after the Ba'ath regime itself. He had already decided that U.S. forces would not retaliate with chemical or nuclear weapons if the Iraqis attacked with chemical munitions. There was obviously no reason to inform the Iraqis of this. In hopes of persuading them to consider more soberly the folly of war, I purposely left the impression that the use of chemical or biological agents by Iraq could invite tactical nuclear retaliation. (We do not really know whether this was the reason there appears to have been no confirmed use by Iraq of chemical weapons during the war. My own view is that the calculated ambiguity regarding how we might respond has to be part of the reason.) James A. Baker, III, *The Politics of Diplomacy: Revolution, War and Peace* (1995), 359.

Confirming Secretary of State Baker's suspicions, U.N. Ambassador Rolf Ekeus, said that "Iraq took it for granted that it meant the use of maybe nuclear weapons against Baghdad, or something like that. And that the threat was decisive for them not to use the weapons." *Nuclear Weapons Case*, Judge Schwebel dissent, *International Legal Materials* 35, 842.

6 Joint Pub 3-12, I-2.

7 Ibid.

8 Ibid., I-5.

9 Ibid.

10 Nagendra Singh, *Nuclear Weapons and International Law* (1959), 18, and note 69. See also Fritz Kalshoven, *The Law of Warfare* (1973), 83.

11 See generally Geoffrey Francis Andrew Best, *Humanity in Warfare: The Modern History of the International Law of Armed Conflicts* (1983).

12 Singh, 19, and note 71.

13 Henri Dunant, *Souvenir de Solferino* (1862). The International Committee of the Red Cross was established not long after his account of the bloody battle during the Italian War of Unification.

14 "Instructions for the Government of Armies of the United States in the Field," General Order 100, April 24, 1863.

15 Article 23(e) of the "Hague Regulations Respecting the Laws and Customs of War on Land 1899/1907."

16 The *Nuremberg Judgment* discussed the sources of international law. "[T]he law of war is to be found not only in treaties but in customs and practices of States, which gradually obtained universal recognition, and from the general principles of justice applied by jurists and practiced by military courts. This law is not static, but by continual adaptation follows the needs of a changing world. Indeed, in many cases treaties do no more than express and define for more accurate reference the principles of law already existing." "Trial of German Major War Criminals," (H.M.S.O.), Part 22 (1950): 445. In the *Hostages Trial* of 1948, the Tribunal declared "[t]he sources of International Law which are usually enumerated are: (1) customs and practices accepted by civilized nations generally, (2) treaties, conventions and other forms of inter-State agreements, (3) the decisions of international tribunals, (4) the decisions of national tribunals dealing with international questions, (5) the opinions of qualified text writers, and (6) diplomatic papers." U.N.W.C.C., *Law Reports of Trials of War Criminals* 8 (1949): 34, at paragraph 49. These "sources" of international law have been codified in Article 38(1) of the Statute of the International Court of Justice, June 26, 1977, 59 Stat. 1031, T.S. No. 933, 3 Bevans 1153, 1976 *Yearbook of the United Nations* 1052. (Hereinafter referred to as the ICJ Statute).

> The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
> b. international custom, as evidence of a general practice accepted as law;
> c. the general principles of law recognized by civilized nations;
> d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

17 See "Hague Declaration No. 3, 1899," reprinted in W. Michael Reisman and Chris T. Antoniou, eds., *The Laws of War* (1994): 49, prohibiting the use of bullets that expand or flatten easily in the body; "Regulations Respecting the Laws and Customs of War on Land," annexed to Hague Convention No. IV, 1907, art. 23(a), 36 Stat. 2277, 205 Consol. T.S. 277, reprinted in Adam Roberts and Richard Guelff, eds., *Documents on the Laws of War* (1989, 2nd ed.), 53, which prohibits employing poison or poisoned weapons (hereinafter referred to as Hague IV); "Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous, or Other Gases, and of Bacteriological Methods of Warfare," June 17, 1925, 26 U.S.T. 571, *International Legal Materials* 14 (49) (1975), prohibiting the use of asphyxiating, poisonous, or other gases, all analogous liquids, materials or devices, and bacteriological methods of warfare (hereinafter referred to as the Gas Protocol); "Convention on the Prohibition of Development, Production, and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction," April 10, 1972, 26 U.S.T. 583, 1015 U.N.T.S. 164, *International Legal Materials* 11 (310), which prohibits the possession of bacteriological and toxin weapons (hereinafter referred to as the Biological Weapons Convention); "Convention on the Prohibition and Development, Production, Stockpiling, and Use of Chemical Weapons and on Their Destruction," January 13, 1993, *International Legal Materials* 32 (800) (1993), which prohibits all use of chemical weapons and requires the destruction of existing stocks (hereinafter referred to as the Chemical Weapons Convention); "Convention on the Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects," October 10, 1980, 1342 U.N.T.S. 7, *International Legal Materials* 19 (1523) (1980), and its four protocols: "Protocol on Non-Detectable Fragments," (Protocol I), October 10, 1980, *International Legal Materials* 19 (1523) (1980), banning weapons which injure by fragments non-detectable by X-rays; "Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps, and Other Devices," as amended on May 3, 1996 (Protocol II), *International Legal Materials* 35 (1209) (1996), which prohibits most forms of booby-traps and restricts the use and delivery of landmines, requiring them to be self-disarming; "Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons," (Protocol III), October 10, 1980, *International Legal Materials* 19 (1523) (1980), prohibiting the use of weapons primarily designed to set fire to objects or cause burn injuries; and "Protocol on Blinding Laser Weapons," (Protocol IV), October 13, 1995, *International Legal Materials* 35 (1218) (1996), which bans the use of blinding lasers; "Convention on the Prohibition of the Use, Stockpiling, Production, and Transfer of Anti-Personnel Mines and on their Destruction," September 18, 1997, *International Legal Materials* 36 (1507), reprinted in *International Review of the Red Cross*, (September-October 1997): 563, which prohibits the use, stockpiling, production, or transfer of anti-personnel mines (hereinafter referred to as the Ottawa Treaty).

18 See *Nuclear Weapons Case*, note 5.

19 February 14, 1967, 22 U.S.T. 762, T.I.A.S. No. 7137, 634 U.N.T.S. 281, reprinted in *International Legal Materials* 6 (521) (1967). (Hereinafter referred to as the Treaty of Tlatelolco).

20 Reprinted in *International Legal Materials* 35 (698) (1996). (Hereinafter referred to as the Treaty of Pelindaba).

21 August 6, 1985, 1445 U.N.T.S. 177, *International Legal Materials* 24 (1440) (1985). (Hereinafter referred to as the Treaty of Rarotonga).

22 December 15, 1995, *International Legal Materials* 35 (635) (1996). Available online at www.unog.ch/frames/disarm/distreat/asean.htm. (Hereinafter referred to as the Bangkok Treaty).

23 Articles I and II of the NPT, article 1 of the Treaty of Tlatelolco, article 3 of the Treaty of Pelindaba, article 3 of the Treaty of Rarotonga, and article 3 of the Bangkok Treaty.

24 "The Antarctic Treaty," 12 U.S.T. 794, 402 U.N.T.S. 71 (1959).

25 "Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies," 18 U.S.T. 2410, 610 U.N.T.S. 205 (1967). (Hereinafter referred to as the Outer Space Treaty).

26 "Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea-Bed and the Ocean Floor and in the Subsoil Thereof," 23 U.S.T. 701, 955 U.N.T.S. 115, reprinted in *International Legal Materials* 10 (146) (1971). (Hereinafter referred to as the Sea-Bed Treaty).

27 Article 1 of the Treaty of Tlateloco, article 1 of Protocol I of the Treaty of Pelindaba, article 1 of Protocol 2 of the Treaty of Rarotonga, and article 3 of the Bangkok Treaty.

28 480 U.N.T.S. 43 (1963).

29 However, the regional nuclear weapon free zone (NWFZ) treaties are accompanied by additional protocols to which nuclear weapon states may become party. These protocols contain certain prohibitions against using or threatening to use nuclear weapons against parties to the Treaty, see note 89 and accompanying text.

30 For instance, the preamble of the Treaty of Tlatelolco states, "[c]onvinced: That the incalculable destructive power of nuclear weapons has made it imperative that the legal prohibition of war should be strictly observed in practice if the survival of civilization and of mankind itself is to be assured." The preamble to the Treaty of Pelindaba states, "[c]onvinced of the need to take all steps in achieving the ultimate goal of a world entirely free of nuclear weapons, as well as of the obligations of all States to contribute to this end." The NPT preamble says, "[c]onsidering the devastation that would be visited upon all mankind by a nuclear war and the consequent need to make every effort to avert the danger of such a war and to take measures to safeguard the security of peoples, believing that the proliferation of nuclear weapons would seriously enhance the danger of nuclear war..."

31 The argument for prohibition is derived by "analogy" from conventions with respect to poisonous gas, such as the Gas Protocol, or other weapons causing disproportionate suffering, such as Article 23(a) of Hague IV. For instance, advocates of the position that nuclear weapons are prohibited by analogy with poison, poisonous weapons, and/or "analogous materials or devices" maintain that nuclear weapons have poisonous consequences, defining "poison" as "any substance that, when introduced into, or absorbed by, a living organism, destroys life or injures health." See Elliot L. Meyrowitz, *Prohibition of Nuclear Weapons: The Relevance of International Law* (1990), 23 and note 207. Although they concede that nuclear explosions do not directly produce these things, they argue that nuclear weapons are in certain fundamental respects similar in that they alter the chemical structure of humans and have long-term genetic effects.

32 The right of self-defense is based on customary international law. See *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)*, I.C.J. 4 (1986), (hereinafter referred to as the *Nicaragua Case*). The right is codified in Article 51 of the U.N. Charter which states: "[n]othing 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." This customary right of self-defense is subject to conditions of necessity and proportionality.

33 U.N. Charter, art. 1.

34 Additional Protocol I, note 34, article 51, paragraph 5(b), defines it as "an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damages to civilian objects or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."

On proportionality generally, see Judith G. Gardam, "Proportionality and Force in International Law," *American Journal of International Law* 87 (391) (1993).

35 Also referred to as the principle of humanity. "Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight," December 11, 1868, reprinted in *The Laws of War*, 35, (hereinafter referred to as the Declaration of St. Petersburg); Article 23(e) of Hague IV; and reaffirmed in article 35(2) of "Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts," June 8, 1977, U.N. Doc. A/32/144, Annex I, *International Legal Materials* 16 (1391), 1125 U.N.T.S. 3 (1977), (hereinafter referred to as Additional Protocol I). The Additional Protocols supplement the Geneva Conventions with regard to international and non-international armed conflict. "Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts," June 8, 1977, U.N. Doc. A/32/144, Annex II, *International Legal Materials* 16 (1442) (1977), applies to non-international armed conflict. Online at http://www.icrc.org/ihl. See also "Hague IV, preamble," (hereinafter referred to as the Martens Clause). Its function was to preserve any pre-existing rules of warfare, expressly declaring that in all cases not covered by the Conventions, civilians and belligerents should remain under the protection of the "principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience." See also Additional Protocol I, article 1(2).

36 Also referred to as distinction. See Additional Protocol I, articles 44(3), 48.

37 See the "Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques," December 10, 1976, 31 U.S.T. 333, 1108 U.N.T.S. 152; Additional Protocol I, article 35(3).

38 "Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land," October 18, 1907, 36 Stat. 2310, reprinted in *The Laws of War*, 134.

39 "Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 1974-1977," 2, (hereinafter referred to as Official Records).

40 Although the U.S. has not ratified Protocol I, it did sign it with the following formal understanding: "It is the understanding of the United States of America that the rules established by this Protocol were not intended to have any effect on and do not regulate or prohibit the use of nuclear weapons." See Official Records, Vol. VII, 295. A number of other states made formal statements upon signature or ratification emphasizing that the new rules adopted in the Protocol would not apply to nuclear weapons. See e.g. UK, Official Records Vol. VII, 303; France Official Records Vol. VII, 193; Sweden, Official Records, Vol. V, 145; Canada, Official Records, Vol. V, 184; and Germany, Official Records Vol. V, 132. The Ad Hoc Committee on Conventional Weapons at the conference noted "the limitation of the work of this Conference to conventional weapons." Official Records Vol. XVI, 454.

41 Some States at the Conference declared that Additional Protocol I should apply to nuclear weapons. See for example, Ghana, Official Records Vol. V, 97; Romania, Official Records, Vol. V, 103; China, Official Records Vol. V, 120; Iraq, Official Records, Vol. V, 123; and Zaire, Official Records, Vol. V, 195.

42 The Statute of the International Court of Justice defines custom as "a general practice accepted by law." ICJ Statute, article 38(1)(b). The Restatement notes that custom "results from a general and consistent practice of states followed by them from a sense of legal obligation." "Restatement (Third), Foreign Relations Law of the United States," § 102(2) (1987). See also *North Sea Continental Shelf Cases*, 1969 I.C.J. 3, 44 ("Not only must the acts concerned amount to settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule requiring it."); *The Paquete Habana*, 175 U.S. 677, 20 S.Ct. 290, 44 L.Ed 320 (1900); *The Case of the S.S. Lotus (France v. Turkey)*, 1927 P.C.I.J. (ser. A) No. 10 (1927) (hereinafter referred to as the *S.S. Lotus Case*); *Asylum Case (Columbia v. Peru)*, 1950 I.C.J. 266; *Case Concerning Right of Passage over Indian Territory (Portugal v. India)*, 1960 I.C.J. 6. The view that customary law applies only to states that have participated in the custom is illustrated in the classic *S.S. Lotus Case*, 21. For a contrary view, see the "Restatement," § 201.

43 U.N.G.A. Res. 1653, U.N. GAOR Supp. (No. 17) 4, U.N. Doc. A/5100 (1961). See also, U.N.G.A. Resolution 2936 (1972), U.N.G.A. Resolution 33/71 B (1978), U.N.G.A. Resolution 35/152 D (1980), U.N.G.A. Resolution 36/92 I (1981), and U.N.G.A. Resolution 47/53 C (1992).

44 Erik Suy, "Innovations in International Law-Making Progress," (1978), reprinted in Stephen M. Schwebel, *The Effect of Resolutions of the U.N. General Assembly on Customary International Law Proceedings*, (1979), 304-305.

45 See U.N. Charter, 11(1). The ICJ in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (SW Africa) Notwithstanding Security Council Resolution 276* (1970), 1971 I.C.J. 15, considered U.N. General Assembly Resolutions to have determinative effect only in certain exceptional matters. For instance,

the ICJ in the *Nicaragua Case,* 100, treated Resolution 2625, "Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations," G.A. Res. 2625 (XXV), U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. A/8082 (1970), as reflecting the content of customary international law. The requirement that a General Assembly resolution command wide support has been discussed generally in "Restatement (Third) of the Foreign Relations of Law of the United States," §102(2). See also *Case Concerning the Continental Shelf (Libyan Arab Jamahhiriya v. Malta),* 1985 I.C.J. 13, and *North Continental Shelf Cases,* 44.

46 Resolution 1653 was adopted by 55 votes to 20, with 26 abstentions. Of the nuclear weapon states, France, the UK, and the U.S. voted against the resolution while Russia voted in favor. Later resolutions on the subject also failed to collect the general support characterizing resolutions that have been viewed as declaratory of customary international law.

47 Article 11(1) of the U.N. Charter states: "The General Assembly may consider the general principles of cooperation in the maintenance of international peace and security, including the principles governing disarmament and the regulation of armaments, and may make recommendations with regard to such principles to the Members or to the Security Council or to both."

48 Reprinted in *American Journal of International Law* 58 (1016) (1964).

49 Interestingly, the Japanese government in defending the case was put in the unique position of arguing that nuclear weapons did not violate international law. For instance, they argued that the bombs were "new inventions and therefore not covered by either the customary or the conventional rules of the international law of war. Since the use of the atomic bomb was not expressly forbidden by international law, there [was] no legal basis upon which to object to their use by a belligerent," in this case, the United States. Richard A. Falk, "The Shimoda Case: A Legal Appraisal of the Atomic Attacks Upon Hiroshima and Nagasaki," *American Journal of International Law* 59, 759, 764, 778-780 (1965).

50 William M. Evan and Lalit K. Aggarwal, "A Survey of International Lawyers on the Legality of Nuclear Weapons," in William M. Evan and Ved P. Nanda, eds., *Nuclear Proliferation and the Legality of Nuclear Weapons* (1995).

51 Evan and Aggarwal, 317. For example, Georg Schwarzenberger concluded that it is "impossible to discover any automatic limitation of the freedom of the subjects of international law to possess, test, or use nuclear weapons." Schwarzenberger, *The Legality of Nuclear Weapons* (1958), 11. However, he theorized that the prohibitions of the Gas Protocol would apply to nuclear weapons, "if the radiation and fallout effects of nuclear weapons can be likened to poison, all the more they can be likened to poison gas which is but an even more closely analogous species of the genus poison." Ibid., 38. Since the prohibitions regarding poisoned and poisonous weapons and "all analogous liquids, materials, or devices" are declaratory of international customary law, it is irrelevant whether a state is a party to the conventions prohibiting the use of poison. Ibid. Despite this conclusion, he noted that there are several possible exceptions to the prohibition of the use of nuclear weapons including self-defense, reprisal, and necessity, and that reprisals utilizing nuclear weapons would be a lawful means of retaliation for an illegal act if the reprisals were "proportionate to the offense against which they are directed." Ibid., 40-41. Allan Rosas also acknowledged that there is no treaty prohibiting the use of nuclear weapons, but he asserts that the prohibition in the NPT on the acquisition of nuclear weapons implies a ban against their use. Allan Rosas, "International Law and the Use of Nuclear Weapons," in *Essays in Honour of Erik Castrén* (1979), 74.

52 Evan and Aggarwal, 318. For example, they note Francis Boyle's argument that the use of nuclear weapons in combat was, and is, absolutely prohibited under all circumstances by both conventional and customary international law. See Francis A. Boyle, "The Criminality of Nuclear Weapons," *Waging Peace Series* Booklet 27 (Santa Barbara, CA: Nuclear Age Foundation, 1991).

53 Evan and Aggarwal, 319. For example, Robert Tucker claims that restrictions on the use of nuclear weapons must be derived from the traditional principles of the laws of war, since in contrast to other types of weapons, there is no treaty regulating or prohibiting the use of nuclear weapons and no evidence of state practice sufficient to constitute a customary prohibition. Robert Tucker, "The Law of War and Neutrality at Sea," *International Law Studies* 50 (1957): 55. He concluded that the use of nuclear weapons if used primarily against a military objective "at present may be considered as permitted by the laws of war." William O'Brien also argued that the use of nuclear weapons is lawful so long as the incidental damage done to the proximate civilian population is not disproportionate, averring that the relevant question is not whether nuclear weapons are illegal *per se,* but whether nuclear weapons can be used in a particular situation consistent with legitimate military necessity. William O'Brien, "Legitimate Military Necessity in Nuclear War," *World Policy* 2 (35) (1960): 48.

54 See Department of the Army Pamphlet 27-10, "The Law of Land Warfare," paragraph 35 (1956), (here-

inafter referred to as FM 27-10); Department of the Navy, NWIP 10-2, "Law of Naval Warfare," paragraph 613 (1959); Department of the Air Force Pamphlet 110-31, "International Law: The Conduct of Armed Conflict and Air Operations" (1976), paragraph 6-5; Joint Pub 3-12 at vi, II-1, "Doctrine for Joint Theater Nuclear Operations," Joint Pub 3-12.1, February 9, 1996 at v, vii-viii, I-1-2, III-1. The unpublished annotation to paragraph 35 of FM 27-10 concludes that the reasons nuclear weapons are considered legal are: "that it has been used, that it still exists, that the major powers are practically committed to use it in a future war, and that it has been accepted to the extent that it is spoken of in the context of disarmament rather than illegality." Captain Fred Bright, Jr., "Nuclear Weapons as a Lawful Means of Warfare," *Military Law Review* 30 (1) (1965): 1-2.

55 *S.S. Lotus Case.*

56 Evan and Aggarwal, 320.

57 *Nuclear Weapons Case*, paragraph 1.

58 Ibid., paragraph 105(2), (hereinafter referred to as the *dispositif*). The verbatim holding follows:

A. Unanimously,
There is in neither customary nor conventional international law any specific authorization of the threat or use of nuclear weapons;

B. By eleven votes to three,
There is in neither customary nor conventional international law any comprehensive and universal prohibition of the threat or use of nuclear weapons as such;
IN FAVOUR: *President* Bedjaoui; *Vice-President* Schwebel; *Judges* Oda, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, Ferrari Bravo, Higgins;
AGAINST: *Judges* Shahabuddeen, Weeramantry, Koroma.

C. Unanimously,
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;

D. Unanimously,
A threat or use of nuclear weapons 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 treaties and other undertakings which expressly deal with nuclear weapons;

E. By seven votes to seven, by the President's casting vote,
It follows from the above-mentioned 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 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 or unlawful in an extreme circumstance of self-defense, in which the very survival of a State would be at stake;
IN FAVOUR: *President* Bedjaoui; *Judges* Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, Ferrari Bravo;
AGAINST: *Vice-President* Schwebel; *Judges* Oda, Guillaume, Shahabuddeen, Weeramantry, Koroma, Higgins.

F. Unanimously,
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.

59 The Court also mentioned Article 42 of the U.N. Charter, which states: "[s]hould the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations."

60 Further, Article 2(4) did not restrict the right of states to act in self-defense, and that resort to self-defense under Article 51 was subject to the conditions of proportionality and necessity found in customary international law. The Court warned 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." *Nuclear Weapons Case*, paragraph 43.

61 *Nuclear Weapons Case*, paragraph 52. After examining the conventions applicable to poisoned weapons and

"analogous materials or devices," it concluded that state practice indicated that the terms applied to weapons whose chief effect is to poison or asphyxiate and not to nuclear weapons whose primary consequence is heat and blast. Citing the Chemical Weapons Convention and the Biological Weapons Convention, the court stated "the pattern until now has been for weapons of mass destruction to be declared illegal by specific instruments." Ibid., paragraph 57.

62 Ibid., paragraph 62.

63 Ibid., paragraph 71.

64 See notes 34 to 38 and accompanying text. According to the Court, the "cardinal" principles of this aspect of international law are: belligerents are not unlimited in their choice of means and methods of warfare; the protection of civilians and civilian objects and the distinction between civilian and military targets; the principle banning unnecessary suffering; and the overriding principle of humanity found in the Martens Clause. With regard to the applicability of Additional Protocol I to nuclear weapons, the Court commented that there was no need to decide the question, noting that at the Diplomatic Conference there was no explicit resolution of the issue. However, the Court did say that Additional Protocol I "in no way replaced the general customary rules applicable to all means and methods of combat including nuclear weapons. In particular, the Court observed that all States are bound by those rules in Additional Protocol I which, when adopted, were merely the expression of the pre-existing customary law..." *Nuclear Weapons Case*, paragraph 84. As to the principle of neutrality, the Court merely stated that it applied in all armed conflict whatever weapons are used.

65 Ibid., paragraph 95.

66 Ibid., at paragraph 36.

67 Ibid.

68 *Interpretation of Peace Treaties with Bulgaria, Hungary, and Romania,* 1950 I.C.J. 65, 71, affirmed in *The Western Sahara,* 1975 I.C.J. 12, reprinted in *International Legal Materials* 14 (1355) (1975). "The decision of the Court has no binding force except between the parties and in respect of that particular case." ICJ Statute, article 59. But see Mohamed Shahabuddeen, *Precedent in the World Court* (1996), 171, "although an advisory opinion has no binding force under article 59 of the Statute, it is as authoritative a statement of the law as a judgment rendered in contentious proceedings."

69 Roger Clark, "International Court of Justice: Advisory Proceedings on the *Legality of the Threat or Use of Nuclear Weapons* (Question Posed by the General Assembly): The Laws of Armed Conflict and the Use or Threat of Use of Nuclear Weapons," *Criminal Law Forum* 7 (265) (1996): 290.

70 Those voting against this paragraph included the judges from the United States (J. Schwebel), the United Kingdom (J. Higgins), France (J. Guillame), Japan (J. Oda), Sierra Leone (J. Koroma), Sri Lanka (J. Weeramantry), and Guyana (J. Shahabuddeen).

71 See *Nuclear Weapons Case,* Judge Shahabuddeen dissenting opinion, in 35, in *International Legal Materials,* 872.

72 Even some of the judges felt the Court's analysis fell short. See *Nuclear Weapons Case,* Judge Higgins dissenting opinion, "[i]t is not sufficient to answer the question put to it, for the Court merely briefly states the requirements of the law of armed conflict (including humanitarian law) and then simply to move to the conclusion that the threat or use of nuclear weapons is generally unlawful by reference to these principles and norms...At no point in its Opinion does the Court engage in the task that is surely at the heart of the question asked: the systematic application of the relevant law to the use or threat of nuclear weapons...An essential step in the judicial process—that of legal reasoning—has been omitted." *International Legal Materials* 35, 935, paragraph 9. Judge Bedjaoui in his declaration stated, "[t]he Court is obviously aware that, at first sight, the reply to the General Assembly is unsatisfactory. However, while the Court may leave some people with the impression that it has left the task unassigned to it half completed, I am on the contrary persuaded that it has discharged its duty by going as far... as the elements at its disposal would permit." *International Legal Materials* 35, 1346, paragraph 17. Judge Guillaume in his declaration commented, " the opinion has many imperfections. It deals too quickly with complex questions which should have received fuller and more balanced treatment, for example, environmental law, the law of reprisals, humanitarian law and the law of neutrality...It also accorded excessive scope to the resolutions of the General Assembly..." *International Legal Materials* 35, 1351, paragraph 1. The Court also failed to discuss, pursuant to Article 38(1) of its statute, other judicial decisions (i.e. the *Shimoda* case), as well as the thoughts of highly qualified publicists.

73 *Nuclear Weapons Case,* paragraph 105(2)(E).

74 U.S. Department of State, "International Court of Justice: Legality of Nuclear Weapons," July 8, 1996. See also Michael J. Matheson, "The Opinions of the International Court of Justice on the Threat or Use of

Nuclear Weapons," *American Journal of International Law* 91 (417) (1997), "I do not believe that the Court's opinions suggest a need for any change in the nuclear posture and policy of the United States or the North Atlantic Treaty Organization (NATO) alliance." The UK took a similar view. See Ved P. Nanda and David Krieger, *Nuclear Weapons and the World Court* (1998), 155.

75 Citing President Bedjaoui's statement that:

> [t]he fact remains that the use of nuclear weapons by a State in circumstances in which its survival is at stake risks in turn endangering the survival of all mankind, precisely because of the inextricable link between terror and escalation in the use of such weapons. It would thus be quite foolhardy unhesitatingly to set the survival of a State above all other considerations, in particular the survival of mankind itself.

Nuclear Weapons Case, Judge Badjaoui declaration, *International Legal Materials* 35, 1347, paragraph 22.

76 Burns H. Weston has argued that the opinion has shifted "the burden of policy proof by creating a presumption of illegality where previously the opposite was assumed, at least by the nuclear powers." Burns H. Weston, "Nuclear Weapons and the World Court: Ambiguity's Consensus," *Transnational Law and Contemporary Problems* 7 (371) (1997).

77 Comprehensive Test Ban Treaty, opened for signature September 24, 1996, U.N. Doc A/50/1027 (1996), *International Legal Materials* 35 (1439), (hereinafter referred to as the CTBT). Upon the U.N. General Assembly's adoption of the CTBT, Secretary of State Warren Christopher announced "[i]t moves us toward the fulfillment of a decades-old dream that there will be no nuclear explosions anywhere. This dream has been shared by world leaders beginning with Presidents Eisenhower and Kennedy. The CTBT will prohibit any nuclear explosion, whether for military or peaceful purposes. It will effectively constrain the development and improvement of nuclear weapons and contribute to the prevention of nuclear proliferation and our ultimate goal of nuclear disarmament." U.S. Department of State, "The Comprehensive Test Ban Treaty: Strengthening Security for the U.S. and the World," *Dispatch Magazine*, 7 (38) (September 16, 1996). All five of the nuclear weapons states have signed the treaty. The U.S. signed the CTBT on September 24, 1996. However, the U.S. Senate failed to gather the required two-thirds majority required for its "advice and consent" on the CTBT on October 14, 1999. World leaders were dismayed at the defeat. French President Jacques Chirac called the Senate vote "a setback to the process of nonproliferation and disarmament." *Denver Rocky Mountain News*, October 15, 1999, "U.S. Rebuff of Treaty Stirs Anger," 49A. To enter into force, the CTBT requires ratification by all nuclear weapon capable states. On 21 April 2000, the Russian Duma overwhelmingly approved the CTBT, a week after ratifying the START II treaty under which Russia and the U.S. would destroy thousands of nuclear warheads. President Vladimir Putin "has made nuclear arms reduction a key part of his foreign policy." *The New York Times*, April 21, 2000, online at www.nytimes.com/yr/mo/day/late/21cnd-russia.html.

78 U.N.G.A. Res 52/38, December 9, 1997.

79 White House Press Release, March 22, 2000, online at www.whitehouse.gov/WH/New/SouthAsia/speeches/20000322.html

80 *BBC News*, May 21, 2000, online at http://www.news.bbc.co.uk/hi/English/uk/newsis_757000/757845.stm

81 Ibid.

82 Alison Mitchell, "Bush Says U.S. Should Reduce Nuclear Arms," *The New York Times*, May 24, 2000, online at http://www.nytimes.com/library/politics/camp/052400wh-gop-bush.html.

83 White House Press Release, February 9, 2001, online at http://www.whitehouse.gov/news/briefings/20010209.html.

84 Ibid.

85 See generally Schwarzenberger, 30-34.

86 *Nuclear Weapons Case*, paragraph 63.

87 See Robert Bell's speech to the Arms Control Association's annual membership meeting, in which he noted, "[W]e are continuing to stand up for the assurances we've given the world that have been so instrumental in achieving our non-proliferation goals and underpinning our non-proliferation agenda, including the extension of the NPT and the attainment of the CTB." Robert Bell, "Strategic Agreements and the CTB Treaty: Striking the Right Balance," *Arms Control Today* (January-February 1998).

88 Statement by Warren Christopher, A/50/153, S/1995/263.

89 Ibid.

90 See notes 18 to 22, 27, and accompanying text. Article 3 of Additional Protocol II to the Treaty of Tlatelolco, article 1 of Protocol I of the Treaty of Pelindaba, article 1 of Protocol 2 of the Treaty of Rarotonga, and article 2 of the Protocol to the Bangkok Treaty. All five nuclear weapon states are parties to Protocol II of the Treaty of Tlatelolco, but the United States submitted declarations outlining the circumstances in which it would regard itself as free to use nuclear weapons. Specifically, it regards a Treaty party's attack on the U.S. assisted by one of the nuclear weapon states as inconsistent with basic Treaty obligations. Only France and China are parties to Protocol I of the Treaty of Pelindaba while the remaining nuclear weapon states have signed it. Only China and Russia are parties to Protocol 2 of the Treaty of Rarotonga (the remaining nuclear weapon states have signed but not ratified the protocol). None of the nuclear weapon states are parties to the Protocol of the Bangkok Treaty. Also, at the indefinite extension of the NPT in 1995, the U.S. issued a statement on April 5, 1995 stating "[t]he United States reaffirms that it will not use nuclear weapons against non-nuclear-weapon States Parties to the Treaty on the Non-Proliferation of Nuclear Weapons except in the case of an invasion or any other attack on the United States, its territories, its armed forces or other troops, its allies, or on a State towards which it has a security commitment, carried out or sustained by such non-nuclear-weapon State in association or alliance with a nuclear-weapon State." U.N. Doc. A/50/153/S/1995/263, April 6, 1995. This is the U.S. negative security assurance. Except for China, the remaining nuclear weapon states issued similar statements.

91 See China's annex to U.N.S.C. Res 984, A/50/155, S/1995/265.

92 "The PDD reaffirmed the U.S. negative security assurance that we have held to in this administration and that we codified in a UN Security Council resolution." See Robert Bell, note 87.

93 1974 I.C.J. 253.

94 See Robert Bell, note 87.

95 George Bunn, Letter to the Editor: "Moving Toward 'Legally Binding' Negative Security Assurances," *Arms Control Today*, March 1998. Online at www.armscontrol.org/ACT/march98/lettermr.hrm

96 Ibid.

97 Ibid. "The court concluded unanimously that any threat or use of nuclear weapons 'should...be compatible with the requirements of international law applicable in armed conflict...as well as with specific obligations under treaties and other undertakings which expressly deal with nuclear weapons.' [I]t is clear that, by 'treaties and other undertakings,' the court referred to nuclear-weapon-free-zone treaties and to the NPT negative security assurances. Though the court used the word 'should' to describe the nature of the responsibility to comply, it used the same word to describe that responsibility with respect to obligations it characterized as 'international law' and 'treaties.' They are without a doubt legally binding. The court must have meant that the NPT negative assurance should also be regarded as legally binding."

98 The U.S. has made numerous statements indicting that it is bound by the assurances. For example, Ambassador John Holum stated, "[a]t the time that Ukraine gave up its nuclear arsenal the nuclear weapons states extended, including the United States, the principle of a negative security assurance precisely to Ukraine, making clear that we wouldn't use or consider using or threatening against Ukraine." Ambassador John Holum, Senior Advisor for Arms Control and International Security Affairs, and Norman Wulf, Senior Advisor and Special Representative of the President for Nuclear Non-Proliferation, "U.S. Policy on Nuclear Non-Proliferation," U.S. Department of State's Worldnet "Dialogue," Washington, D.C., November 9, 1999.

99 See Robert Bell, note 87.

100 See State Press Briefing, February 5, 1998. Online at http://secretary.state.gove/www/briefings/9802/980205db.html.

101 Patrick Sloyan, "New Nuke Policy by Clinton Directive Allows Atomic Retaliation," *Newsday*, February 1, 1998, A7.

102 News and Negotiations, *Clinton Issues New Guidelines on U.S. Nuclear Weapons Doctrine*, on file with authors.

103 Ibid., see also Robert Bell, note 87, 6.

104 See Robert Bell, note 87.

105 Ibid.

106 "Vienna Convention on the Law of Treaties," May 23, 1969, article 60, paragraph 5, 1155 U.N.T.S. 331, *International Legal Materials* 8 (679) (1969).

107 "Additional Protocol I to the Treaty for the Prohibition of Nuclear Weapons in Latin America," 33 U.S.T. 1792 (hereinafter Tlatelolco, API); Additional Protocol II to the Treaty for the Prohibition of Nuclear Weapons in Latin America," 22 U.S.T. 754 (hereinafter Tlatelolco, APII).

108 Treaty of Pelindaba, see note 20.

109 Treaty of Tlateloco; Tlatelolco, API; Tlatelolco, APII. See note 19, and note 107.

110 Treaty of Pelindaba, see note 20.
111 Treaty of Rarotonga, see note 21.
112 White House press briefing by Mike McCurry and Robert Bell, Special Assistant to the President and Senior Director for Defense Policy and Arms Control, National Security Council, April 11, 1996. Online at http://www.pub.whitehouse.gov/uri-res/I2R?urn:pdi://oma.eop.gov.us/1996/4/11/6.text.1.
113 Burrus Carnahan, "Comment by Burrus Carnahan," in Dr. Hortst Fischer, ed., *Yearbook of International Humanitarian Law,* Volume 1 (1998), 519-520. While the comment suggests that only the NWFZ protocols create legally binding non-use obligations, the U.S. has maintained that the NPT negative assurance only has three exceptions. See note 92 and accompanying text.
114 *Nuclear Weapons Case,* paragraph 46.
115 If nuclear weapons were illegal *per se,* the U.S. would not be able to rely on their use in self-defense, since weapons used in self-defense must be lawful weapons.
116 See L.C. Green, *The Contemporary Law of Armed Conflict* (1993), 119; and Kalshoven, 110-114.
117 Morris Greenspan, *The Modern Law of Land Warfare* (1959), 408.
118 Kalshoven, 110.
119 See Best, 167; and Kalshoven, 111-112.
120 "Geneva Convention Relative to the Treatment of Prisoners of War," August 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, (hereinafter Geneva Convention III), article 3
121 Kalshoven, 112.
122 Morris Greenspan, 408, citing *The Falkenhorst Trial* (Trial of von Falkenhorst) (1946), British Military Court, Germany, GCT Series, VI, 250-255.
123 See *In re List (The Hostages Trial),* 641-44.
124 See Kalshoven, 113-114.
125 "Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field," August 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; "Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea," August 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; "Geneva Convention Relative to the Treatment of Prisoners of War," August 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; and "Geneva Convention Relative to the Protection of Civilian Persons in Time of War," August 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287. These documents are also available online at http://www.icrc.org/ihl.
126 "Cultural Property Convention in the Event of Armed Conflict," May 14, 1954, 1954 U.S.T. LEXIS 388.
127 Additional Protocol I, article 51(6).
128 See generally Official Records.
129 Additional Protocol I, article 35(2).
130 See Additional Protocol I, articles 51(6) (civilians), 52(1) (civilian objects), 53 (cultural objects), 54(4) (objects indispensable for sustenance), 55(2) (protecting the environment), and 56(4) (regarding dangerous forces).
131 Yoram Dinstein, *War, Aggression, and Self-Defense,* 2nd ed., (1994), 218-219. But see Greenspan, 412. Reprisals may not include acts of torture, cruelty, treachery, or the attack or execution of innocent persons, citing *Trial of Bruns, eg. al.* (1946), Supreme Court Of Norway, LR.T.W.C.K.III, 19.
132 Written Statement of the Government of the United States of America, June 20, 1995 ("Legality of the Threat or Use of Nuclear Weapons"), 25. (Hereinafter referred to as Written Statement of U.S.). The U.S. is not a party to Additional Protocol I, but agrees that some of it restates customary international law.
133 *The Naulilaa Case,* 2 R.I.A.A. 1011, 1026-7 (1928), defined the need to first seek a peaceful solution before resorting to reprisal.
134 See Dieter Fleck, *The Handbook of Humanitarian Law in Armed Conflicts* (1995), 205.
135 See Greenspan, 411. "Since reprisals are an extreme measure only to be used as an unavoidable last resort, every endeavor should first be made to regulate the matter by other means, unless the circumstances are so urgent that the safety of the troops demands immediate drastic action." See also Written Statement of U.S., 30, stating that reprisals must be taken with the intent to cause the enemy to cease violations of the law of armed conflict, other means of securing compliance should be exhausted and the reprisal must be proportionate to the violations.
136 Greenspan, 407-413. When Hitler ordered the execution of allied airmen in reprisal for allied attacks on civilian targets, the allied campaign was a reprisal in response to Germany's own violation of the laws of war, and would not justify a counter-reprisal.
137 See Fleck, 205; and Greenspan, 412.

138 *Nuclear Weapons Case*, Judge Schwebel dissent, 63.

139 *Naulilaa Case* (1928), 2 R.I.A.A. 1011, 1026 and *Portugal v. Germany*, 8 Trib. Arb. Mixtes, 409, 425 (1928), excerpted and translated in H. Briggs, *The Law of Nations* (1953), 951, 953.

140 Ibid.

141 Kalshoven, 112.

142 See The Gas Protocol, "[w]hereas the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids materials or devices, has been justly condemned by the general opinion of the civilized world; and Whereas the prohibition of such use has been declared in Treaties to which the majority of Powers of the world are Parties; and To the end that this prohibition shall be universally accepted as a part of International Law, binding alike the conscience and the practice of nations...[T]he High Contracting Parties, so far as they are not already Parties to Treaties prohibiting such use, accept this prohibition, agree to extend this prohibition to the use of bacteriological methods..." See also Schwarzenberger, 37-38; and Nanda and Krieger, 141.

143 The Appellate Chamber considered whether prohibition on use of chemical weapons, prohibited by the 1925 Gas Protocol "in war" had extended to internal armed conflict rules. The tribunal considered U.S. State Department guidance that "it is clear that such use against the civilian population would be contrary to the customary international law that is applicable to internal armed conflicts, as well as other international agreements" (citing U.S. Department of State, Press Guidance, September 9, 1988). Furthermore, the tribunal noted the statement by Ambassador R.W. Murphy, Assistant Secretary for Near Eastern and South Asian Affairs, before the Sub-Committee on Europe and the Middle East of the House of Representatives Foreign Affairs Committee, "brand[ing] the use illegal." (*Tadic Appeal*, paragraph 122). Iraq had "flatly denied the poison gas charges" (*Tadic*, citing *The New York Times*, September 16, 1988, A11). "Ambassador Murphy said: 'On September 17, Iraq reaffirmed its adherence to the international law, including the 1925 Geneva Protocol on chemical weapons as well as other international humanitarian law. We welcome this statement as a positive step and asked for confirmation that Iraq means by this to renounce the use of chemical weapons inside Iraq as well as against foreign enemies. On October 3, the Iraqi Foreign Minister confirmed this directly to Secretary Schultz.'" (*Tadic Appeal*, citing Department of State Bulletin, December 1988, 44.)

144 Fleck, 205; and Kalshoven, 111-112.

145 See Myres Smith McDougal and Florentino P. Feliciano, *The International Law of War: Transnational Coercion and World Public Order* (1994), 68-69. "The quantum of permissible reprisal violence, so determined, may under certain circumstances conceivably be greater than that inflicted in the enemy's original unlawful act. Upon the other hand, violence so gross as to have no reasonable relation to the postulated deterrent effect is appropriately characterized, not as a legitimate reprisal, but as a new and independent unlawful act. The requirement of proportionality in reprisals may thus be seen to be but one more manifestation of the pervasive policies of military necessity and minimum destruction."

146 See Meyrowitz, 70, 73; and Greenspan, 412. In 1959, Judge Nagendara Singh wrote that "nuclear weapons should only be admitted as legitimate when resorted to as retaliation in kind to their actual prior use by the enemy...." Singh, 22.

147 Singh, 220.

148 *Nuclear Weapons Case*, Judge Schwebel dissent, 63.

149 Ibid.

150 Nanda and Krieger, 141.

151 See generally L. Oppenheim, *International Law* 2 (565) (7th ed., 1952); Fritz Kalshoven, *Belligerent Reprisals* (1971), 366, 377; and Hilaire McCourbry and Ashgate Dartmouth eds., *International Humanitarian Law, Modern Developments in the Limitation of Warfare* (2nd ed.).

152 Adapted from "Nuclear Strategy: An Introduction," Policy Division, Department of the Air Force, Chapter 6, page 3, and Treaties in Force.

153 According to a former Soviet weapons scientist, Russia may have destroyed its large stockpile of biological weapons, but it retains the capability to produce them. "Scientist: Russia Retains Chemical War Capability," *Denver Rocky Mountain News*, October 21, 1999.