

“Legality of Nuclear Warfare”

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This comprehensive work on the subject, “Legality of Nuclear Warfare” examine different uses of nuclear weapons and will assess the legality of these uses under positive and customary international law. In addition to this, it will also remark that in all but its most limited uses, weapons would cause unnecessary suffering, would fail to discriminate between combatants and noncombatants, and would violate the territoriality of neutrals, this Article will demonstrate that the realities associated with the use of nuclear weapons necessitate the remark that any military benefit conferred by such use is inherently disproportionate to the harms caused by any use of nuclear weapons and, therefore, that any use of nuclear weapons is illegal under international law.

In my words, Nuclear Warfare refers to, “the use of nuclear weapons either due to military conflict or due to the use of political strategy, so as to destroy the enemy into the war.

The first gesture that can be made before evaluating the Legality of Nuclear Warfare is to know the appropriate body of law applicable over a particular subject. In case, whenever we refer to any subject of International Law, the first thing that comes in our mind is that of the Charter of United Nations. The Charter of United Nations states different sources of international law viz.,

- a. International Convention,
- b. International Custom,
- c. General principles of law taken by civilized nations,
- d. Scholarly writings, etc.

Unfortunately, there does not exist any treaty or convention that specifically or explicitly addresses or covers the legality of the use of nuclear weapons. Those who argue that international law is inapplicable to any issue of nuclear weapons point to this lack of a comprehensive treaty provision as an indication that the taking of use of nuclear arms is not strictly forbidden by international law. In support of this contention, we can cite here the famous S.S Lotus Case.¹ The Lotus Case held, essentially, that a nation is legally permitted to take any action that is not strictly prescribed under the rules of international law. Since no treaty expressly prohibits all uses of nuclear weapons, these scholars argue that use of nuclear weapons cannot be deemed illegal under international law.

Thus, the lack of any specific or explicit treaty or convention over the above mentioned subject does not warrant to the conclusion that the international law is impotent with regard to nuclear warfare. Although no convention states that all uses of nuclear weapons are per se illegal, many agreements have addressed the inevitable consequences and effects that would stem from any use of nuclear weapons. Any argument that a convention that antedates the arrival of nuclear weapons or doesn't specifically check with nuclear weapons failed to will stop the use of nuclear weapons and, therefore, may not be considered in such a manner, is untenable.

Herein, on the other hand we can state the Nuclear Non-Proliferation Treaty whose objective is to prevent the spread of nuclear weapons and weapons technology, to promote cooperation in the peaceful uses of energy and to additional the goal of achieving nuclear disarmament and general and complete disarmament. The Pact represents the sole binding commitment in a exceedingly goal to the goal of disarmament by the nuclear-weapon States. The Pact is considered as the cornerstone of the world nuclear non-proliferation regime and an essential foundation for the pursuit of nuclear disarmament. It was structured to prevent the spread of nuclear weapons, to further the goals of nuclear disarmament and general and complete disarmament, and to promote cooperation in the peaceful uses of nuclear energy.

¹ *SS Lotus (France vs. Turkey)* 1927 P.C.I.J.

By the resolution no. 71/258, the General Assembly decided to organise in 2017 a United Nations conference to negotiate a legally binding instrument to prohibit nuclear weapons, leading towards their total elimination. The Assembly inspired all Member States to participate in the Conference, with the participation and contribution of international organizations and civil society representatives.

This embody undertakes a comprehensive set of prohibitions on participating in any nuclear weapon activities. These involve undertakings not to develop, test, produce, acquire, possess, stockpile, use or threaten to use nuclear weapons.

The Pact additionally prohibits the preparation of nuclear weapons on national territory and the provision to any State in the conduct of prohibited activities. States parties will be complied to prevent and suppress any activity prohibited under the TPNW undertaken by persons or on territory under its jurisdiction or control.

The Pact also makes compulsory for States parties to provide necessary help to individuals affected by the use or testing of nuclear weapons, as well as to take necessary and appropriate measure of environmental rectification in areas under its jurisdiction or control mixed as a result of activities related to the testing or use of nuclear weapons.

The Treaty so adopted by UN on the Prohibition of Nuclear Weapons was adopted by the Conference (by a vote of 122 States in favour (with one vote against and one abstention) at the United Nations on 7 July 2017, and opened for signature by the Secretary-General of the United Nations on 20 September 2017.

However, It will enter into force 90 days after the fiftieth instrument of ratification, acceptance, approval or accession has been deposited.

In its final remarks and recommendations for follow-on actions, the Conference expressed its deep concern at the catastrophic humanitarian consequences of any use of nuclear weapons and reaffirmed the need for all States at all times to comply with applicable international law, including international humanitarian law.²

² Treaty on Prohibition of Nuclear Weapons, available at <https://www.un.org/disarmament/wmd/nuclear/npt/> (Visited on 09th November 2018)

Given the fact that the taking of the use of nuclear weapons is not anywhere expressly prohibited by international law, the next question is whether bursting a nuclear weapon would violate the dictates of a pact that does not specifically address the nuclear issue. In coming to the conclusion whether or not a nation's conduct violates an agreement internationally, the action in question should be viewed in the literal terms of the document. The legality of an action depends solely upon whether or not the action violates the terms of a given agreement.

- a. Unnecessary Suffering :- The internationally recognised concept of humanity requires combatants to lessen the degree of suffering and destruction caused to opposing forces. The start of the principle date back to the Declaration of St. Petersburg in 1868. The Declaration was enacted to restrict the use of a new kind of bullet that caused painful wounds that were difficult to treat. This convention was the first document to recognize a limitation on the means available to accomplish military end stating that combatants may not use weapons to "uselessly aggravate the sufferings of disabled men."

The standard used to check whether or not the use of a particular weapon constitutes unnecessary suffering has never been authoritatively set forth. The inherently pliable term "unnecessary" can be assigned several meanings. The most common standard of "unnecessary suffering" balances the harm caused by the weapon against the necessity of the military goals sought to be achieved.' One measure of this test states that the legality of the taking use of a particular weapon hinges upon the "needlessness, the superfluity, the disproportionality of harm relative to the military result" as opposed to the degree of destruction and human suffering.³

However, what can be actually referred to is that any use of nuclear weapon in the vicinity where the civil population is residing is incidental to any of the military goals. Even the smallest of the nuclear weapon would be incapable to avoid any kind of destruction to any of the military goal.

- b. Gas :- A second argument that a use of nuclear weapons would violate the principles of humanity involves the Geneva Gas Protocol of 1925⁴. The Protocol accepts the universal recognition that the utilization in war of toxic or other alternative gases and every other alternative toxic connected substances are illegal under international law. The traditional defenses accessible beneath law of nations aren't accessible to those nations who violate this principle; the prohibition against mistreatment is absolute.

³Weston, "Nuclear Weapons and International Law", 28 LJ, 552-554 (1983)

⁴The Geneva Gas Protocol, 1925

- c. **Military Necessity & Proportionality** :- Perhaps the most commonly taken defense is that of military necessity. Military necessity is referred to as the "necessity of those acts which are important for securing the ends of war, and which are lawful in terms to the modern law and usages of law."⁶ It is on universal level recognized that international law places barriers on military necessity. The just presence of a military objective doesn't in itself gives permission for unlimited destruction. During the Nuremberg war trials, a United States Military Tribunal didn't accepted the defendants' military necessity defense for actions which were committed in an occupied territory. The court held as follows: "the destruction of property to be lawful must be in case demanded by the necessities of war. Destroying as an end in itself is a violation of international law. There must be some particular connection between the destruction of property and the overtaking of the enemy forces."⁷

The extent to which law of nations places limitations on the philosophy of military necessity is subject to discussion. Several commentators have suggested that if an action violates a rule of international law, the doctrine of military necessity will not excuse the act. This restriction on military necessity, however, seems overbroad. It is unlikely that any military campaign that a country would be able to completely avoid contravention of international law. For example, although conventional bombardment of a city may violate certain principles of humanity, it has been sanctioned by the international legal community. Conventional bombings, like a nuclear strike, undoubtedly cause casualties on an indiscriminate basis. A strong argument can even be created that some of the suffering caused by such ways is not important. Since standard bombings have achieved widespread acceptance and use, it appears that although a particular action may be offensive of some side of law of nations, this factor is not dispositive.⁸ Now, what I find out is that the concept of proportionality provides a useful framework for evaluating the lawfulness of all military tactics. Regarding the widespread acceptance of a conventional bombardment on a defended city that attempted to destroy legitimate military targets, it is apparent that the degree to which the principles of humanity are violated is relatively small compared to a legitimate military objective. If a belligerent were to manuever of bombardment a civilian space with standard bombs, the likelihood that such actions would be deemed illegal under the proportionality test would increase. The use of nuclear weapons is clearly even more harder to justify under this standard.

⁵ Bownlie, "*Legal Aspects of Use of Nuclear Weapons*", 14 LQ, 437-444 (1965).

⁶ Lesanne, "Military Instructions for Armies", Ragone, 16 September, 1984.

⁷ United States vs. List & Ors. , 7(1948) 15 ILR 632

⁸ Paust, "The Nuclear Decision in World War-II", in Truman's ending and avoidance of war by Truman, 160,172, (1974)

Thus, The legal consequences of some uses of nuclear weapons are easier to evaluate than others. It would be difficult to find support for the notion that the annihilation of a large city, predominantly inhabited by civilians, would be lawful, notwithstanding other military objectives.

- d. Reprisals and Self-Defense :- A second concept that may excuse a use of nuclear weapons that would on the other hand be unlawful is reprisal. Reprisal may be defined as any activity against the other person, especially as a sanction by military forces or a political group.⁹ There are generally two possible sets of conditions that could lead to the use of nuclear weapons as an act of reprisal: a conventional attack and a nuclear attack.

It is difficult to conceive of a nuclear reprisal that would be proportionate to a conventional attack. The capacity for destruction possessed by nuclear weapons far exceeds the damage that can be caused by conventional means, and it is therefore unlikely that this defense would be accepted by the international community under these circumstances.

The use of nuclear weapons in response to a nuclear strike would, at first glance, fare much better in the eyes of international law, provided that the response was proportionate in scope to the original attack. The United Nations Charter, however, in articles 2(4) and 51, condemn forcible reprisals. Article 2(4) forbids a nation from threatening or mistreatment against another state. Article 51 provides an exception to the general rule provided in Article 2(4), but it is limited to actions taken in self-defense. Since the purpose of reprisals is not to defend but to retaliate, article 51 does not cover such actions. Even bigger legal issues are encountered in analyzing the scope of connected philosophical system of self-defense. Self-defense differs from reprisal in that its objective is not to deter future attacks by the enemy, but to prevent harm to a country's territory and its inhabitants.

Customary international law places vital limitations on once self protection that can be invoked. Generally, self-defense is restricted to instances in which the need for self-defense is "instant, overwhelming, and leaves no choice of means, and no moment for deliberation." In addition, any action taken in self-defense is, like reprisal, limited by the concept of proportionality.¹⁰

The concept of self-defense has always been predicated on the notion that an attacked country will be able to respond to the attack of the aggressor. With the development of nuclear weapons, this assumption no longer holds true. For self-protection to retain its effectiveness, the argument concludes, Art. 51 should be taken to permit proportionate armed strike in antecedent of self protection.¹¹

⁹ Meaning of Reprisal, available at : <https://dictionary.cambridge.org/dictionary/english/reprisal> (Visited on : 9th November,2018 at 10:16 PM)

¹⁰ Kennedy, A Critique of United States, Nuclear Deterrence Theory, 35 (Brook LYN) 1983

¹¹ W. Friedman, The Changing Structures of International Law, 259-60 (1964).

Since the advent of nuclear weapons in the 1940s, various sources of international law have provided some evidence as to whether the use of these weapons is against customary international law. Perhaps the most useful sources of evidence are the international conventions discussed above. Another important source for determining customary international law is international judicial precedent. There has been only one instance in which a tribunal has rendered judgment as to the legality of first use of nuclear weapons. In 1963, the District Court of Tokyo decided *The Shimoda Case*, in which it assessed the legality of the atomic bombings of Hiroshima and Nagasaki by the United States.

In *Shimoda*, five Japanese plaintiffs brought an action against the Japanese government, claiming that the government had violated their constitutional rights by waiving the rights of its nationals to pursue claims against the United States government that arose from the bombings."¹² The plaintiffs claimed that the bombs caused indiscriminate and unnecessary suffering, constituted a poisonous gas, and failed to distinguish between combatants and noncombatants, all in violation of various international agreements.

The court, while holding that the plaintiffs had no legal basis for recovering damages from the Japanese government, agreed with plaintiffs' contention that the atomic bombings contravened international law.

"The court's opinion focused not on the general issue of the legality of atomic weapons, but instead on whether the particular bombings of Hiroshima and Nagasaki by the United States violated international law. Although the court noted that a new weapon is legal until prohibited by international law, it averred that an international convention need not be direct or express to be applicable. The court then examined the present state of international law and concluded that the weapon employed by the United States was within the penumbra of earlier prohibitions. Specifically, the court upheld the plaintiffs' claim that the bombings did not discriminate between military and nonmilitary objectives caused unnecessary suffering, violated prohibitions against poison gas, and was not justified by military necessity.

Commentators have expressed differing views as to the significance of the *Shimoda* case and U.N. Resolution 1653. The significance of *Shimoda* is limited by three factors. First, the part of the opinion devoted to the issue of whether the use of the atomic weapons by the United States was not essential to the holding of the case and was therefore *dicta*. Second, the court's holding was narrowly circumscribed and did not extend beyond the factual situation involved. Third, the court rendering the opinion was under the sovereignty of the country that was the target of the weapon.

¹² *The Shimoda Case*, (1965) 59 Int'l 763-64

4. Different theories applicable under International Law

The Trigger Theory

Proponents of the „trigger theory“ accept that states may not use force unless they have been subject to an armed attack. Once such an attack has occurred, however, the victim state may defend itself not only against that attack, but against threats posed by the aggressor, whether imminent or not. In this situation the victim state may use a show of force in order to deter the aggressor from repeating its attack in the future or to destroy the military potential of that state so that it will not be able to mount another attack in the near future.¹³

The original proponent of the idea that Article 51 is based on the trigger theory maintained that the right of self-defence in that Article is the right to resort to war, and that this right may be exercised as long as an armed attack has occurred, whatever its scale.

Now what I can understand from The Trigger Theory is that The trigger theory may not appear to be the kind of theory that serves the purpose of reducing the scope of armed conflicts. It is impossible to draw a clear line between armed attacks that justify a limited response and those that trigger the right to use massive force to destroy the enemy. The trigger theory sends a clear message to potential aggressors that they will not be able to determine the level of force used in response to an armed attack. The knowledge that any armed attack on another state could trigger a massive response could potentially serve as a deterrent against launching an attack.

Under the trigger theory, once a large-scale armed attack has been launched *jus ad bellum* proportionality no longer plays a part. The victim state is constrained by the norms of *jus in bello* and possibly by the notion of military necessity, namely that it may use only such force as is necessary to achieve its military objectives. But given the acceptance that those objectives may be extremely wide, it may be difficult to regard as unnecessary a concrete military action that is compatible with the rules of *jus in bello*.

The Future Attack Theory

As stressed above, it is widely accepted that a state may use force to thwart an imminent attack. It would seem illogical to argue that if a state has not yet been attacked it may use force to thwart an imminent armed attack, but that if it has already been attacked it may not do so. Even some scholars who reject in principle the notion that a state that has not been subject to an armed attack may mount an anticipatory attack accept that if a state has been attacked it may use force to prevent further attacks.

Is a state that has been attacked in the same situation as a state that has not yet been attacked and wishes to pre-empt a future attack? Obviously, as long as the fighting with the aggressor continues there is not much point in trying to find a line between imminent and non-

¹³Mellow, “Counterfactuals and proportionality criterions”, 20, EIA 434 (2006)

imminent future attacks. But the question has arisen in recent years in relation to 9/11 type attacks, which are over and done with before the victim state has had a chance to respond. Some commentators maintain that even in such a situation the victim state may use force only if it has evidence that further attacks are imminent. Others accept that, having been attacked, the victim state may use force not only to repel that attack but to prevent future attacks too, without requiring that such attacks be imminent.

Defence against future attacks seems to be the fairly standard argument advanced by states in justifying their response to an armed attack that has been completed. Sometimes states expressly refer to imminent attacks. More often, however, they simply refer to future planned attacks.

Examples are the statement of the US representative in the SC debate on the US attacks on targets in Libya and the arguments of the US before the International Court of Justice in the Oil Platforms case. This was also the argument made by both the US and the UK when justifying their resort to force against Afghanistan following the attacks of 9/11. Aligned with this approach is the reliance of states on a pattern of attacks as evidence that further use of force against them in the future is anticipated.¹⁴

5. Advisory opinion of World Court on Legality of Nuclear Weapons

On July 8, 1996, the International Court of Justice (ICJ), popularly called the globe Court, delivered 2 informatory opinions on separate requests received from the globe Health Organization and the General Assembly of the United Nations, severally, concerning the lawfulness of nuclear weapons beneath jurisprudence.

The principal judicial organ of the United Nations, whose Statute forms Associate in Nursing integral a part of the United Nations Charter, consists of 15 judges representing the different regions and principal legal systems of the world. In addition to the Court's operate of delivering judgments in contentions cases submitted to that by states, it's going to issue non-binding informatory opinions at the request of sure United Nations organs and agencies.

On Gregorian calendar month twenty, 1994, the United Nations General Assembly requested the ICJ to grant Associate in Nursing informatory opinion on the question: "Is the threat or use of nuclear weapons in any circumstance permitted under international law?" At the kickoff, the ICJ confirmed the Assembly's broad competency to create such an invitation, deriving from the UN Charter and the Assembly's longstanding activities regarding disarmament and nuclear weapons.

The Court conjointly found that the request associated with a legal question inside the which means of the ICJ Statute and therefore the United Nations Charter which there have been no

¹⁴ The Future Attack Thoery available at, <https://academic.oup.com/ejil/article/24/1/235/438278> (Visited on : 9th November, 2018 at 11:12 pm)

compelling reasons to refuse the request, albeit the question placed to that didn't relate to a selected dispute and was couched in abstract terms.

In determining the lawfulness or unlawfulness of the threat or external use of nuclear weapons, the ICJ set that the foremost directly relevant applicable law governing the Assembly's question consisted of (1) the provisions of the United Nations Charter concerning the threat or use of force, (2) the principles and rules of international humanitarian law that type a part of the law applicable in armed conflict and therefore the law of neutrality, and (3) any relevant specific treaties on nuclear weapons.

In applying this law, the Court thought about it imperative to require under consideration sure distinctive characteristics of nuclear weapons, specifically their harmful capability that may cause much human suffering for generations to come.

The Court initially thought about the provisions of the United Nations Charter concerning the threat or use of force. Although Article 2(4) (generally prohibiting the threat or use of force), Article fifty one (recognizing each state's inherent right of individual or collective self-defence if Associate in Nursing armed attack occurs) and Article forty two (authorizing the protection Council to require military social control measures) don't seek advice from specific weapons, the Court control that they apply to any use of force, notwithstanding the type of weapon employed.

The Court noted that the United Nations Charter neither expressly prohibits, nor permits, the employment of any specific weapon (including nuclear weapons) which a weapon that's already unlawful per se by written agreement or custom doesn't become lawful by reason of its getting used for a legitimate purpose beneath the Charter.

Whatever the means that of force utilized in self-defence, the twin customary condition essentially and proportion and therefore the law applicable in armed conflict apply, as well as such additional concerns as the terribly nature of nuclear weapons and therefore the profound risks related to their use.

The ICJ conjointly thought about the question whether or not a signalled intention to use force if sure events occur qualifies as Associate in Nursing unlawful "threat" beneath Article 2(4) of the United Nations Charter. According to the Court, the notions of "threat" or "use" of force under Article 2(4) work in tandem in that the illegal use of force in a given case will likewise create the threat to use such force unlawful. The Court detected that the mere possession of nuclear weapons wouldn't represent Associate in Nursing unlawful "threat" to use force contrary to Article 2(4), unless the actual use of force envisaged would be directed against the territorial integrity or political independence of a state or would be inconsistent with the needs of the United Nations or, within the event that it were supposed as a way of defense, such envisaged use of force would violate the principles of necessity and proportionality.

The Court next examined the law applicable in things of armed conflict by addressing 2 questions: (1) are there specific rules in jurisprudence regulation the lawfulness or unlawfulness of recourse to nuclear weapons as such, and (2) what are the implications of the principles and rules of humanitarian law applicable in a The Court examined whether or not any such prohibition of recourse to nuclear weapons are often found in accord law.

With relevance sure specific treaties coping with the acquisition, manufacture, possession, preparation and testing of nuclear weapons, the Court noted that these treaties "point to Associate in Nursing increasing concern in the international community" with relevance nuclear weapons, and concluded that they "could therefore be seen as foreshadowing a future general prohibition of the use of such weapons, but they do not represent such a prohibition by themselves." As to those treaties that address the issue of recourse to nuclear weapons, the Court observed that they "testify to a growing awareness of the necessity to liberate the community of States and therefore the international public from the risks ensuing from the existence of nuclear weapons," but that these treaties also do not quantity to a comprehensive and universal typical prohibition on the threat or use of nuclear weapons in and of itself.

The Court then examined customary international law. First, it determined that the non-use of nuclear weapons doesn't quantity to a customary prohibition, because the world community is profoundly divided on the issue. Second, the Court examined whether or not sure General Assembly resolutions that wear down nuclear weapons signify the existence of a rule of customary law of nations prohibiting recourse to nuclear weapons.

In the Court's read, although these resolutions are "a clear sign of deep concern regarding the problem of nuclear weapons" and "reveal the desire of a very large section of the international community to require, by a specific and express prohibition of the use of nuclear weapons, a significant step forward along the road to complete nuclear disarmament," they fall short of a customary rule specifically prohibiting the employment of nuclear weapons in and of itself.

The ICJ next thought-about whether or not recourse to nuclear weapons should be thought-about as extrajudicial within the lightweight of the principles and rules of international humanitarian law applicable in armed conflict and of the law of neutrality. The Court expressed that the cardinal principles of international humanitarian law prescribing the conduct of military operations are: (1) the protection of the civilian population and civilian objects and the prohibition of the employment of weapons incapable of characteristic between combatants and non-combatants, and (2) the prohibition on inflicting excess suffering to combatants by exploitation sure weapons.

According to the Court, the elemental rules of humanitarian law applicable in armed conflict should be discovered by all states whether or not or not they need legal the conventions that contain them, as a result of they represent intransgressible principles of international customary law.

The ICJ in agreement with the overwhelming majority of states furthermore as writers that there are often little doubt on the relevance of the principles and rules of humanitarian law in armed conflict to a potential threat or use of nuclear weapons, despite the actual fact that these principles and rules had evolved before the invention of nuclear weapons.

It conjointly found that the customary principle of neutrality is applicable, subject to the relevant provisions of the global organization Charter, to any or all international armed conflict, no matter style of weapons might be used (although the principle of neutrality isn't well outlined, and therefore the ICJ left its content vague here, it's typically considered requiring a minimum of that no attack be created on a state that has declared itself a neutral and is conducting itself accordingly).

Finally, the Court examined the requirement to barter in straightness an entire nuclear demobilisation, recognized in Article VI of the accord on the Non-Proliferation of Nuclear Weapons of 1968. The ICJ judges control nem con that the requirement enshrined in Article VI involves "an obligation to realize a particular result-nuclear demobilisation all told its aspects-by adopting a selected course of conduct, namely, the pursuit of negotiations on the matter in straightness." The Court noted that this twofold obligation to pursue and conclude negotiations in accordance with the essential principle of fine religion formally issues the 182 states parties to the accord on the Non-Proliferation of Nuclear Weapons, constituting the overwhelming majority of the international community conflict and therefore the law of neutrality?

The Court examined whether any such prohibition of recourse to nuclear weapons can be found in treaty law. With regard to certain specific treaties dealing with the acquisition, manufacture, possession, deployment and testing of nuclear weapons, the Court noted that these treaties "point to an increasing concern in the international community" with regard to nuclear weapons, and concluded that they "could therefore be seen as foreshadowing a future general prohibition of the use of such weapons, but they do not constitute such a prohibition by themselves." As to those treaties that address the issue of recourse to nuclear weapons, the Court observed that they "testify to 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," but that these treaties also do not amount to a comprehensive and universal conventional prohibition on the threat or use of nuclear weapons as such.

The Court then examined customary international law. First, it determined that the non-use of nuclear weapons does not amount to a customary prohibition, because the world community is profoundly divided on the issue. Second, the Court examined whether certain General Assembly resolutions that deal with nuclear weapons signify the existence of a rule of customary international law prohibiting recourse to nuclear weapons. In the Court's view, although these resolutions are "a clear sign of deep concern regarding the problem of nuclear weapons" and "reveal the desire of a very large section of the international community to take, by a specific and express prohibition of the use of nuclear weapons, a significant step forward along the road to

complete nuclear disarmament," they fall short of a customary rule specifically prohibiting the use of nuclear weapons as such.

The ICJ next considered whether recourse to nuclear weapons must be considered as illegal in the light of the principles and rules of international humanitarian law applicable in armed conflict and of the law of neutrality. The Court stated that the cardinal principles of international humanitarian law prescribing the conduct of military operations are: (1) the protection of the civilian population and civilian objects and the prohibition of the use of weapons incapable of distinguishing between combatants and non-combatants, and (2) the prohibition on causing unnecessary suffering to combatants by using certain weapons. According to the Court, the fundamental rules of humanitarian law applicable in armed conflict must be observed by all states whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law. The ICJ agreed with the vast majority of states as well as writers that there can be no doubt as to the applicability of the principles and rules of humanitarian law in armed conflict to a possible threat or use of nuclear weapons, despite the fact that these principles and rules had evolved prior to the invention of nuclear weapons. It also found that the customary principle of neutrality is applicable, subject to the relevant provisions of the UN Charter, to all international armed conflict, whatever type of weapons might be used (although the principle of neutrality is not well defined, and the ICJ left its content undefined here, it is generally regarded as requiring at least that no attack be made on a state that has declared itself a neutral and is conducting itself accordingly).

Finally, the Court examined the obligation to negotiate in good faith a complete nuclear disarmament, recognized in Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons of 1968. The ICJ judges held unanimously that the obligation enshrined in Article VI involves "an obligation to achieve a precise result-nuclear disarmament in all its aspects-by adopting a particular course of conduct, namely, the pursuit of negotiations on the matter in good faith." The Court noted that this twofold obligation to pursue and conclude negotiations in accordance with the basic principle of good faith formally concerns the 182 states parties to the Treaty on the Non-Proliferation of Nuclear Weapons, constituting the vast majority of the international community.¹⁵

¹⁵ Legality of the threat or use of nuclear weapons, available at : <https://www.icj-cij.org/en/case/95> (Visited on : 9th November,2018 at 11:28 PM)

6. Conclusion

As per our understanding, the conclusion that can be drawn is Despite the lack of a binding international convention specifically outlawing the use of any nuclear weapon, many strong argument exist that any such use would be contrary to positive and customary international law. In all but its most limited uses, nuclear weapons could certainly violate one or more of the principles of humanity.

The determination that one or more of these principles have been offended does not necessarily warrant the conclusion that the use of all nuclear weapons are prohibited under international law. For most violations, a country may exempt itself from a determination that its conduct was unlawful by successfully invoking the defenses of military necessity, reprisal, or self-defense. The success of these defenses rests on a determination that the degree of the violations is proportionate to the military objective sought to be achieved.

The broad language of the Gas Protocol indicates that its terms should be extrapolated to cover the radiation present in nuclear weapons. The vast majority of potential uses of nuclear weapons would interfere with the territoriality of other countries. Even with a limited use of a nuclear weapon, there is no guarantee that adverse weather conditions or technological error would not result in a violation of a neutral country's territorial right. These two prohibitions warrant the conclusion that any use of nuclear weapons would violate positive international law. Despite the availability of various defenses to excuse a nuclear strike, it is difficult to envision a situation in which the harm caused in such an attack would be proportionate to the military objective.