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„Is there a legal gap in the prohibition of the threat or use of
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When they shell the telephone building in Madrid it is all right because it is a military objective. When they shell gun positions and observation posts that is war. If the shells fall too long or too short that is war too. But when they shell the city indiscriminately in the middle of the night to try to kill civilians in their beds it is murder.

- Ernest Hemingway

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Acronyms

BWC	Biological Weapons Convention
CWC	Chemical Weapons Convention
DPRK	Democratic People's Republic of Korea
IAEA	International Atomic Energy Agency
ICJ	International Court of Justice
NATO	North Atlantic Treaty Organization
NPT	Non-proliferation Treaty
NSA	Negative security assurances
NWFZ	Nuclear weapons-free zone
NWS	Nuclear weapons state
NNWS	Non-nuclear weapon state
UK	United Kingdom
UN	United Nations
US	United States

1. Introduction

1.1. Purpose and Significance of the study

"It is said that previous conquerors like Attila and Jenghiz Khan used to proclaim that not even a dog or cat or mouse would be left alive when they destroyed the cities which defied them. Our generation with the nuclear weapon in its hand is far more brutal and primitive than any of those conquerors of the past, however barbaric they might have been", said once the former judge of International Court of Justice (ICJ), Christopher Weeramantry¹. The destroying potential of nuclear weapons and its catastrophic humanitarian consequences have been obvious since the very first and only time nuclear weapons were used. By wiping out over 100 000 inhabitants of the Japanese cities of Hiroshima and Nagasaki from the face of Earth in August 1945, the history demonstrated that disastrous mid and long term consequences of these weapons cannot be contained neither in space nor in time. Devastating consequences nuclear explosions have on health, environment, infrastructure, food security, climate, development, social cohesion and the global economy underpinned the importance and responsibility of international law to ensure such scenario does not recur ever again².

And yet, seventy years after the bombings of Hiroshima and Nagasaki, although we can observe somewhat reduced overall nuclear stock pile held by individual nuclear weapons states, at the same time we count number of nuclear weapons states larger than ever before (NWS). Moreover, beside around 14,900 nuclear warheads worldwide present, NWS continue to modernize and sophisticate their arsenals. It is in these very days that the question of a new cold war³ between Russia and the United States is mentioned on one hand and an all-out nuclear war between Democratic

¹ Jamshed Baruah, 'Nuke Generation Far More Brutal Than Past Conquerors', In Depth News, January 14, 2017, accessed January 26, 2017, <http://www.indepthnews.info/index.php/nuclear-abolition/905-nuke-generation-far-more-brutal-than-past-conquerors>.

² Roland Timerbaev, "Nuclear weapon-free world: Ways of moving ahead", 15 SECURITY INDEX, No. 2 (87), (April, 2012), accessed January 26, 2017, http://www.nuclearsecurityproject.org/uploads/publications/NuclearWeaponFreeWorld_RolandTimberbaev_0409.pdf.

³ Lizzie Dearden, "Mikhail Gorbachev warns of new Cold War with US-Russia arms race 'in full swing'", *Independent*, April 18, 2017, accessed March 5, 2017, <http://www.independent.co.uk/news/world/politics/mikhail-gorbachev-new-cold-war-us-russia-arms-race-full-swing-soviet-premier-putin-trump-north-korea-a7688321.html>.

People's Republic of Korea (DPRK)⁴ and the United States (US), on the other hand, becomes a threat⁵.

The question whether the existence of such a situation in the second decade of the twenty-first century is authorized, prohibited or in any way regulated by international law is a question that has not only moral but great theoretical and academic importance from the point of view of all those interesting in achieving the rule of law and raising general awareness on illegality of this lethal devices. Moreover, the core of its moral aspect is the thesis that nuclear weapons and human security cannot coexist as the scope of its annihilating consequences are so vast that they deny respect of human existence and its integrity of any kind⁶.

Notwithstanding the above mentioned, it must be noted that the author is sharing Schwarzenberger's opinion on the fact that "the first and most self-denying duty of the international lawyer is to warn against the dangerous illusion that his findings on the legality or illegality of nuclear weapons are likely to influence one way or the other the decision on the use of these devices of mechanized barbarism⁷" and is therefore aware of a possibly limited practical influence this study may have in preventing the potential actual use of nuclear weapons⁸. This particular issue is undoubtedly one of the main reasons why the question of (il)legality of nuclear weapons has been neglected and its practical relevance discarded by many international lawyers. Another reason is the chasm that happened between the international law and international relations scholarship after the World War II (WW II), to be explained more in detail in the upcoming chapter.

⁴ Will Ripley, Tim Schwarz and Ben Westcott, "Nuclear tests will 'never stop,' North Korean government official says", CNN, April 17, 2017, accessed April 20, 2017, <http://edition.cnn.com/2017/04/26/asia/north-korea-official-nuclear/>.

⁵ Justin McCurry, Tom Phillips and Julian Borger, "China urges North Korea and US to step back from brink of war", *The Guardian*, April 14, 2017, accessed April 14, 2017, <https://www.theguardian.com/world/2017/apr/14/north-korea-blames-donald-trumps-aggression-amid-nuclear-test-crisis>.

⁶ Douglas Roche, "Illegal in any circumstances whatsoever," in "At the nuclear precipice. Catastrophe or transformation", ed. Richard Falk and David Krieger (New York: Palgrave Macmillan, 2008), xvi.

⁷ Georg Schwarzenberger, "The legality of nuclear weapons", (Toronto: Stevens & Sons Limited, 1958), 61.

⁸ Richard Reeve Baxter, review of *The Legality of Nuclear Weapons*, by Schwarzenberger Georg, *American Journal of International Law*, 53(2), 497-497, <https://www.cambridge.org/core/journals/american-journal-of-international-law/article/legality-of-nuclear-weapons-by-schwarzenberger-georg-toronto-carswell-co-ltd-london-stevens-sons-ltd-1958-pp-viii-61-paper-3-s-6-d-65-cloth-10-s-180/DA0BC58A426980E32CBEB2E36D674C3C>, [accessed 11 March 2017]

1.2. Literature review

The debate on the legality of threat or use of nuclear weapons has been everything but recent or unusual among international lawyers and practitioners, whilst almost a century after its first use, no general clear and unambiguous answers to that question has been given.⁹

Whereas Weston acknowledges the absence of a treaty explicitly prohibiting nuclear weapons, in general, he argues that the restraints of war have never been limited to treaty law alone. Therefore, he rejects a purely hegemonic and statist conception of international law and argues that illegality of nuclear weapons should be judged against the implicit treaty provisions, international customs, general principles, judicial decisions and United Nations (UN) declarations. For him, the issue is essential, whether any of the authority cited is of a sort that “counts as law” insofar as the use and threat of use of nuclear weapons are concerned¹⁰. Corwin goes along this line in stating that regardless of the fact that there is no international convention explicitly outlawing all uses of nuclear weapons, their effects are governed by numerous conventions and customary international law. He does, however, leave a narrow space to “its most limited uses” when nuclear weapons would possibly not cause unnecessary suffering, fail to discriminate between combatants and non-combatants and violate the territoriality of neutrals but concludes that the realities associated with the use of nuclear weapons necessitate the conclusion that any military benefit conferred by such use is inherently disproportionate to the harms inflicted by their use and therefore, illegal under international law¹¹.

⁹ *Advisory Opinion Concerning Legality of the Threat or Use of Nuclear Weapons*, International Court of Justice (ICJ), 8 July 1996, <http://www.icj-cij.org/docket/index.php?sum=498&p1=3&p2=4&case=95&p3=5> [accessed 26 January 2017].

¹⁰ Burns H. Weston, “Nuclear Weapons Versus International Law: A Contextual Reassessment”, *McGill Law Journal*, Vol. 28, 1983, <http://www.lawjournal.mcgill.ca/userfiles/other/7673710-westou.pdf>, [accessed 20 March 2017].

¹¹ David M. Corwin, “The Legality of Nuclear Arms Under International Law”, *Dickinson Journal of International Law*, Vol. 5 No. 2, 1987, *Penn State International Review*, <http://elibrary.law.psu.edu/cgi/viewcontent.cgi?article=1057&context=psilr>, [accessed 14 February 2017].

Nystuen¹² and Egeland¹³, Sheldon¹⁴, Singh¹⁵, Gardam¹⁶, Laurence Boisson de Chazournes and Philippe Sands all agree that international humanitarian law represents the most important legal regime when considering the legality of the use or threat of nuclear weapons¹⁷.

Singh and McWhinney argue suffering, which nuclear weapons inevitably inflict, is prohibited as contrary to the law of humanity under various international declarations and binding agreements. The second argument is that nuclear weapons fall within the category of poisons and poisoned arms already prohibited in terms of Hague Regulations and the Geneva Protocol of 1925, the latter being the instrument prohibiting not only poisonous and other gases but also “analogous liquids, materials and devices”¹⁸. The second argument is much supported by many of their distinguished contemporaries such as Castren¹⁹, von der Heydte²⁰, Stone²¹ and Schwarzenberger²². According to Schwarzenberger, even if separated from their possible character as poisons or poisoned weapons it does not bring into question nuclear weapons’ illegality under general, customary international law²³.

¹² Gro Nystuen, “Threats of use of nuclear weapons and international humanitarian law”, in “Nuclear weapons under international law”, ed. Gro Nystuen, Stuart Casey-Maslen and Annie Golden Bersagel, (Cambridge: Cambridge University Press, 2014), 164.

¹³ Gro Nystuen and Kjølve Egeland, „A ‘Legal Gap’? Nuclear Weapons Under International Law”, Arms Control Association (March 2016), https://www.armscontrol.org/ACT/2016_03/Features/A-Legal-Gap-Nuclear-Weapons-Under-International-Law, [accessed 26 January 2017].

¹⁴ Jill M. Sheldon, “Nuclear Weapons and the Laws of War: Does Customary International Law Prohibit the use of Nuclear Weapons in all Circumstance?”, Fordham International Law Journal, Volume 20, Issue 1, 1996, <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1514&context=ilj>, [accessed 8 February 2017].

¹⁵ Nagendra Singh, “Nuclear Weapons and international Law”, (London, UK: Stevens and Sons Limited, 1959).

¹⁶ Judith Gail Gardam, “Proportionality and Force in International Law”, *The American Journal of International Law*, Vol. 87, No. 3, (1993), <http://www.jstor.org/stable/pdf/2203645.pdf?refreqid=excelsior%3A1ba9536515d0ceee13d59d9a6e9bdc5f>, [accessed 12 March 2017].

¹⁷ Laurence Boisson de Chazournes and Philippe Sands, “International Law, the International Court of Justice and Nuclear Weapons” (Cambridge, UK: Cambridge University Press, 1999).

¹⁸ Nagendra Singh and Edward McWhinney, “Nuclear Weapons and Contemporary International Law”, (London: Martinus Nijhoff Publishers, 1989), 307-324.

¹⁹ Erik Castren, “The Illegality of Nuclear Weapons”, *Toledo Law Review*: 89, 1971, <http://heinonline.org/HOL/LandingPage?handle=hein.journals/utol3&div=13&id=&page=>, [accessed 14 February 2017].

²⁰ James D. Fry, “Legal Resolution of Nuclear Non-Proliferation Disputes”, (Cambridge: Cambridge University Press, 2013), 186.

²¹ Julius Stone, “Legal Controls of International Conflict”, (New York: Rinehart, 1954), 343.

²² Georg Schwarzenberger, “The legality of nuclear weapons”, (Toronto: Stevens & Sons Limited, 1958).

²³ International Law Association, Report of the Fiftieth Conference, 1964, “Report on Self-defence under Charter and the Use of Prohibited Weapons”,

On the other hand, O'Brien²⁴ argues that international law does not apply to the use of nuclear weapons because of the lack of a treaty provision explicitly prohibiting its use and therefore not strictly forbidden by international law²⁵. To support this contention it is often used the ICJ decision *The Lotus Case*, which, in its substance held that a nation is legally permitted to take any action which the rules of international law do not strictly prohibit²⁶. Some, such as Stowell²⁷, Thomas²⁸ or Baxter²⁹ even go as far as to contend that nuclear weapons have made the laws of war obsolete. To this end, Sheldon argues that because the international community has neither expressly consented to nor evidenced their intent to accept a ban on nuclear weapons use, customary international law does not contain a rule forbidding the use of nuclear weapons in all circumstances³⁰. Richard Falk, condemning nuclear weapons and all its aspects as intrinsically illegal in any circumstance, argues that there is a gap between the legal and moral imperatives prohibiting nuclear weapons and the operational code that controls their use which needs to be addressed³¹.

<http://heinonline.org/HOL/LandingPage?handle=hein.ilarc/ilarc1964&div=1&src=home>, [accessed 14 February 2017].

²⁴ William V. O'Brien, "Some Problems of the Law of War in Limited Nuclear Warfare", 14 Mil. L. Rev. 1 (1961), <http://heinonline.org/HOL/LandingPage?handle=hein.journals/milrv14&div=5&id=&page=>, [accessed 2 March 2017].

²⁵ David M. Corwin, "The Legality of Nuclear Arms Under International Law", Dickinson Journal of International Law, Vol. 5 No. 2, 1987, Penn State International Review, <http://elibrary.law.psu.edu/cgi/viewcontent.cgi?article=1057&context=psilr>, [accessed 14 February 2017].

²⁶ Case of the SS Lotus (France v. Turkey), PCIJ, Series A, No. 10 (1927), http://www.icj-cij.org/pcij/serie_A/A_10/30_Lotus_Arret.pdf, [accessed 12 February 2017].

²⁷ Ellery C. Stowell, "The Laws of War and the Atomic Bomb", The American Journal of International Law, Vol. 39, No. 4 (Oct., 1945), American Society of International Law, <https://www.jstor.org/stable/pdf/2193421.pdf?refreqid=excelsior%3Accba349214be40270e7dac2deca893e5>, [accessed 2 March 2017].

²⁸ Elbert D. Thomas, "Atomic Bombs in International Society", The American Journal of International Law, Vol. 39, No. 4 (October 1945), American Society of International Law, <https://www.jstor.org/stable/pdf/2193412.pdf?refreqid=search%3Af4abdb9373a0a138f939de7fed405ea>, [accessed 2 March 2017].

²⁹ Richard R. Baxter, "The Role of Law in Modern War", *Proceedings of the American Society of International Law at Its Annual Meeting (1921-1969)*, Vol. 47, World Progress in International Law (APRIL 23-25, 1953), <https://www.jstor.org/stable/pdf/25657295.pdf?refreqid=search%3A751424e8e537013a544e5cb8f1b5dd07>, [accessed 2 March 2017].

³⁰ Jill M. Sheldon, "Nuclear Weapons and the Laws of War: Does Customary International Law Prohibit the use of Nuclear Weapons in all Circumstance?", Fordham International Law Journal, Vol. 20, Issue 1, 1996, <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1514&context=ilj>, [accessed 8 February 2017].

³¹ Richard Falk, "Non-Proliferation Treaty Illusions and International Lawlessness", in "At the nuclear precipice. Catastrophe or transformation", ed. Richard Falk and David Krieger (New York: Palgrave Macmillan, 2008), 43.

When it comes to the illegality of nuclear weapons in a political context, however, it seems that over the last few decades, due to the well evolved and deeply rooted nuclear deterrence doctrine, the importance of legal provisions applying to nuclear weapons are losing on its importance. The first “official” support of what was the landmark International Court of Justice (ICJ) Advisory Opinion on Nuclear Weapons on which, in line with the level of its ambiguity, the opinions were equally contentious. Whereas Rostow claims that an ICJ finding that nuclear weapons are illegal would violate the role of state consent³², Jeremy J. Stone³³, on the other hand, argues that the Court’s majority opinion, shouldn’t be taken as that unexpected or ground-breaking, as it rules out very little of the present-day nuclear doctrine. In his words, the opinion asks less than the nuclear powers have already undertaken to do. David, furthermore, more optimistically finds that the fact that the Court could not conclude definitely whether certain uses of nuclear weapons would be lawful or unlawful “neither adds nor detracts” from the rule of “general illegality” which the Court has affirmed³⁴.

Judge Weeramantry’s, comprehensive and prominent dissent is by many called as an illustration of Grotian jurisprudence at its finest as at the heart of it lays the principle that nuclear arsenals are simply incompatible with the idea of law, legality and reasoned elaboration³⁵. His stance that nuclear weapons are illegal in any circumstance is supported by judges Koroma and Shahabuddeen. Nagan sees the question posed to the Court as a threshold question of whether matters of national security (including nuclear arsenals) are political and hence beyond the cognizance of the institutional constraints of juridical elaboration and normative guidance. In his view, more generous interpretation of the relevant sources could be given from the Court

³² Nicholas Rostow, “The World Health Organization, the International Court of Justice and Nuclear Weapons”, Yale Journal of International Law, Vol. 20, Issue 1, 1995, <http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1658&context=yjil>, [accessed 8 February 2017].

³³ Jeremy J. Stone, “Less than meets the eye”, Bulletin of Atomic Scientists, Sep/oct 1996, 43-45., <https://books.google.at/books?id=pAsAAAAAMBAJ&pg=PA1&lpg=PA1&dq=jeremy+stone+less+than+meets+the+eye+bulletin&source=bl&ots=3ey9mWbCPH&sig=E6QHAXb04xTFleeiz6NwC91ISTo&hl=en&sa=X&ved=0ahUKEwj68oWUr73UAhWMa1AKHcJjA5QQ6AEIJjAB#v=onepage&q=jeremy%20stone%20less%20than%20meets%20the%20eye%20bulletin&f=false>, [accessed 8 February 2017].

³⁴ Eric David, “The Status of Nuclear Weapons in the Light of the Court’s Opinion of 8 July 1996”, in “International Law, International Court of Justice and Nuclear Weapons”, ed. Laurence Boisson de Chazournes and Philippe Sands (Cambridge: Cambridge University Press, 1999), 209.

³⁵ Winston P. Nagan, “Nuclear arsenals, International Lawyers, and the Challenge of the Millennium”, 24 The Yale Journal of International Law, no. 2 (1999): 532, accessed March 29, 2017, <http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1106&context=yjil>.

whereas Weeramantry's dissent he finds to be a "more realistic picture of the legal character of nuclear weapons". He's conclusion, in Grotian spirit too, states that nuclear weapons cannot possibly be reconciled with the fundamental expectations of the UN Charter and modern international law³⁶.

Weston, on the other hand, finds the Opinion resulting from „ambiguity's consensus", and criticises its contradictories, vagueness and negligence in regard to existing rules of international humanitarian law. However, he explains the ambiguity for the Court being "compelled" to give concessions to both sides, if it wanted to keep its credibility and relevance and avoid the "jurisdictional rollback" that it suffered at the hands of the United States and others following its decision in *Nicaragua* case³⁷. Nevertheless, he assessed the Court's opinion as "tilting in the direction of" unlawfulness of the threat or use nuclear weapons. Another critic of the Court's opinion is Richard Falk who, rightly, holds the opinion to be "repudiating the moral consensus of international society and translating this moral consensus into a political mandate"³⁸.

Mendlovitz's and Datan's critics go that far to pronounce the Court's holding as "non-holding" and support Weeramantry's opinion by stating that the Court's conclusion can only be interpreted as prohibiting nuclear weapons³⁹. Beside following the same tone of its aforementioned contemporaries, Weiss on the other hand, went to criticise NWS for having ignored the advice of the Court and denied its significance, "in word as well as deed" giving as example US that instead of pursuing the negotiations on nuclear disarmament pursued robust modernization of its nuclear arsenal⁴⁰.

³⁶ Winston P. Nagan, "Nuclear arsenals, International Lawyers, and the Challenge of the Millennium", 24 The Yale Journal of International Law, no. 2 (1999): 535, accessed March 29, 2017, <http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1106&context=yjil>.

³⁷ Burns H. Weston, "Nuclear Weapons and the World Court: Ambiguity's Consensus", Transnational Law & Contemporary Problems, Vol. 7: 371-389, (1997), accessed May 11, 2017, <http://heinonline.org/HOL/LandingPage?handle=hein.journals/tlcp7&div=24&id=&page=>.

³⁸ Richard Falk, "The Nuclear Weapons Advisory Opinion and the New Jurisprudence of Global Civil Society", 7 Transnat'l L. & Contemp. Probs.: (Fall, 1977), accessed May 19, 2017, http://heinonline.org/hol/cgi-bin/get_pdf.cgi?handle=hein.journals/tlcp7§ion=22.

³⁹ Saul Mendlovitz and Merav Datan, "Judge Weeramantry's Grotian Quest", 7 Transnational Law & Contemporary Problems, (1997): 417, accessed 11 May 2017, <http://heinonline.org/HOL/LandingPage?handle=hein.journals/tlcp7&div=25&id=&page=>.

⁴⁰ Peter Weiss, "The World Court Tackles Fate of the Earth: An Introduction to the ICJ Advisory opinion on the Legality of the Threat and Use of Nuclear Weapons", 7 Transnational Law & Contemporary Problems, (1997):330, accessed April 3, 2017, <http://heinonline.org/HOL/LandingPage?handle=hein.journals/tlcp7&div=21&id=&page=>, [accessed 2 April 2017].

As the ICJ Advisory Opinion diverted the attention from the discussion on prohibition of nuclear weapons to the state practice known as nuclear deterrence doctrine, and by way of doing so gave it a solid degree of legitimacy, there were many attempts to make such doctrine plausible enough to accept it as useful and worth disregarding the illegality of nuclear weapons *per se*.

As Warnke is arguing, one of the reasons why it is not that easy to “get rid of” nuclear weapons is that, regardless of the fact that in broader public’s mind they are perceived as “lethal, evil devices” they actually do have their “fan club”. Some more extreme strategic thinkers, perceive them as serving the useful purpose in preserving world peace and believe that there are circumstances in which they should and would be used. The others, more moderate, believe that we cannot get rid of them completely and that prevention of nuclear war, for the foreseeable future, will depend upon preserving the nuclear stalemate at the lowest possible level of numbers and risk⁴¹.

Weeramantry’s view is that, logically, without a readiness to use the weapons, deterrence is useless and is therefore illegal as the use itself would be⁴². Francis Boyle on the other hand goes perhaps too far by stating that nuclear deterrence is not only illegal but criminal but does not offer a sufficiently argument reasoning for such a statement⁴³. Moreover, for Falk and Krieger, deterrence was always a very unstable and misrepresented policy which in order to work requires rational leaders and clear communication, requirements which certainly did not envisage risks that terrorism nowadays actively poses⁴⁴. Moran and Lawrence argue that deterrence works better in practice than in theory largely because it is virtually impossible to witness it in ac-

⁴¹ Paul C. Warnke, review of the “Nuclear Weapons and Law”, ed. by Arthur S. Miller and Martin Feinridger, 10 Yale Journal of International Law, no. 1 (1984): 253, accessed April 4, 2017, <http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1322&context=yjil>.

⁴² Dissenting Opinion of judge Weeramantry, appended to the *Advisory Opinion Concerning Legality of the Threat or Use of Nuclear Weapons*, International Court of Justice (ICJ), July 9, 2004, accessed January 26, 2017, <http://www.icj-cij.org/docket/files/95/7521.pdf>.

⁴³ Francis Boyle, “The Criminality of Nuclear Deterrence Today: International Law as Anchoring Ground”, speech delivered at the XVIIIth Conference “Mut zur Ethic”: Direct Democracy, Feldkirch, Austria, September 4, 2010.

⁴⁴ Richard Falk and David Krieger, “The Human Right to a Nuclear Weapon-Free World”, in “At the nuclear precipice. Catastrophe or transformation”, ed. Richard Falk and David Krieger (New York: Palgrave Macmillan, 2008), 5.

⁴⁴ Georg Schwarzenberger, “The legality of nuclear weapons”, (Toronto: Stevens & Sons Limited, 1958), 61.

tion, in line with Lawrence calling the deterrence theory the "international relations theory masquerading as science: too many variables; too few cases"⁴⁵.

Finally, Harvey announces the paradigm shift towards a new nuclear age we are already in and lays down plausible strategic reasons which make the NWS' reluctance towards "codification" of the "nuclear arms control, non-proliferation and disarmament regime (NACD). Another issue at stake is lack of valid and effective alternatives to the nuclear deterrence doctrine"⁴⁶.

1.3. Research Question

The main research question to which this master's thesis aims to provide a comprehensive and constructive answer is:

Is there a legal gap in international law in the prohibition of use or threat to use nuclear weapons?

Moreover, if there is no legal gap and the threat or use nuclear weapons is prohibited under international law, how to explain the manufacture, modernization, stockpiling and deployment currently being undertaken by nuclear weapons states?

The hypothesis aims to claim that there is no legal gap as use or threat to use nuclear weapons, due to its characteristics and effects, is inevitably violating the existing provisions of UN Charter, international law of human rights, environmental law and

⁴⁵ Daniel Moran, "Beyond Deterrence", review of "Deterrence" by Lawrence Freedman (Cambridge MA: Polity Press, 2004) and "Reshaping Rogue States: Preemption, Regime Change, and U.S. Policy toward Iran, Iraq, and North Korea", ed. by Alexander T. J. Lennon and Camille Eiss (Cambridge MA: Polity Press, 2004), 7International Studies Review, No. 2 (June, 2005), accessed May 19, 2017, <https://www.jstor.org/stable/pdf/3699651.pdf?refreqid=excelsior%3A8c72de29e28d74f15df361cab0bf518f>.

⁴⁶ Frank P. Harvey, "The Future of Strategic Stability and Nuclear Deterrence", 58 International Journal, No. 2 (Spring, 2003), accessed May 7 2017, <http://www.jstor.org/stable/pdf/40203844.pdf?refreqid=excelsior%3A60d079fda149706cd5802f88a6a0ab60>.

foremost laws of armed conflict and rules and principles of international humanitarian law.

However, the fact that nuclear weapons are not (yet) explicitly prohibited and the ICJ's reliance on the existing world order still holding on to the nuclear deterrence doctrines were the reasons that allowed and compelled the ICJ to refuse to declare threat or use of nuclear weapons illegal in any circumstance and pronounce a *non liquet* for the first time ever in a case with an abundance of legal sources and factual elements at its disposal.

1.4. Theoretical approach

This master's thesis is based on an interdisciplinary approach, involving international law and international relations theory. The legal analysis in the research commences by relying on a positivist legal approach as the corpus of conventional law sources relevant for answering the research question is quite extensive⁴⁷. However, following the logic whose most prominent proponent was judge Weeramantry, the research question cannot be fundamentally answered without employing the ideas of the Grotian theory of law⁴⁸, governed by the dictates of humanity, morality, ethics and universal principles.

International law and international relations theory, although by common sense and logic indispensably intertwined disciplines⁴⁹, after WW II experienced a vast chasm to the detriment of international law and international legal scholarship⁵⁰. After neither law nor the institutions of the international law had succeeded in averting the horrors of the WW II, realist theory gained on its importance as its preaching that international law rules should stay out of international politics started to seem more

⁴⁷ Kenneth Einar Himma, "Legal Positivism", Internet Encyclopedia of Philosophy, accessed February 28, 2017, <http://www.iep.utm.edu/legalpos/>.

⁴⁸ Benedict Kingsbury, "A Grotian Tradition of Theory and Practice? Grotius, Law and Moral Skepticism in the Thought of Hedley Bull", Duke University School of Law, Vol. 17 (1997), accessed February 28, 2017, http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=5584&context=faculty_scholarship.

⁴⁹ Kenneth W. Abbott, Modern International Relations Theory: A Prospectus for International Lawyers, 14 Yale Journal of Int'l Law, (1989): 335, accessed March 26, 2017, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1402758.

⁵⁰ Anne-Marie Slaughter Burley, "International law and international relations theory: a dual agenda", *American Journal of International Law* 87: 2, April 1993, pp. 205–39 at p. 205, <http://www.jstor.org/stable/pdf/2203817.pdf>, [accessed 26 March 2017]

and more plausible⁵¹. Therefore, the last part of this study will have to resort to realism in order to explain how the nuclear deterrence doctrine undermines the *opinio iuris* and the authority of international law when it comes to nuclear weapons legality and how it explains the current status of threats by the world's existing nuclear arsenals.⁵²

1.5. Structure and methodology

The aim of this research is to analyse the historical development and current legal status of the threat or use of nuclear weapons under existing corpus of treaty and customary law, principles and rules of international law, relevant international judicial decisions and the legal scholarship.

In order to do so, the study first engages in defining the legal gap (*lacunae*) within the purview of legal theory and secondly, determines its stance on the existence of *non liquet* situations in international law and the ICJ jurisprudence. The second part of the thesis deals with the description of the capabilities, effects and consequences that nuclear weapons inflict and which are necessary to note before approaching the assessment of their legality. Chapter four deals with the legal analysis of all the sources of international law that might directly or indirectly be relevant for the assessment of the status of threat or use of nuclear weapons. It commences with the early instruments regulating armed conflicts and codifying existing customary law, through the UN Charter provisions and nuclear disarmament law establishing different regional and geographical nuclear weapons-free zones (NWFZ). It compares the status of threat or use of nuclear weapons to the legal status accorded to the use and threat to use of other two kinds of weapons of mass destruction – biological weapons by the Biological Weapons Convention (BWC) and chemical weapons by the Chemical Weapons Convention (CWC). It follows analysis of the relevant provisions of the non-proliferation and arms control treaties such as PTBT, CTBT and the

⁵¹ Chandra Lekha Sriram, "International law, International Relations theory and post-atrocity justice: towards a genuine dialogue", *International Affairs (Royal Institute of International Affairs 1944-)* Vol. 82, No. 3 (May, 2006), pp. 467-478, <https://www.jstor.org/stable/pdf/3874262.pdf>, [accessed 26 March 2017].

⁵² Chandra Lekha Sriram, "International law, International Relations theory and post-atrocity justice: towards a genuine dialogue", *International Affairs (Royal Institute of International Affairs 1944-)* Vol. 82, No. 3 (May, 2006), pp. 467-478, <https://www.jstor.org/stable/pdf/3874262.pdf>, [accessed 26 March 2017].

NPT. Next subchapter turns its attention to the laws of human rights analysis such as the Universal Declaration of Human Rights and the Covenant on Civil and Political Rights. Furthermore, the analysis of the international law protection of the environment involves some of the instruments of laws of armed conflict such as the Additional Protocol I to the Geneva Convention, beside the Stockholm and Rio Declaration. Finally, after touching upon the legal effect the UN General Assembly and Security Council resolutions may have in the sphere governing the threat or use of nuclear weapons, fair part of the forth chapter is dedicated to the analysis of the landmark ICJ's Advisory Opinion on Nuclear Weapons, Court's ambiguous conclusions and relevant dissenting and other opinions.

In chapter five, theory of nuclear deterrence and states' nuclear doctrines and security assurances are to be involved in the debate on tendencies of nuclear weapons prohibition on one hand, and the inherent right of states on self-defence and the concept of nuclear deterrence on the other.

Finally, the last chapter will shortly touch upon the developments that came out of the long-time neglected obligation from Article VI of the NPT on conclusion of a treaty for complete nuclear disarmament. Negotiations on the treaty explicitly banning nuclear weapons are ongoing at the date of the thesis' submission, giving rise to optimism that one day in not that far future, a nuclear weapon – free world ruled by the international laws and not states' interests is going to become a reality.

2. Concept of lacunae and permissibility of non liquet (in international law)

The question of what constitutes a legal gap or lacuna and whether international tribunals should be allowed to declare *non liquet* when faced with such situation has been a subject of extensive debate among practitioners and great theoreticians of public international law for a long time⁵³.

⁵³Kiyotaka Morita, "The issue of lacunae in international law and non-liquet revisited", Hitotsubashi journal of law and politics, 45: 33-51 (February, 2007), <http://hermes-ir.lib.hit-u.ac.jp/rs/bitstream/10086/28304/1/HJlaw0450000330.pdf>, [accessed 26 February 2017].

2.1. (None) existence of gaps in the law

The issue of *lacuna* has drawn quite some attention of jurists as the law, understood as an expression of lawmakers will, tends to claim to be complete, meaning to be able to offer the judge a solution for any concrete case⁵⁴. As mere definition cannot suffice the purpose of this analysis, it is necessary to employ findings of legal theory and legal philosophy⁵⁵.

Among those accepting the existence of *lacunas*, two main conceptions can be identified: those which assimilate the *lacuna* of law with the absence of legal norm and those which assimilate the *lacuna* with the omission and insufficiency of a norm. Within conceptions which assimilate the *lacuna* of law with the absence of legal norm, Norberto Bobbio defines it as a situation when “in a given legal system there is a missing rule which the judge may invoke in case he has to solve a controversy deduced to his judgment”. On the other hand, Alchourron’s⁵⁶ definition of *lacuna* as a situation in which “there is no legal solution for a generic case” could satisfy the needs of legal reality as it reflects the fact that the infinity of the reality is irrelevant for *lacuna* and the law-maker should not and cannot ever foresee all the concrete cases to be regulated⁵⁷. By way of concluding, in order to qualify as *lacuna*, a situation needs to meet the following conditions: the existence of a normative legal system as a reference, the absence of legal norm and the existence of a category of concrete cases which need legal regulation⁵⁸.

2.2. (Im)permissibility of *non liquet* in international law

⁵⁴ Otilia Miclosina, “Defining gap in law”, <http://www.upm.ro/proiecte/EEE/Conferences/papers/S1A12.pdf>, [accessed 26 April 2017].

⁵⁵ Marijan Pavcnik, “Questioning the nature of gaps in the law”, *i-lex. Scienze Giuridiche, Scienze Cognitive e Intelligenza artificiale*, no.16 July 2012, <http://www.i-lex.it/articles/volume7/issue16/pavcnik.pdf>, [accessed 2 April 2017].

⁵⁶ Carlos Alchourron, Eugenio Bulygin, “Sistemi normative. Introduzione alla metodologia della scienza giuridica”, (Torino: G. Giappichelli Editore, 2005), 15.

⁵⁷ Otilia Miclosina, “Defining gap in law”, <http://www.upm.ro/proiecte/EEE/Conferences/papers/S1A12.pdf>, [accessed 26 April 2017].

⁵⁸ *Ibid.*

Accepting the fact that the substantive law is inevitably imperfect, the question arises, what a court discovering a gap should do, and whether is it allowed to render a decision of *non liquet*. Contrary to the national legal systems, at the international level, there is no such express provision concerning the admissibility of *non liquet* and the extent of the competence of international judicial organs to remedy the *lacunae*⁵⁹.

The argument coming from the doctrine of the material completeness of international law negates the possibility of the incompleteness of law by stating that state's sovereignty cannot be limited unless the state voluntarily agrees to such limitation. This concept, summarized as "whatever is not prohibited is permitted", or in Kelsen's terms, "where there is no duty there is freedom"⁶⁰ and known as the residual negative principle, gained its biggest support in jurisprudence through *Lotus* case. There the Court stated that "restrictions upon state cannot, therefore, be presumed" and in the absence of prohibitory rules, "every state remains free to adopt the principles which it regards as best and most suitable."⁶¹ It is logical and clear that such a stance would eventually result in an international legal disorder where each state would adopt principles which suit its own interests and which are not necessarily in line with others' interests resulting therefore in conflicts⁶².

In practice, until the 1996 Advisory opinion on nuclear weapons, the Court has always succeeded to detect lacuna and avoid pronouncing *non liquet*. In some cases, it resorted to the necessity of agreement between the parties which should be based simply on their good will, for political convenience, in equitable principles or using analogy and equity. As it is going to be argued later in this study more in detail, the ICJ's advisory opinion on nuclear weapons is by many scholars and legal practitioners considered to be the first instance of a non liquet declared by an international court in the sense of a legal question not being answerable by recourse to existing

⁵⁹ Prosper Weil, "The Court Cannot Conclude Definitely...Non Liqueur Revisited", Columbia Journal of Transnational Law, 36:109 (1997), 109-119.

⁶⁰ Kiyotaka Morita, "The issue of lacunae in international law and non-liqueur revisited", Hitotsubashi journal of law and politics, 45: 33-51 (February, 2007), <http://hermes-ir.lib.hit-u.ac.jp/rs/bitstream/10086/28304/1/HJlaw0450000330.pdf>, [accessed 26 February 2017].

⁶¹ Mariano J. Aznar-Gomez, "The 1996 Nuclear Weapons Advisory Opinion and Non Liqueur in International Law", *The International and Comparative Law Quarterly*, Vol.48, No1(January 1999), <http://www.jstor.org/stable/pdf/761619.pdf>, [accessed 28 April 2017].

⁶² Prosper Weil, "The Court Cannot Conclude Definitely...Non Liqueur Revisited", Columbia Journal of Transnational Law, 36:109 (1997), 109-119.

international law⁶³. For these reasons, it is a prevailing international law view that declarations of *non liquet* or their equivalent “are to be avoided even though they appear not to be expressly and explicitly prohibited”⁶⁴

Nevertheless, it has been argued that a certain difference should be noted between the contentious and advisory proceedings when it comes to the admissibility of *non liquet* in international law. The purpose of the advisory function is not to settle-at least directly-disputes between states but to offer legal advice to the requestors of the opinion. According to some scholars, duty to answer does not necessarily imply the duty to resolve the question referred to it. However, to answer that on a certain issue the law has no answer leaves open the question of practical consequences of such an answer. Moreover, it leaves open the question of the international tribunal’s relevance and necessity⁶⁵.

3. Capabilities and effects of nuclear weapons

The destructive capacity of nuclear weapons, capacity to cause untold human suffering, as well as their ability to cause damage to generations to come, have often been called unique⁶⁶. They have so far been used only twice, on the Japanese cities of Hiroshima and Nagasaki in August 1945 but the evidence from these events, as well as atmospheric nuclear testing and nuclear power accidents, made up the basis of human’s knowledge of their effects.⁶⁷ The atomic bomb dropped by the US Air Force on the city of Hiroshima on August 6, 1945 destroyed four square miles of Hiroshima and caused more than 80,000 deaths or about one-quarter of the population. On August 9, 1945, another atomic bomb was dropped on Nagasaki, destroying one and

⁶³ Ulrich Fastenrath and Franziska Knur, “Non liquet”, March 2016, *International Law*, <http://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0130.xml> [accessed 25 February 2017].

⁶⁴ Burns H. Weston, “Nuclear Weapons and the World Court: Ambiguity’s Consensus”, *Transnational Law & Contemporary Problems*, Vol. 7: 391, 1997, <http://heinonline.org/HOL/LandingPage?handle=hein.journals/tlcp7&div=24&id=&page=>, [accessed 11 May 2017].

⁶⁵ Prosper Weil, “The Court Cannot Conclude Definitely...Non Liquet Revisited”, *Columbia Journal of Transnational Law*, 36:109 (1997), 118-119.

⁶⁶ *Ibid.*

⁶⁷ “The Effects of nuclear weapons”, Campaign for Nuclear Disarmament, <http://www.cnduk.org/campaigns/global-abolition/effects-of-nuclear-weapons>, [accessed 28 April 2017].

one-half square miles of Nagasaki and causing more than 40,000 deaths or about one-sixth of the population⁶⁸.

Nuclear weapons produce both immediate and delayed destructive effects. Whereas immediate effects such as blast, thermal radiation, and prompt ionizing radiation inflict destruction within seconds or minutes of a nuclear detonation, the delayed effects such as radioactive fallout and other environmental effects cause damage over an extensive period of time that ranges from hours to years⁶⁹.

The health effects of nuclear explosion consist of direct effects, such as injuries from the explosions itself and the resulting radiation and indirect ones, including blast damage⁷⁰. The primary casualty effects of nuclear weapons include burns, blasts, ionizing radiation and thermal radiation⁷¹. The immediate health consequences of the blast effects include damage to lungs, stomach, intestines and internal haemorrhage. However, at Nagasaki and Hiroshima, the direct effect was not a significant primary cause of fatality as most of those who were near enough to the explosion to be affected in that manner were mostly burned or crushed to death. In fact, the indirect blast was proven to be more fatal, as people were injured by flying objects or crushed or buried.” Human beings were thrown violently against fixed structures, glass fragments penetrated to an inch beneath the skin and the light summer clothing offered little protection. A large number of casualties were caused by flash burns from instantaneous thermal radiation. Most critical was radiation from gamma rays, which affect people in the same way as over-exposure to X-rays, inflicting a wide range of detrimental consequences to health ultimately causing death to nearly everyone who was fully exposed to them to a distance of half a mile from the centre of damage. Of the immediate effects on human reproduction, the most striking were those on pregnancy, resulting in miscarriages or prematurely born infants who soon

⁶⁸ Jill M. Sheldon, “Nuclear Weapons and the Laws of War: Does Customary International Law Prohibit the use of Nuclear Weapons in all Circumstance?”, *Fordham International Law Journal*, Volume 20, Issue 1, 1996, <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1514&context=ilj>, [accessed 8 February 2017].

⁶⁹ “The Energy from a Nuclear Weapon”, *atomicarchive.com*, <http://www.atomicarchive.com/Effects/effects1.shtml>, [accessed 10 April 2017].

⁷⁰ Tom Reinken, “Attack on Hiroshima; Dropping the Bomb”, *Los Angeles Times*, August 1995, http://articles.latimes.com/1995-08-06/news/mn-32185_1_atomic-bomb/2, [accessed 28 April 2017].

⁷¹ Jill M. Sheldon, “Nuclear Weapons and the Laws of War: Does Customary International Law Prohibit the use of Nuclear Weapons in all Circumstance?”, *Fordham International Law Journal*, Volume 20, Issue 1, 1996, <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1514&context=ilj>, [accessed 8 February 2017].

died, at distances to over one mile from the centre of damages⁷². The long-term effects of radiation include a variety of cancers, especially lymphomas and thyroid cancer, as well as malformations of children born to mothers exposed to radiation⁷³. The 1986 Chernobyl accident provides more recent data on the health effects of nuclear weapons and other long-term illnesses inflicted by the nuclear explosions including various blood disorders such as anemia, cataracts, and leukemia, increased infant mortality rate, shorter life expectancy, a higher infertility rate and genetic mutations⁷⁴. According to the official press release of the United States Atomic Energy Commission of February 1955 in regard to the effects of hydrogen bomb tests in Pacific, the longevity of contamination from radio-strontium ranges up to thirty years⁷⁵.

Catastrophic effects of nuclear weapons are no less detrimental to the environment. Explosions produce radiation sickness in animals and genetic effects in plants. For instance, a considerable amounts of fish landed in Japan for eight months after the explosion was condemned as unfit for human consumption.⁷⁶ In addition, large amounts of toxic substances cause widespread pollution and large amounts of nitrogen oxides produced by the nuclear explosions' fireballs cause a significant depletion of the ozone layer which depending on the total yield of nuclear explosions and the time of the year varies from 10 to 50 per cent⁷⁷.

More recent studies have shown that" nuclear weapons pose the single biggest threat to the Earth's environment" and that even a small-scale nuclear war could devastate the world's climate and ecosystems, causing damage that would last for over a decade". Moreover, scientists estimated that detonating just 0.03% of the world's arsenal would "throw enough soot in the atmosphere to create climactic anomalies unprecedented in human history. Global temperatures would crash and

⁷² Nagendra Singh, "Nuclear Weapons and international Law", (London, UK: Stevens and Sons Limited, 1959), 21-25.

⁷³ "What's the damage?", Greenpeace, April 26 2006, <http://www.greenpeace.org/international/en/campaigns/peace/abolish-nuclear-weapons/the-damage/>, [accessed 7 April 2017].

⁷⁴ "Inherited damage is found in Chernobyl area Children", N.Y. Times, April 1996, <http://www.nytimes.com/1996/04/25/world/inherited-damage-is-found-in-chernobyl-area-children.html>, [accessed 7 April 2017].

⁷⁵ Nagendra Singh and Edward McWhinney, "Nuclear Weapons and Contemporary International Law", (London: Martinus Nijhoff Publishers, 1989), 199.

⁷⁶ Nagendra Singh, "Nuclear Weapons and international Law", (London, UK: Stevens and Sons Limited, 1959), 29.

⁷⁷ Erik Koppe, "The Use of Nuclear Weapons and the Protection of the Environment during International Armed conflict, (Oxford and Portland, Oregon: HART Publishing, 2008), 103.

the world would be unable to grow crops for more than five years after a conflict. In addition, the ozone layer would be depleted by 40% over many inhabited areas and up to 70% at the poles”⁷⁸. Smoke layer would heat the upper atmosphere, and cause massive destruction of protective stratospheric ozone, while simultaneously blocking warming sunlight and creating Ice Age weather conditions on Earth⁷⁹.

Having said that, it goes without saying that the social and economic consequences of used nuclear weapons in a highly interconnected world would be devastating⁸⁰. “Severe physical damage from blast, fire, and radiation followed by the collapse of food production and distribution and possibly even water supplies due to contamination with the radiation would confront masses with the prospect of widespread starvation and diseases”⁸¹. Consequently, devastating consequences that would have on infrastructure, development, social cohesion and the global economy are virtually unmeasurable.

3.1. Nuclear weapons’ power today

Nuclear weapons that have been developed since Hiroshima and Nagasaki are over 3,000 times more powerful than the Hiroshima bomb was⁸². More precisely, in terms of sheer destructive capability among the most powerful nuclear weapons nowadays are the B83 nuclear bomb developed by United States with a maximum yield of 1.2 megatons (1,200 kilotons)⁸³ or 80 times as powerful as bomb dropped on Hiroshima⁸⁴. Furthermore, the history of nuclear testing remembers even much more pow-

⁷⁸ Alok Jha, “Climate threat from nuclear bombs”, *The Guardian*, December 12 2006, <https://www.theguardian.com/environment/2006/dec/12/nuclearindustry.climatechange>, [accessed 10 April 2017].

⁷⁹ Steven Starr, “Consequences of nuclear weapons”, http://www.nuclearfiles.org/menu/key-issues/nuclear-weapons/issues/effects/PDFs/2010_10_25_starr_1stcomm.pdf, [accessed 10 April 2017].

⁸⁰ Douglas Roche, “Illegal in any circumstances whatsoever,” in “At the nuclear precipice. Catastrophe or transformation”, ed. Richard Falk and David Krieger (New York: Palgrave Macmillan, 2008), xvi.

⁸¹ Ibid.

⁸² Jay Bennett, Today's Nukes Are Thousands of Times More Powerful Than WWII A-Bombs, October 10, 2016, Popular Mechanics, <http://www.popularmechanics.com/military/a23306/nuclear-bombs-powerful-today/>, [accessed 10 May 2017].

⁸³ Zachary Keck, “The Most Dangerous Nuclear Weapon in America’s Arsenal”, July 28, 2015, The National Interest, <http://nationalinterest.org/blog/the-buzz/the-most-dangerous-nuclear-weapon-americas-arsenal-13433>, [accessed 10 May 2017].

⁸⁴ Jamie Seidel, “Russian media boasts of its new Satan II ICBM missiles’ devastating power”, May 11, 2016, News.com.au, <http://www.news.com.au/technology/russian-media-boasts-of-its-new-satan-ii-icbm-missiles-devastating-power/news-story/dcfb48956097210846fc064fbbecf86f>, [accessed 10 May 2017].

erful devices such as the largest nuclear weapon ever detonated – Soviet Union’s 50,000 kilotons thermonuclear Tsar bomb⁸⁵. Therefore, when assessing the legality of nuclear weapons today one should measure it not only bearing in mind the effects that nuclear weapons inflicted once they were used in World War II but that those effects can be multiplied by 3,333 times.

4. Legality of the threat or use of nuclear weapons under international law

4.1. International Humanitarian Law

The laws of war or law of armed conflict, much older than nuclear weapons themselves, have always aimed to balance the military necessity with humanitarian considerations. The international community has, therefore, developed international humanitarian law to guard against the “excesses” of the use of weapons in armed conflict⁸⁶. In re-emerging nuclear age we are currently facing, the importance of the law of war cannot be over-emphasized although it often seems to be under-respected if not neglected. One needs to bear in mind that until the end of the nineteenth century the law of war completely rested on the primacy of customary international law.⁸⁷

The paramount importance lays in few rules of humanitarian law that directly apply to potential use of nuclear weapons such as the rule of distinction, the rule of proportionality, the rule of “precautions in attack”, the prohibition on means of warfare of a nature to cause superfluous injury and unnecessary suffering and the protection of the natural environment.⁸⁸

⁸⁵ Mark Wilson, *Ingeniously Charting The Horrifying Power Of Today’s Nuclear Bombs*, April 20, 2012, CO. Design, <https://www.fastcodesign.com/1669575/ingeniously-charting-the-horrifying-power-of-todays-nuclear-bombs>, [accessed 10 May 2017].

⁸⁶ Jacob Werksman and Ruth Khalatschi, “Nuclear weapons and ius cogens. Peremptory norms and justice pre-empted?”, in “International Law, International Court of Justice and Nuclear Weapons”, ed. Laurence Boisson de Chazournes and Philippe Sands (Cambridge: Cambridge University Press, 1999), 192.

⁸⁷ Richard Falk, “Non-Proliferation Treaty Illusions and International Lawlessness”, in “At the nuclear precipice. Catastrophe or transformation”, ed. Richard Falk and David Krieger (New York: Palgrave Macmillan, 2008), 41.

⁸⁸ Gro Nystuen and Kjølsv Egeland, „A ‘Legal Gap’? Nuclear Weapons Under International Law”, Arms Control Association (March 2016), https://www.armscontrol.org/ACT/2016_03/Features/A-Legal-Gap-Nuclear-Weapons-Under-International-Law, [accessed 26 January 2017].

4.1.1. Early initiatives

4.1.1.1. St. Petersburg Declaration 1868

The first international instrument to declare a prohibition on the use of a specific weapon in armed conflict was the St. Petersburg Declaration.⁸⁹ The contracting parties also sought to establish a consensus on when the necessities of war should yield to humanitarian interests: “While expressly banning a means of war, the Declaration proclaimed that certain humanitarian principles apply to conduct during warfare. For the contracting parties the only legitimate military objective was the weakening of enemy forces and by agreeing that a belligerent state could attack only the enemy’s military forces, contracting parties acknowledged a distinction between combatants and non-combatants⁹⁰. Accordingly, St. Petersburg Declaration confirmed the customary rule according to which the use of arms, projectiles, and material of a nature to cause unnecessary suffering is prohibited⁹¹.”

4.1.1.2. The 1899 and 1907 Hague Conferences

The two conferences were held at The Hague in 1899 and 1907, jointly constituting the “International Peace Conferences” and they represented the first multilateral approach to the general problems of modern warfare and, after the St. Petersburg Declaration, the next phase in the codification of the laws of war. The 1899 Hague conference participants formally adopted three conventions which dealt with the peaceful settlement of disputes, the laws, and customs of land warfare and maritime war-

⁸⁹ Jill M. Sheldon, “Nuclear Weapons and the Laws of War: Does Customary International Law Prohibit the use of Nuclear Weapons in all Circumstance?”, *Fordham International Law Journal*, Volume 20, Issue 1, 1996, <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1514&context=ilj>, [accessed 8 February 2017].

⁹⁰ *Ibid.*

⁹¹ Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight. Saint Petersburg, 29 November / 11 December 1868, International Committee of the Red Cross, <https://ihl-databases.icrc.org/ihl/INTRO/130?OpenDocument>, [accessed 11 April 2017].

fare. They also passed the declarations limiting the use of specific weapons such as dum-dum bullets, asphyxiating gases and balloons projectiles and explosives⁹².

The Conference was resumed in 1907 and it revised the three conventions and one declaration from 1899 in addition to adopting ten new conventions. Although failing to make progress on disarmament negotiations, the development of the humanitarian principles was addressed. Moreover, the parties contracting to both 1899 and 1907 Hague Conferences drafted regulations by which they established principles of customary international law explicitly applicable to land warfare, such as the basic principle that belligerents have limited right to injure the enemy or the principle forbidding aggressors to cause unnecessary suffering by employing arms, projectiles or materials calculated especially to cause such suffering. Most of the provisions of these regulations are widely argued to be embodying rules of customary international law and as such also binding on states which are not formally parties to them⁹³. Moreover, Article 23.(a) of its Regulations⁹⁴, condemning the use of poison and poisonous weapons in war should be regarded as absolute⁹⁵.

In the light of the provisions cited above, and noting the earlier described effects of nuclear weapons, it can be concluded that the use of H-bombs of 20-megaton capacity, means of injuring the enemy would clearly be converted to his complete destruction. Moreover, its effects cannot be limited nor contained “in space or in time”. Furthermore, all the suffering that these sort of weapons, falling under general term “arms, projectiles or material...”, inflict not only to current but to generations to come

⁹² Jill M. Sheldon, “Nuclear Weapons and the Laws of War: Does Customary International Law Prohibit the use of Nuclear Weapons in all Circumstance?”, *Fordham International Law Journal*, Volume 20, Issue 1, 1996, <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1514&context=ilj>, [accessed 8 February 2017].

⁹³ Jill M. Sheldon, “Nuclear Weapons and the Laws of War: Does Customary International Law Prohibit the use of Nuclear Weapons in all Circumstance?”, *Fordham International Law Journal*, Volume 20, Issue 1, 1996, <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1514&context=ilj>, [accessed 8 February 2017].

⁹⁴ International Conferences (The Hague), *Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land*, 18 October 1907, Art. 23 (a), <https://ihl-databases.icrc.org/ihl/WebART/195-200033?OpenDocument>, [accessed 2 March 2017].

⁹⁵ Erik Castren, “The Illegality of Nuclear Weapons”, *Toledo Law Review*: 89, 1971, <http://heinonline.org/HOL/LandingPage?handle=hein.journals/utol3&div=13&id=&page=>, [accessed 14 February 2017].

can in no case be argued to be “necessary”⁹⁶. Therefore, any use of nuclear weapons would severely breach the above cited provisions of the Hague Conventions.⁹⁷

4.1.1.3. Geneva Gas Protocol 1925

In June 1925, the International Conference on the Control of the International Trade in Arms, Munitions and Implements was held in Geneva. At the conference, thirty-eight nations signed the Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare. Taking into consideration both immediate and residual poisonous effects that nuclear radiation inflicts as an inseparable consequence of fission and fusion bombs, it is little in doubt that its blast effects are not covered by the prohibition of the use of poisons⁹⁸. “If the radiation and fall-out effects of nuclear weapons can be likened to poison, all the more can they be likened to poison gas which is but an even more closely analogous species of the same genus. Prohibitions of nuclear weapons, equally as prohibitions of chemical and bacteriological warfare contained in the Gas Protocol must be taken to be merely declaratory of international customary law and equally binding on all States. It then becomes irrelevant whether any particular State is a party to the Geneva Protocol of 1925.”⁹⁹ Beside, falling under the scope of the provisions prohibiting poisonous and other gases, use of nuclear weapons should be deemed as violating the prohibition of using “analogous liquids, materials or devices”¹⁰⁰

4.1.1.4. Geneva conventions 1949

In the aftermath of the World War II, under the auspices of International Committee of the Red Cross at a diplomatic conference held in Geneva in 1949, four conven-

⁹⁶ Nagendra Singh and Edward McWhinney, “Nuclear Weapons and Contemporary International Law”, (London: Martinus Nijhoff Publishers, 1989), 115-116.

⁹⁷ David M. Corwin, “The Legality of Nuclear Arms Under International Law”, Dickinson Journal of International Law, Vol. 5 No. 2, 1987, Penn State International Review, accessed February 14, 2017, <http://elibrary.law.psu.edu/cgi/viewcontent.cgi?article=1057&context=psilr>.

⁹⁸ Nagendra Singh and Edward McWhinney, “Nuclear Weapons and Contemporary International Law”, (London: Martinus Nijhoff Publishers, 1989), 124-126.

⁹⁹ Georg Schwarzenberger, “The legality of nuclear weapons”, (Toronto: Stevens & Sons Limited, 1958), 27-28,38.

¹⁰⁰ Julius Stone, “Legal Controls of International Conflict”, (New York: Rinehart, 1954), 343.

tions for the protection of the wounded, sick and civilians were adopted. The first three conventions reaffirmed earlier humanitarian principles providing protections for wounded, sick or shipwrecked combatants, for those tending to wounded, sick or shipwrecked combatants and for prisoners of war. The 1949 Geneva Convention IV established protections for civilians as well as combatants¹⁰¹. The incompatibility of nuclear weapons with the fundamental principle of the four Geneva Conventions can be deducted from their main objective – “disinterested aid given without discrimination to all victims of war who on account of their wounds, capture or shipwreck cease to be enemies but become suffering and defenceless human beings”. Lack of preamble to all the four Conventions is due to them being inspired by the eternal principles of the law which are the foundation and the safeguard of civilization.” The nature of protection and status granted to certain categories of personnel by the four Geneva Conventions of 1949 is such as to conflict with the use of thermonuclear weapons because of the inevitable difficulty or impossibility of restricting their devastating effect to legally permissible objects of destruction. Moreover, “grave breaches” laid down in Geneva Convention I as those “committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, ..., wilfully causing great suffering or serious injury to body or health and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly” are summarizing fundamental effects that nuclear weapons inevitably induce and therefore flagrantly breach its provisions, objectives, and principles¹⁰².

4.1.1.5. Additional Protocols I and II of 1977 to the Geneva Conventions 1949

The evolution of the warfare during World War II prompted the international community to revise the laws of war as they, contrary to the military reality, were not advanced since the 1907 Hague conference and the 1925 Geneva Gas Protocol. New forms of armed conflict such as guerrilla warfare, wars for national liberation and

¹⁰¹ Jill M. Sheldon, “Nuclear Weapons and the Laws of War: Does Customary International Law Prohibit the use of Nuclear Weapons in all Circumstance?”, *Fordham International Law Journal*, Volume 20, Issue 1, 1996, <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1514&context=ilj>, [accessed 8 February 2017].

¹⁰² Nagendra Singh and Edward McWhinney, “Nuclear Weapons and Contemporary International Law”, (London: Martinus Nijhoff Publishers, 1989), 151-174.

other non-international disputes started to rapidly develop resulting in civilians gradually losing protections due to the means and methods of warfare which had outgrown the protections provided for in the pre-1950's agreements and conventions. In order to extend the protection, International Committee of the Red Cross convened a conference in Geneva where Geneva Conventions were supplemented with two protocols. 1977 Geneva Protocol I expanded protection for civilians by forbidding belligerents to consider civilians as objects of attack and by prohibiting any act or threat primarily intended to spread terror among a civilian population¹⁰³. In addition, Article 40 prohibits "to order that there shall be no survivors, to threaten an adversary therewith or to conduct hostilities on this basis". Furthermore, under fundamental guarantees of the para.2. of Article 75, a list of acts which are and shall remain prohibited "at any time and in any place whatsoever, whether committed by civilian or by military agents", besides violence to the life, health or physical or mental well-being of persons such as murder, torture, mutilations, collective punishments and others, includes the "threat to commit any of the foregoing acts"¹⁰⁴. In the same words, Additional Protocol II assures the same fundamental guarantees in its Article 4., as well as provides for the protection of the civilian population, including the prohibition of "acts or threats of violence primary purpose of which is to spread terror among the civilian population (Article 13.2.)"¹⁰⁵. As an important novelty, Additional Protocol I also banned belligerents from considering civilian objects as objects of attack or reprisal and it further developed the law on reprisals by prohibiting the reprisals against the natural environment¹⁰⁶.

¹⁰³ International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3, Art. 51, https://www.icrc.org/eng/assets/files/other/icrc_002_0321.pdf, [accessed 8 February 2017].

¹⁰⁴ International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3, Art. 75. (2), https://www.icrc.org/eng/assets/files/other/icrc_002_0321.pdf, [accessed 8 February 2017].

¹⁰⁵ International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977, 1125 UNTS 609, <https://treaties.un.org/doc/publication/unts/volume%201125/volume-1125-i-17513-english.pdf>, [accessed 8 February 2017].

¹⁰⁶ International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3, Art. 35. (3), https://www.icrc.org/eng/assets/files/other/icrc_002_0321.pdf, [accessed 8 February 2017].

Finally, it codified one of the humanitarian principles most relevant for the prohibition of use or threat to use nuclear weapons, principle prohibiting indiscriminate attacks including attacks which would strike military targets, civilians or civilian objects without distinction¹⁰⁷. Explicit inclusion of “threat” in its provisions greatly contributes to successful legal reasoning that the threat itself is prohibited not only by mere analogy - employing the so-called “Brownlie Formula” (“if the promise is to resort to force in conditions in which no justification for the use of force exists, the threat is itself illegal¹⁰⁸”), but via an established rule of international law of armed conflicts.

4.1.2. Article 2(4) and 51 of the UN Charter

The UN Charter fairly contributed to the development of the laws of war through its prohibition of the threat or use of force and its Article 2(4) and 51 are considered to be the core of the contemporary *jus ad bellum*, beside customary international law¹⁰⁹. In that regard, it has to be noted that the allowance of the use of force in cases of self-defence in Article 51 is, no matter how often argued the contrary, a qualified right. As it is going to be argued later in this work, although used by the International Court of Justice in its Advisory opinion as a pretext to declare the possibility of very limited but still existing possibility of legal use or threat to use nuclear weapons, it is the same article that the court used in *Military and Paramilitary Activities* case to state that customary international law principles of necessity and proportionality apply to responses by use of force in self-defence¹¹⁰. These requirements provide that the use of force must be a proportionate and necessary response to an armed attack¹¹¹, therefore reiterating the principles and rules of international humanitarian law

¹⁰⁷ Jill M. Sheldon, “Nuclear Weapons and the Laws of War: Does Customary International Law Prohibit the use of Nuclear Weapons in all Circumstance?”, *Fordham International Law Journal*, Volume 20, Issue 1, 1996, <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1514&context=ilj>, [accessed 8 February 2017].

¹⁰⁸ Ian Brownlie, “International Law and the Use of Force by States”, (Oxford: Clarendon Press, 1963), p.364.

¹⁰⁹ Jasmine Moussa, “Nuclear weapons and the separation of *jus ad bellum* and *jus in bello*”, in “Nuclear weapons under international law”, ed. Gro Nyustén, Stuart Casey-Maslen and Annie Golden Bersagel, (Cambridge: Cambridge University Press, 2014), 65.

¹¹⁰ “Military and paramilitary activities”, (*Nicaragua v. United States*), 1986, International Court of Justice, <http://www.icj-cij.org/docket/?sum=367&p1=3&p2=3&case=70&p3=5>, [accessed 24 April 2017].

¹¹¹ Jill M. Sheldon, “Nuclear Weapons and the Laws of War: Does Customary International Law Prohibit the use of Nuclear Weapons in all Circumstance?”, *Fordham International Law Journal*, Volume 20, Issue 1, 1996, <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1514&context=ilj>, [accessed 8 February 2017].

and laws of war under which is virtually impossible to argue that the use of nuclear weapons can be deemed legal.

4.1.3. International customary law

International customary law rests in natural law and it derives authority from the ethical teachings of the great world religions. Until the twentieth century, governments used the rules of international customary law for providing a legal framework for inter-state relations. The relevance of international customary law extends to new sorts of weapons and tactics that have not been explicitly regulated but are nevertheless subjected to general principles governing the behaviours of states in wartime. Martens clause that has been inserted in various treaties including the four Geneva Conventions of 1949 underscored this understanding. The preamble of these treaties states that until a complete code of the laws of war has been issued, “the inhabitants and belligerents remain under the protection of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of public conscience¹¹².” And such an assertion unambiguously embeds all the previously described principles of just war as applicable to the conduct of war, which prohibit indiscriminate, disproportionate, and inhumane weapons and tactics, even in the case of a military justification for the conflict.¹¹³

4.1.4. Status of use or threat to use nuclear weapons under international humanitarian law

Noting the previously analysed effects and consequences that nuclear weapons inflict, there is no valid argument for claiming that these weapons are legally permissible until an explicit treaty is concluded¹¹⁴. Regardless of objecting states, the ab-

¹¹² Gro Nystuen and Kjølvi Egeland, „A ‘Legal Gap’? Nuclear Weapons Under International Law”, March 2016, Arms Control Association, accessed January 12, 2017, https://www.armscontrol.org/ACT/2016_03/Features/A-Legal-Gap-Nuclear-Weapons-Under-International-Law.

¹¹³ Richard Falk, “Non-Proliferation Treaty Illusions and International Lawlessness”, in “At the nuclear precipice. Catastrophe or transformation”, ed. Richard Falk and David Krieger (New York: Palgrave Macmillan, 2008), 41-42.

¹¹⁴ Dissenting Opinion of judge Weeramantry, appended to the *Advisory Opinion Concerning Legality of the Threat or Use of Nuclear Weapons*, International Court of Justice (ICJ), July 9, 2004, 429-555, accessed January 26, 2017, <http://www.icj-cij.org/docket/files/95/7521.pdf>.

sence of a treaty does not mean that nuclear weapons are unregulated by international law¹¹⁵ as there is a universal acceptance of international humanitarian law principles. Principles of distinction and distinction cannot possibly ever be met as nuclear weapons are simply too amazing, powerful and gawky to distinguish between military and civilian objects. Any use of nuclear weapons “may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated¹¹⁶.” Even those weapons with fairly low yields are capable of harming non-combatants (including civilians and neutral parties) virtually inevitably¹¹⁷. In addition, use of low-yield nuclear weapons would also potentially be precluded under international law as virtually any military objectives for which such weapons might be used could equally so be addressed by conventional weapons as the rules of necessity and proportionality, as already reiterated, prohibit the use of nuclear weapons if the military objective could be achieved through conventional weapons¹¹⁸. Moreover, such argument, initially argued by the United States before the ICJ, ignores the likely effects of counter-strike and escalation, effects which are inevitable to include in the legal analysis¹¹⁹.

Furthermore, even in a scenario of nuclear weapons targeted to a remote uninhabited island or a submarine as a legitimate military aim, due to its radiation effects on future generations as well as the effects inflicting on the environment, this principle of discriminate attacks cannot be met¹²⁰.

It has been often argued by the opponents of the prohibition of nuclear weapons’ use and threat to use that “threat” to use and “use” are significantly divergent terms, latter

¹¹⁵ Richard Falk, “Non-Proliferation Treaty Illusions and International Lawlessness”, in “At the nuclear precipice. Catastrophe or transformation”, ed. Richard Falk and David Krieger (New York: Palgrave Macmillan, 2008), 41.

¹¹⁶ Rule 14, ICRC Customary International Humanitarian Law Study; Art. 51, Additional Protocol I.

¹¹⁷ Burns H. Weston, “Nuclear Weapons Versus International Law: A Contextual Reassessment”, McGill Law Journal, Vol. 28, 1983, <http://www.lawjournal.mcgill.ca/userfiles/other/7673710-westou.pdf>, [accessed 20 March 2017].

¹¹⁸ Charles J. Moxley Jr., John Burroughs and Jonathan Granoff, “Nuclear Weapons and Compliance with International Humanitarian Law and the Nuclear Non-Proliferation Treaty”, Fordham International Law Journal, Vol.34: Issue 4 (2011): 660., <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2290&context=ilj>, [accessed 20 March 2017].

¹¹⁹ Ibid. 661.,

¹²⁰ Dissenting Opinion of judge Weeramantry, appended to the *Advisory Opinion Concerning Legality of the Threat or Use of Nuclear Weapons*, International Court of Justice (ICJ), July 9, 2004, 429-555, accessed January 26, 2017, <http://www.icj-cij.org/docket/files/95/7521.pdf>.

being clearly prohibited in *ius in bello* whereas former more ambiguous. To that end, it shall be noted that articles 40, 51.2. and article 75 of the 1977 Additional protocol I to the Geneva Conventions as well as articles 4.2.(h) and 13.2. of the 1977 Additional protocol II for non-international armed conflicts, explicitly prohibit “any act or threat primarily intended to spread terror among a civilian population” as well as guarantee as prohibited “at any time and in any place whatsoever, whether committed by civilian or by military agents”, “threat to commit” any of the acts prohibited by the protocol. For that reason, beside the fact that threat to use nuclear weapons should be equally illegal or their use itself following the analogy and the Brownlie formula, the supposition that threat *in bello* violates international humanitarian law has a legal valid argumentation too¹²¹.

Furthermore, NWS such as the US have signed but not ratified 1977 Additional Protocol I and they, together with the United Kingdom and France also maintained that the Protocol does not apply to nuclear weapons. Nonetheless, if a treaty provision reflects an element of customary international law, it applies to all states that are not persistent objectors, regardless of whether a state has ratified the relevant treaty. In the case of the specific Article 40 and the prohibition against orders or threats that no quarter will be given, the US, United Kingdom, and France are all parties to the Hague Regulations of 1907, on which *inter alia* Article 40 is based and which were concluded well before the advent of nuclear weapons. In addition, the ICRC study of customary international humanitarian law notes that the same rule is also to be found in the US, UK and French military manuals¹²². Thus, such rule shall apply to these three states also with respect to nuclear weapons¹²³.

As nuclear weapons cannot be used without severely breaching every single principle of humanitarian law, their prohibition clearly falls under the sphere of international humanitarian law, leaving no space for legal gap regardless of the absence of an explicit ban.

¹²¹ Gro Nystuen, “Threats of use of nuclear weapons and international humanitarian law”, in “Nuclear weapons under international law”, ed. Gro Nyusten, Stuart Casey-Maslen and Annie Golden Bersagel, (Cambridge: Cambridge University Press, 2014), 148-167.

¹²² Jean-Marie Henckaerts and Louise Doswald-Beck, “Customary International Humanitarian Law”, Vol. I, (Cambridge: Cambridge University Press, 2005), 918-920.

¹²³ Gro Nystuen, “Threats of use of nuclear weapons and international humanitarian law”, in “Nuclear weapons under international law”, ed. Gro Nyusten, Stuart Casey-Maslen and Annie Golden Bersagel, (Cambridge: Cambridge University Press, 2014), 164.

4.2. Disarmament / Non-proliferation / Arms Control Law

4.2.1. Nuclear Weapon Free Zones

After World War II, the idea of nuclear weapons-free zones (NWFZ) emerged with a view of containing the number of existing nuclear weapons and preventing the spread of nuclear weapons¹²⁴. Moreover, their establishment is underpinned by Article VII of the NPT encouraging states “to conclude regional treaties in order to assure the total absence of nuclear weapons in their respective territories¹²⁵”.

Currently, over 100 countries worldwide are parties to a NWFZ treaty, representing over 50 percent of the Earth’s surface. The impact of the NWFZs is even more substantial in the southern hemisphere, with ninety-nine percent of all southern land areas being included in a NWFZ. These zones can be separated into *geographical zones* covering uninhabited territory or areas, such as the moon or the sea-bed, *regional zones*, consisting of clusters of states or entire continents, including Latin America, the Caribbean, Africa and large parts of Asia¹²⁶.

Geographical zones

4.2.1.1. Antarctica: the Antarctic Treaty (1959)

The Antarctic treaty was the first global treaty on the non-proliferation of nuclear weapons that originated in the wake of the Cold War, in 1959. Initiated by the United States, twelve countries with interests in Antarctica agreed to guarantee that “... Antarctica shall continue forever to be used exclusively for peaceful purposes and shall

¹²⁴ Jozef Goldblat, “Nuclear weapon –free zones: A history and assessment”, The Nonproliferation Review/Spring-Summer 1997, <https://www.nonproliferation.org/wp-content/uploads/npr/goldbl43.pdf>, [accessed 12 April 2017].

¹²⁵ Treaty on the Non-Proliferation of nuclear weapons, United Nations Office for Disarmament, https://unoda-web.s3-accelerate.amazonaws.com/wp-content/uploads/assets/WMD/Nuclear/pdf/NPTEnglish_Text.pdf, [accessed 1 March 2017].

¹²⁶ Gro Nystuen, “Legal aspects of nuclear weapons”, ILPI – UNIDIR Vienna Conference Series, <http://nwp.ilpi.org/wp-content/uploads/2014/12/No-6-Legal-aspects-of-nuclear-weapons.pdf>, [accessed 12 January 2017].

not become the scene or object of international discord¹²⁷. The Antarctic treaty established a nuclear-weapon-free and demilitarised zone by prohibiting the introduction of “any measures of a military nature, such as the establishment of military basis and fortifications, the carrying out of military manoeuvres, as well as testing of any type of weapon¹²⁸.” Whereas the Treaty does not prevent the use of military personnel and equipment for peaceful purposes, testing of nuclear weapons would fall within the scope of the prohibition on testing any weapons under Article I. Moreover, Article V prohibits any nuclear explosions and disposal of radioactive waste material in Antarctica¹²⁹.

4.2.1.2. Outer space: the Outer Space Treaty (1967) and the Moon Treaty (1979)

Adopted on 27 January 1967, the Treaty now has 101 states parties and the key stipulation in regard to disarmament is that states parties “undertake not to place in orbit around the earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction, install such weapons on celestial bodies, or station such weapons in outer space in any other manner.” It affirms that the Moon and other celestial bodies shall be used by all States Parties to the Treaty exclusively for peaceful purposes and prohibits the establishment of military bases, installations and fortifications, the testing of any type of weapons and the conduct of military manoeuvres on celestial bodies.¹³⁰

4.2.1.3. Seabed: the Seabed Treaty (1970)

Another treaty dealing with an uninhabited but environmentally vulnerable area is the 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

¹²⁷ Antarctic Treaty, NTI, February 1, 2017, <http://www.nti.org/learn/treaties-and-regimes/antarctic-treaty/>, [accessed 22 May 2017].

¹²⁸ The Antarctic Treaty, Washington DC, December 1, 1959, in force June 23, 1961, 402 UNTS 71, Art. 1.

¹²⁹ Cecilie Hellestveit and Daniel Mekonnen, “Nuclear weapons-free zones: the political context”, in “Nuclear weapons under international law”, ed. Gro Nyusten, Stuart Casey-Maslen and Annie Golden Bersagel, (Cambridge: Cambridge University Press, 2014), 352.

¹³⁰ Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, London, Moscow and Washington DC, January 27, 1967, 610 UNTS 205, Art. IV.

Thereof, or commonly known as the Seabed Treaty. The treaty prohibits the states parties to “emplant or emplace on the seabed and the ocean floor and in the subsoil thereof beyond the outer limit of a sea-bed-zone, any nuclear weapons or any other types of weapons of mass destruction as well as structures, launching installations or any other facilities specifically designed for storing, testing or using such weapons¹³¹”.

Regional zones

4.2.1.4. Latin America and the Caribbean: the Treaty of Tlatelolco (1967)

In the wake of the Cuban missile crisis, in February 1967, the Treaty for the Prohibition of Nuclear Weapons in Latin America and the Caribbean was signed by a number of Latin American states. The two Additional protocols annexed to the Treaty were designed to be signed by extra-zonal states, focusing on undertakings by NWS not to use or threaten to use nuclear weapons against states in the zone: negative security assurances¹³². By now, of all the protocols to the various NWFZ treaties containing obligations and commitments for the P-5 nuclear weapon states (NWS), only the relevant protocol to the Tlatelolco Treaty has been ratified by all five¹³³.

Under the treaty, the state parties agreed to prohibit and prevent in their respective territories “testing, use, manufacture, production or acquisition by any means whatsoever of any nuclear weapons” as well as “receipt, storage, installation, deployment and any form of possession of any nuclear weapons, directly or indirectly, on behalf of anyone else or in any other way¹³⁴”. “Additional Protocol I provides for the application of the status of denuclearization in territories for which, *de jure* or *de facto*, France, the Netherlands, the United Kingdom, and the United States are internationally responsible, and which lie within the limits of the geographic zone established by

¹³¹ 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, Washington DC, London and Moscow, February 11, 1971, 955 UNTS 115, Art. I.

¹³² Cecilie Hellestveit and Daniel Mekonnen, “Nuclear weapons-free zones: the political context”, in “Nuclear weapons under international law”, ed. Gro Nyusten, Stuart Casey-Maslen and Annie Golden Bersagel, (Cambridge: Cambridge University Press, 2014), 355.

¹³³ Rebecca Johnson, “Rethinking Security interests for a nuclear-weapon-free zone in the Middle East”, Acronym Institute for Disarmament Diplomacy, December 15 2007, <http://www.acronym.org.uk/old/dd/dd86/86nwfzme.htm>, [accessed 19 April 2017].

¹³⁴ Treaty for the prohibition of nuclear weapons in Latin America and the Caribbean, Mexico City, February 14, 1967, in force April 22, 1968, 634 UNTS 281, Art. 1.

the treaty. All four states have acceded to Protocol I. Furthermore, additional Protocol II obliges all NWS officially recognized by the international community to respect the status of denuclearization of the relevant geographic zone and commits them not to use or threaten to use nuclear weapons against parties to the treaty. All five NWS acceded to the protocol.

The Tlatelolco Treaty has been a de facto a model for all future nuclear-weapon-free zone (NWFZ) agreements¹³⁵. Concerning the Cold War atmosphere in which the treaty was negotiated, it is also often considered an example of a success story demonstrating how a treaty can be obtained even in the context of serious setbacks in the area of arms control and disarmament¹³⁶.

4.2.1.5. South Pacific: Treaty of Rarotonga (1985)

As a response to growing concerns over the South Pacific being used by the United States, United Kingdom and France as a nuclear weapons testing ground but also dumping of nuclear wastes at sea, fearing radioactive contamination of the marine environment, in 1983 at the annual South Pacific Forum New Zealand and Australia put forward the proposal for the setting up of a NWFZ in the region¹³⁷. Content and scope-wise the Treaty of Rarotonga is similar to the Treaty of Tlatelolco, with the exception of the Treaty of Rarotonga prohibiting also the dumping of radioactive waste. The Treaty explicitly prohibits each party to “manufacture or otherwise acquire, possess or have control over any nuclear explosive device by any means anywhere inside or outside the South Pacific Nuclear Free Zone¹³⁸”. It also bans seeking or receiving assistance in the manufacture or acquisition of nuclear explosive devices. Of the five NWS, the Treaty’s Protocol II on negative assurances and Protocol III on nuclear testing have both been ratified by France, United Kingdom and

¹³⁵ Treaty for the prohibition of nuclear weapons in Latin America and the Caribbean, May 8, 2017, NTI, <http://www.nti.org/learn/treaties-and-regimes/treaty-prohibition-nuclear-weapons-latin-america-and-caribbean-lanwzf-tlatelolco-treaty/>, [accessed 2 April 2017].

¹³⁶ Cecilie Hellestveit and Daniel Mekonnen, “Nuclear weapons-free zones: the political context”, in “Nuclear weapons under international law”, ed. Gro Nyusten, Stuart Casey-Maslen and Annie Golden Bersagel, (Cambridge: Cambridge University Press, 2014), 355.

¹³⁷ Jozef Goldblat, “Nuclear weapon –free zones: A history and assessment”, The Nonproliferation Review/Spring-Summer 1997, <https://www.nonproliferation.org/wp-content/uploads/npr/goldbl43.pdf>, [accessed 12 April 2017].

¹³⁸ South Pacific Nuclear Free Zone Treaty, Rarotonga, August 6, 1985, UNTS 1445, Art. 3.

China and the former Soviet Union whereas the United States has signed them but not yet ratified¹³⁹.

4.2.1.6. South-East Asia: Treaty of Bangkok (1995)

Formally adopted in 1995, the Treaty of Bangkok marked the first post-Cold War era NWFZ and established an enhanced supervisory system consisting of a commission and an executive committee, as well as procedures for fact-finding. Beside featuring the same main provisions as Treaties of Tlatelolco and Rarotonga, the Treaty of Bangkok extended the Treaty's territorial zone to exclusive economic zones (EEZ) to states parties to the Treaty. This feature is, however, believed to have made NWS reluctant towards accepting the negative security assurances. None of them has yet signed the protocols, largely due to the United States and French objections regarding the "unequivocal nature of security assurances and over the definitions of territory, including exclusive economic zones (EEZ)"¹⁴⁰, although China has said it may independently agree to it.¹⁴¹

4.2.1.7. Africa: The Treaty of Pelindaba (1996)

The Treaty of Pelindaba is following the standard provisions of other NWFZ treaties on the prohibition of the manufacture, testing, stockpiling or acquisition by other means, as well as possession and control of any explosive device by the parties. The important novelty in comparison to the previous treaties is, however, research on, and development of nuclear weapons. Moreover, the treaty is banning seeking, receiving or encouraging any assistance in these activities¹⁴². The negative security

¹³⁹ South Pacific Nuclear-Free Zone (SPNFZ) Treaty of Rarotonga, July 12, 2016, NTI, <http://www.nti.org/learn/treaties-and-regimes/south-pacific-nuclear-free-zone-spnfz-treaty-rarotonga/>, [accessed 19 April 2017].

¹⁴⁰ Southeast Asian Nuclear-Weapon-Free-Zone Treaty, September 22, 2016, NTI, <http://www.nti.org/learn/treaties-and-regimes/southeast-asian-nuclear-weapon-free-zone-seanwzf-treaty-bangkok-treaty/>, [accessed 19 April 2017].

¹⁴¹ Rebecca Johnson, "Rethinking Security interests for a nuclear-weapon-free zone in the Middle East", Acronym Institute for Disarmament Diplomacy, December 15 2007, <http://www.acronym.org.uk/old/dd/dd86/86nwzfme.htm>, [accessed 19 April 2017].

¹⁴² Jozef Goldblat, "Nuclear weapon –free zones: A history and assessment", The Nonproliferation Review/Spring-Summer 1997, <https://www.nonproliferation.org/wp-content/uploads/npr/goldbl43.pdf>, [accessed 12 April 2017].

assurances in the Treaty's supplementary protocols are in force, and although ratified by China, France, and the United Kingdom, still represent a point of contention in regard to the question of their exact geographical scope¹⁴³.

4.2.1.8. Conclusion

The most important characteristic of these treaties is that at present, they are the only international law instruments explicitly prohibiting not only use but possession manufacturing, testing, stockpiling or acquisition by other means of nuclear weapons.

Nevertheless, these regimes still face a myriad of challenges. "None of the zones has provisions for commitments or assurances from the three de facto nuclear weapon possessors outside the NPT - India, Israel, and Pakistan (D-3). Many states parties to the zones have failed to conclude their required full-scope safeguards agreements with the IAEA, and only a handful have ratified the Additional Protocol. While the treaties are of indefinite duration they also contain withdrawal clauses, opening up questions about the potential reversibility of such arrangements. Proposals to establish a NWFZ in South Asia were shelved indefinitely following the nuclear tests in 1998, and efforts to start the process towards a NWFZ in the Middle East have been repeatedly stymied¹⁴⁴."

Regardless of numerous drawbacks, these zones do serve important functions. For instance, they complement and reinforce the basic non-proliferation commitments of the NPT. Through their protocols, they give members of these regimes the legally-binding negative security assurances that many such states have sought for decades. "Some contribute to the strengthening of full-scope IAEA safeguards by requiring domestic implementation and/or the application of such safeguards for exports leaving the region, and they also help to strengthen the global norm against nuclear

¹⁴³ Cecilie Hellestveit and Daniel Mekonnen, "Nuclear weapons-free zones: the political context", in "Nuclear weapons under international law", ed. Gro Nyusten, Stuart Casey-Maslen and Annie Golden Bersagel, (Cambridge: Cambridge University Press, 2014), 358.

¹⁴⁴ Rebecca Johnson, "Rethinking Security interests for a nuclear-weapon-free zone in the Middle East", Acronym Institute for Disarmament Diplomacy, December 15 2007, <http://www.acronym.org.uk/old/dd/dd86/86nwfzme.htm>, [accessed 19 April 2017].

testing pending entry into force of the CTBT". Moreover, the zones' potential for defusing the risk of regional nuclear arms races and decreasing the risk of nuclear weapons falling into the hands of non-state actors is an increasingly important factor¹⁴⁵. As former Director-General of the International Atomic Energy Agency (IAEA), Dr. Mohamed ElBaradei pointed out at the 40th anniversary of the Tlatelolco Treaty in Mexico, "Today these five NWFZ cover between them nearly two-thirds of the countries of the world and virtually the entirety of the southern hemisphere. In effect, NWFZ constitutes important first steps to achieving a nuclear-weapon-free world¹⁴⁶."

4.2.2. Legal status of other weapons of mass destruction

4.2.2.1. The Biological Weapons Convention (1972)

The 1899 Hague Convention with Respect to the Laws and Customs of War on Land declared that it is "especially prohibited...to employ poison or poisoned arms." Yet biological weapons were used in the World War I, though not on the same scale as the chemical weapons¹⁴⁷. As a response, the Geneva Gas Protocol was concluded in 1925¹⁴⁸. However, drawbacks of the Geneva Protocol 1925 and the endeavours to prohibit not only the use but also the production and stockpiling of biological and chemical weapons-induced the U.N. General Assembly and the Committee on Disarmament to take up this question¹⁴⁹. Drafted initially by the United Kingdom on a Committee on Disarmament starting in 1969, Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin

¹⁴⁵ Gro Nystuen and Kjølsv Egeland, „A ‘Legal Gap’? Nuclear Weapons Under International Law”, Arms Control Association (March 2016), https://www.armscontrol.org/ACT/2016_03/Features/A-Legal-Gap-Nuclear-Weapons-Under-International-Law, [accessed 26 January 2017].

¹⁴⁶ Rebecca Johnson, “Rethinking Security interests for a nuclear-weapon-free zone in the Middle East”, Acronym Institute for Disarmament Diplomacy, December 15 2007, <http://www.acronym.org.uk/old/dd/dd86/86nwfzme.htm>, [accessed 19 April 2017].

¹⁴⁷ George W. Chrostopher, Theodore J. Cieslak and Julie A. Pavlin, “Biologocal Warfare. A Historical Perspective”, August 6, 1997, *The JAMA Network*, <http://jamanetwork.com/journals/jama/article-abstract/417896>, [accessed 5 May 2017].

¹⁴⁸ Jenni Rissanen, The Biological Weapons Convention, March 1, 2003, NTI, <http://www.nti.org/analysis/articles/biological-weapons-convention/>, [accessed 5 May 2017].

¹⁴⁹ Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction. Opened for Signature at London, Moscow and Washington, April 10, 1972, International Committee of the Red Cross, <https://ihl-databases.icrc.org/ihl/INTRO/450?OpenDocument>, [accessed 5 May 2017].

Weapons and on their Destruction or the Biological Weapons Convention entered into force on March 26, 1975¹⁵⁰. However, it was the first multilateral disarmament treaty banning an entire category of weapons by prohibiting the development, production, and stockpiling of biological agents as well as related equipment and delivery systems that are intended for hostile use. Although the BWC (in its title and in Article I) does not explicitly prohibit "use" of biological weapons, the Final Declaration of the 1996 Treaty Review Conference reaffirmed that, although "use" is not explicitly prohibited under Article I of the BWC, it is still considered to be a violation of the Convention¹⁵¹. It currently, counts 175 states parties¹⁵².

4.2.2.2. Chemical Weapons Convention (CWC)

Since the World War I, poisonous gases such as chlorine, phosgene, a "choking agent" and mustard gas count more than a million casualties worldwide. The Geneva Protocol 1925 did like biological prohibit chemical weapons as well but it had a number of deficiencies such as the fact that many States that ratified the Protocol reserved the right to use prohibited weapons against States that were not a party to the Protocol or as retaliation in kind if chemical weapons were used against them. In the Cold War era, states continued to develop chemical weapons programs and capabilities although since the World War II they have been used only in a few cases, notably by Iraq in the 1980s against the Islamic Republic of Iran. After twelve years of negotiation, the Chemical Weapons Convention was adopted by the Conference on Disarmament in Geneva on 3 September 1992 and entered into force on 29 April 1997. The CWC is the first disarmament agreement negotiated within a multilateral framework that provides for the elimination of an entire category of weapons of mass destruction under universally applied international control¹⁵³. The Chemical Weapons Convention explicitly prohibits the use, development, production, stockpiling and

¹⁵⁰ Jenni Rissanen, The Biological Weapons Convention, March 1, 2003, NTI, <http://www.nti.org/analysis/articles/biological-weapons-convention/>, [accessed 5 May 2017].

¹⁵¹ Ibid.

¹⁵² Kelsey Davenport, Biological Weapons Convention Signatories and States-Parties, July 2016, <https://www.armscontrol.org/factsheets/bwcsig>, [accessed 5 May 2017].

¹⁵³ Chemical Weapons, United Nations Office for Disarmament Affairs, <https://www.un.org/disarmament/wmd/chemical/>, [accessed 5 May 2017].

transfer of chemical weapons¹⁵⁴. Currently, the Convention counts 192 states parties¹⁵⁵.

4.2.2.3. Conclusion

Notwithstanding the devastating effects that both biological and chemical weapons inflict, among so-called Weapons of Mass Destruction nuclear weapons remain uniquely powerful and destructive. Having said that, it seems even more paradoxical the argument that the use of chemical and biological weapons represents a violation of the international humanitarian law and a war crime, and those of nuclear weapons not. Firstly, none of them are explicitly named in the Geneva Conventions and their protocols, but biological and chemical weapons due to their effects are considered prohibited. By way of analogy, the same goes for nuclear weapons which are much folds more powerful, destructive and harmful. Secondly, to any extent to which use of nuclear weapons, equally as the use of biological and chemical weapons, “destroys life or injures health by the introduction of substances released by such weapons into, or their absorption by, a living organism”, they must be considered as prohibited under international customary law¹⁵⁶.

4.2.3. Partial Test Ban Treaty (PTBT)

The Limited or Partial Test Ban Treaty (LTBT/PTBT) as an arms control agreement intended to restrict the testing of nuclear weapons and limit nuclear proliferation, prohibits atmospheric and underwater testing but allows the underground testing. For that reason, the PTBT is considered to have done little to limit the superpower nuclear arms race but it touted as an important precedent for future arms control. Today, more than 120 states are Parties to the PTBT¹⁵⁷.

¹⁵⁴ Daryl G. Kimball, The Chemical Weapons Convention (CWC) at a Glance, October 2015, <https://www.armscontrol.org/factsheets/cwcglance>, [accessed 5 May 2017].

¹⁵⁵ Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, May 22, 1993, United Nations Treaty Collection, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtsg_no=XXVI-3&chapter=26&clang=_en, [accessed 5 May 2017].

¹⁵⁶ Nagendra Singh and Edward McWhinney, “Nuclear Weapons and Contemporary International Law”, (London: Martinus Nijhoff Publishers, 1989), 310.

¹⁵⁷ Limited or Partial Test Ban Treaty (LTBT/PTBT), June 10, 1963, Atomic Heritage Foundation, <http://www.atomicheritage.org/history/limited-or-partial-test-ban-treaty-ltbtptbt>, [accessed 5 May 2017].

4.2.4. Comprehensive Nuclear-Test-Ban Treaty (CTBT)

As the PTBT left the underground tests non-prohibited, nuclear tests not only continued but greatly increased. In 1994, the Conference on Disarmament (CD) began formal negotiations on the CTBT which lasted until 1996¹⁵⁸. Whereas consensus on the verification regime was found relatively quickly, some other aspects such as common definition of a nuclear test (any nuclear test explosion, as well as “peaceful nuclear explosions” but not so-called subcritical tests), the entry into force formula and foremost whether should the treaty include a binding time plan for nuclear disarmament proved quite protracting. Having finally reached a conclusion on the first two issues, the third did not follow. The core provisions of the CTBTO, therefore, are a prohibition of “all nuclear explosions anywhere, by anyone¹⁵⁹”.

Although not having entered into force yet, with the CTBT’s opening for signature on 24 September 1996, a de-facto international norm on nuclear testing was established. While all States Signatories to the CTBT have observed it, only three non-signatories have not: India, Pakistan and Democratic People’s Republic of Korea (DPRK), provoking the unanimously adopted sanctions by the UN Security Council. To date, most of the world’s countries have signed and ratified the CTBT, including the three nuclear weapon States France, United Kingdom, and Russia¹⁶⁰. However, the fact that there are seemingly no prospects of United States doing the same in foreseeable future certainly adds to the arguments stating that the CTBT is deadlocked and sees no bright future¹⁶¹. Virtually the only country that is actively conduct-

¹⁵⁸ “The Treaty. History: Summary”, CTBTO Preparatory Commission, <https://www.ctbto.org/the-treaty/history-summary/>, [accessed 8 May 2017].

¹⁵⁹ Comprehensive Nuclear-Test-Ban Treaty (CTBT), NTI, November 28, 2016, <http://www.nti.org/learn/treaties-and-regimes/comprehensive-nuclear-test-ban-treaty-ctbt/>, [accessed 8 May 2017].

¹⁶⁰ Comprehensive Nuclear-Test-Ban Treaty (CTBT), NTI, November 28, 2016, <http://www.nti.org/learn/treaties-and-regimes/comprehensive-nuclear-test-ban-treaty-ctbt/>, [accessed 8 May 2017].

¹⁶¹ Andreas L. Paulus and Jörn Müller, “Survival Through Law. Is there a Law against Nuclear Proliferation?”, Finnish Yearbook of International Law 2009, www.uni-goettingen.de/de/493440.html, [accessed 8 May 2017].

ing nuclear tests is DPRK, not showing any sign of soon joining any sphere of the non-proliferation regime¹⁶².

One could, however, also argue that atmospheric testing of nuclear weapons is now prohibited under international customary law, although such a norm may not necessarily extend to underground testing¹⁶³.

4.2.4. Treaty on the Non-Proliferation of Nuclear Weapons (NPT)

4.2.4.1. History

The impetus for the negotiation of the NPT was, as for all the above mentioned, concern for the safety of a world caught in an increasing superpowers' arms race that came to a verge of global nuclear war. As the US President John F. Kennedy summed it up in a speech to the UN General Assembly in September 1961: "The weapons of war (nuclear weapons) must be abolished before they abolish us"¹⁶⁴.

Efforts to start negotiations took years to take a wing and negotiations in the Eighteen-Nation Disarmament Committee needed another three years to finally get adopted during which the most contentious and pressing questions have proven to be positive and negative assurances and how to balance the obligations with them. Moreover, in return for giving up the prospect of developing nuclear weapons NNWS wanted access to peaceful nuclear energy and legally binding disarmament obligations for the NWS, aiming the nuclear disarmament to be at the heart of the Treaty¹⁶⁵.

¹⁶² North Korea, May 2017, NTI, <http://www.nti.org/learn/countries/north-korea/>, [accessed 15 May 2017].

¹⁶³ Gro Nystuen, "Legal aspects of nuclear weapons", ILPI – UNIDIR Vienna Conference Series, <http://nwp.ilpi.org/wp-content/uploads/2014/12/No-6-Legal-aspects-of-nuclear-weapons.pdf>, [accessed 12 January 2017].

¹⁶⁴ Address by President John F. Kennedy to the UN General Assembly, 25 September 1961, <http://www.presidency.ucsb.edu/ws/?pid=8352>, [accessed 15 May 2017].

¹⁶⁵ Gro Nystuen and Torbjorn Graff Hugo, "The Nuclear Non-Proliferation Treaty", in "Nuclear weapons under international law", ed. Gro Nystuen, Stuart Casey-Maslen and Annie Golden Bersagel, (Cambridge: Cambridge University Press, 2014), 374-378.

Opened for signature in 1968, and having entered into force in 1970, until 1995 the NPT was a temporary contract between NWS and NNWS with a system of review of success of the operation of the Treaty every five years for altogether twenty-five years, after which an indefinite extension of the Treaty would require two-thirds majority of States parties support. However, at the 1995 NPT Conference, the NNWS failed to agree among themselves to set an agenda that would have advanced the cause of a nuclear-weapon-free world ending up in extending the Treaty indefinitely and unconditionally. By doing so some argue that the NNWS “surrendered the little leverage they secured in 1968 when the Treaty was concluded”¹⁶⁶.

4.2.4.2. Overview

The Treaty represents the only binding commitment in a multilateral treaty on disarmament by the NWS. A total of 191 States have joined the Treaty (including North Korea that withdrew in 2003), including the five nuclear-weapon States. More countries have ratified the NPT than any other arms limitation and disarmament agreement, which is often used for arguing the proof of the Treaty’s significance¹⁶⁷.

The three cores of the Treaty are non-proliferation, disarmament and peaceful use of nuclear energy, the often called “grand bargain” between the five NWS and the NNWS. Based on a two-tier system of non-nuclear weapons states and nuclear weapons states, the Treaty defined the latter as those who had manufactured and exploded a nuclear weapon or other nuclear device prior to January 1, 1967, encompassing therein the five veto powers of the UN Security Council: China, France, Russia (at that time Soviet Union), the United Kingdom and the United States. Non-proliferation pillar of the NPT obliges NWS “not to transfer to any recipient whatsoever nuclear weapons and not to assist, encourage, or induce any NNWS to manufacture or to otherwise acquire them. NNWS are not to receive nuclear weapons from any transfer, and are not to manufacture or acquire them”. Furthermore, the NNWS must accept the IAEA safeguards on all nuclear materials on their territories

¹⁶⁶ Miguel Marin Bosch, “The Non-Proliferation Treaty and its future”, in “International Law, International Court of Justice and Nuclear Weapons”, ed. Laurence Boisson de Chazournes and Philippe Sands (Cambridge: Cambridge University Press, 1999), 377-379.

¹⁶⁷ Treaty on the Non-Proliferation of Nuclear Weapons (NPT), United Nations Office for Disarmament Affairs, <https://www.un.org/disarmament/wmd/nuclear/npt/>, [accessed 15 May 2017].

or under their control. On the peaceful use of nuclear energy, the Treaty states that it “does not affect the right of state parties to develop, produce, and use nuclear energy for peaceful purposes, provided such activities are in conformity with Articles I and II. All state parties undertake to facilitate, and have a right to participate, in the exchange of equipment, materials, and scientific and technological information for the peaceful uses of nuclear energy”. The third and most significant pillar of the Treaty, on nuclear disarmament, is about to be discussed more in detail in the following chapter¹⁶⁸.

4.2.4.3. Nuclear disarmament and Article VI of the NPT

The role of the NPT as a “step towards the achievement of general and complete disarmament and, more particularly, nuclear disarmament”, was reiterated already at the UN General Assembly Resolution of November 1965. The NWS were, however, strongly opposing the inclusion of such provisions in the Treaty, argued that this would make entry into force and success of the NPT dependent on the negotiations of other treaties and therefore weaken the NPT¹⁶⁹.

Article VI obliges each of the parties to the Treaty “pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control.”¹⁷⁰ Nevertheless, compliance with such obligation has been and still is a subject of considerable debate. “Whereas the NWS claim that advances with regard to disarmament have been made and many nuclear warheads have been dismantled, many NNWS expresses increased frustration over the fact that there are still around 14,900¹⁷¹ nuclear warheads in the world.”

¹⁶⁸ Treaty on the Non-Proliferation of Nuclear Weapons (NPT), NTI, April 23, 2015, <http://www.nti.org/learn/treaties-and-regimes/treaty-on-the-non-proliferation-of-nuclear-weapons/>, [accessed 15 May 2017].

¹⁶⁹ Gro Nystuen and Torbjorn Graff Hugo, “The Nuclear Non-Proliferation Treaty”, in “Nuclear weapons under international law”, ed. Gro Nystuen, Stuart Casey-Maslen and Annie Golden Bersagel, (Cambridge: Cambridge University Press, 2014), 383-384.

¹⁷⁰ Treaty on the Non-Proliferation of Nuclear Weapons (NPT), United Nations Office for Disarmament Affairs, <https://www.un.org/disarmament/wmd/nuclear/npt/>, [accessed 15 May 2017].

¹⁷¹ Hans M. Kristensen and Robert S. Norris, “Status of World Nuclear Forces”, 2017, Federation of American Scientists, <https://fas.org/issues/nuclear-weapons/status-world-nuclear-forces/>, [accessed 23 May 2017].

Moreover, the assessment of the fact to what extent have the states “negotiated in good faith” is also not necessarily easy¹⁷².

The obligation to “undertake...to pursue negotiations in good faith” applies to each of the three obligations within the Article VI. Although it does not establish a timeline for achieving these results, aside from the reference to the “cessation of the nuclear arms race at an early date” at the time of writing this chapter (2013), forty-five years have passed since the signing of the NPT.” It is certainly hard to argue that in that time span, states have proactively, diligently, sincerely and consistently pursued these negotiations.¹⁷³

Although the precise scope and nature of the obligation of Article VI remain debated, a few undisputed conclusions can be drawn from it. Firstly, it represents a binding legal obligation, and not a goal whereby pursuing negotiations in good faith does not mean that efforts to merely pay lip service to the idea of negotiation suffice to fulfil the obligation. Developments of the 2010 NPT Review Conference reflect this understanding and will be discussed more in detail in a later chapter, as well as actual NWS practices, which when compared with the Article VI requirements, are all in non-compliance¹⁷⁴.

4.2.4.4. Strengths and weaknesses of the NPT regime

Notwithstanding it is obvious weaknesses within the loose formulations of the Article VI, the NPT has played and continues to play a crucial role in limiting nuclear arsenals in the world and the number of states that have access to these weapons. Some estimations go to say that “if there had been no NPT, the total number of nuclear-weapons states might have reached thirty or forty by now¹⁷⁵.” So as to the non-

¹⁷² Gro Nystuen and Torbjorn Graff Hugo, “The Nuclear Non-Proliferation Treaty”, in “Nuclear weapons under international law”, ed. Gro Nyusten, Stuart Casey-Maslen and Annie Golden Bersagel, (Cambridge: Cambridge University Press, 2014), 392.

¹⁷³ Daniel H. Joyner, “The legal meaning and implications of Article VI of the Non-proliferation treaty”, in “Nuclear weapons under international law”, ed. Gro Nyusten, Stuart Casey-Maslen and Annie Golden Bersagel, (Cambridge: Cambridge University Press, 2014), 409.

¹⁷⁴ Ibid., 416-417.

¹⁷⁵ Roland Timerbaev, “What next for the NPT?”, International Atomic Energy Agency Bulletin, 46/2, March 2005, <https://www.iaea.org/sites/default/files/publications/magazines/bulletin/bull46-2/46203590407.pdf>, [accessed 29 April 2017].

proliferation, beside some drawbacks such as India, Pakistan and Israel never joining the treaty and DPRK withdrawing from the Treaty in 2003, the NPT can be seen as a success. At the same time, there is a wide spectrum of issues that cast shadow on its review cycles ranging from WMD-free zone in the Middle East, negotiations of a Fissile Material Cut-off Treaty (FMCT) and cuts in nuclear arsenals to ratification of the CTBT, all show the underlying divergence of expectations among the parties – divergence that is much older than the NPT itself. The biggest problem is that the NPT is seen by different states as having a different main role, be it non-proliferation, grand bargain keeping the balance within the three pillars or, what its only unachieved role – nuclear disarmament. Namely, the only prohibitions in the Treaty related to proliferation. Nuclear disarmament obligation is still being the one each of the NWS is non-complying with. After all, the NPT is a product of its historical context that served the main purpose of its time¹⁷⁶. However, 2010 NPT review conference initiatives have finally moved from stalemate and will be explained in the last chapter.

4.3. International Law of Human Rights

This chapter will consider the effects of use or threat to use nuclear weapons on human rights and assess its legality under the human rights international law sources, taking into consideration its extraterritorial effect. Although inevitably intertwined with international humanitarian law, the enormous developments in the field of human rights in the post-war years, established human rights as progressively developing separate branch of law. A debate relevant to that end is also whether human rights law applies in armed conflict and can, therefore, be breached by the use or threat to use of nuclear weapons. The latter is confirmed and justified by active human rights enforcement mechanisms which have heard cases relating to armed conflicts such and the European and Inter-American and African court being likely to do so¹⁷⁷. However, when applying human rights law in regard to loss of life inflicted through the use of a certain weapon in warfare, including nuclear weapons, its compliance

¹⁷⁶ Gro Nystuen and Torbjorn Graff Hugo, "The Nuclear Non-Proliferation Treaty", in "Nuclear weapons under international law", ed. Gro Nyusten, Stuart Casey-Maslen and Annie Golden Bersagel, (Cambridge: Cambridge University Press, 2014), 392-396.

¹⁷⁷ Louise Doswald-Beck, "Human rights and nuclear weapons", in "Nuclear weapons under international law", ed. Gro Nyusten, Stuart Casey-Maslen and Annie Golden Bersagel, (Cambridge: Cambridge University Press, 2014), 435.

with human rights laws can only be decided including the reference to the law applicable in armed conflict¹⁷⁸.

International human rights law is seen as an as-yet underused branch of international law in the assessment of the legality of nuclear weapons and promotion of nuclear disarmament although its detrimental effects are more than obvious. Human rights most affected by nuclear weapons are the rights to life, to human treatment, to health, and to a healthy environment¹⁷⁹.

4.3.1. The Charter of the United Nations

The Charter of the United Nations, the foundational treaty of the United Nations, was signed on 26 June 1945, in San Francisco, by fifty out of fifty-one original member states. After being ratified by the original five permanent members of the Security Council, it entered into force on 24 October 1945¹⁸⁰. Although argued to be primarily a law of war document and in that context has earlier been discussed the relation between its articles on the prohibition of the use of force and the right to self-defence, its far-fetching impacts on the law of human rights should be analysed too.

It is empowering and a paradox at the same time, to note that the age of weapons of mass destruction started at the time when the Universal Declaration of Human Rights and its follow-up instruments were codified. Just when the world has learned or at least stated to have learnt that “every human, without regard to the culture, religion, ideology or geography, has the right to life, we have perfected our ability to kill massively¹⁸¹.” Although the UN Charter states a commitment to peace as its principal objective in its preamble, prohibition of aggression in Article 2 (4) and the mandate

¹⁷⁸ Peter Weiss and John Burroughs, “Weapons of mass destruction and human rights”, Disarmament forum, 3, 2004, https://www.peacepalacelibrary.nl/ebooks/files/UNIDIR_pdf-art2139.pdf, [accessed 29 April 2017].

¹⁷⁹ Stuart Casey-Maslen, “The use of nuclear weapons and human rights”, International Review of the Red Cross (2015), 97 (899), <https://www.icrc.org/en/international-review/article/use-nuclear-weapons-and-human-rights>, [accessed 29 April 2017].

¹⁸⁰ “History of the United Nations Charter”, United Nations, <http://www.un.org/en/sections/history-United-nations-charter/index.html>, [accessed 29 April 2017].

¹⁸¹ Douglas Roche, “Illegal in any circumstances whatsoever,” in “At the nuclear precipice. Catastrophe or transformation”, ed. Richard Falk and David Krieger (New York: Palgrave Macmillan, 2008), xvi.

for peaceful resolution of conflicts in Article 33, it does not explicitly state the right to life. However, as judge Weeramantry has pointed out in his dissenting opinion to the Nuclear Weapons Advisory Opinion: “when a weapon has a potential to kill between one million and one billion people, human life becomes reduced to a level of worthlessness that totally belies human dignity as understood in any culture. Such a deliberate action by a State is, in any circumstances whatsoever, incompatible with a recognition by it of that respect for basic human dignity on which world peace depends, and respect for which is assumed on the part of all member States of the United Nations...” And this is enshrined in the preamble of the UN Charter, for one of the ends to which the United Nations is dedicated is “to reaffirm faith in fundamental human rights, in the *dignity* and *worth* of the human person”. No weapons ever invented in the long history of man’s inhumanity to man has so denied the dignity and worth of the human person as has the nuclear bomb¹⁸². Moreover, in the opinion of the Human Rights Committee, “the production, testing, possession, deployment, and use of nuclear weapons should be prohibited and recognised as a crime against humanity”. Therefore, although it does not contain an explicit prohibition of use or threat to use nuclear weapons, the UN Human Rights Committee would most likely consider any use of nuclear weapons to be a serious violation of the right to life and the same should be concluded for the UN Charter¹⁸³.

4.3.2. Universal Declaration of Human Rights

The Universal Declaration of Human Rights (UDHR), proclaimed by the United Nations General Assembly in Paris on 10 December 1948 is a milestone document in the history of human rights¹⁸⁴. It was no coincidence that it was conceived and adopted right after the horrors of the Hiroshima and Nagasaki and two world wars¹⁸⁵. In its Article 3, the Declaration provides that „everyone has the right to life, liberty,

¹⁸² Louise Doswald-Beck, “Human rights and nuclear weapons”, in “Nuclear weapons under international law”, ed. Gro Nyustén, Stuart Casey-Maslen and Annie Golden Bersagel, (Cambridge: Cambridge University Press, 2014), 444-446.

¹⁸³ Ibid. 445.

¹⁸⁴ Universal Declaration of Human Rights, United Nations, <http://www.un.org/en/universal-declaration-human-rights/>, [accessed 30 April 2017].

¹⁸⁵ John Loretz, “Nuclear weapons abolition – a fundamental human right in a democratic world”, January 7, 2009, International Physicians for the Prevention of Nuclear War, <https://peaceandhealthblog.com/>, [accessed 30 April 2017].

and security of person“. There is clearly an overlap between the right to peace and the right to life with an exception of right to life surviving in wartime, „if only because of the humanitarian law prohibition of weapons and tactics that fail to discriminate between combatants and non-combatants¹⁸⁶“.

However, the closest that the Declaration comes to the right to peace is Article 28, providing that “everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized¹⁸⁷.” Taking into consideration detrimental effects that nuclear weapons had and would have on social institutions and economic structures, any use or threat to use nuclear weapons would clearly go against such provision.

4.3.3. International Covenant on Civil and Political Rights

After the inception of the Universal Declaration of Human Rights, in order to make human rights an instrument effectively shaping the lives of individuals and nations, it was clear that the substance of the Declaration should be translated into the hard legal form of an international treaty. As the Western nations, in particular, claimed that the implementation process could not be identical to all the rights, economic and social rights partaking more of the nature of goals to be attained whereas civil and political rights had to be respected strictly and without any reservations, with resolution 543 (VI) of 4 February 1952, the General Assembly directed the Commission on Human Rights to prepare, instead of just one Covenant, two draft treaties; one setting forth civil and political rights and another providing for economic, social and cultural rights. Although the Commission completed its work in 1954, it took many years before eventually, the political climate was ripe for the adoption of these two ambitious texts, essentially brought to bear upon them from Third World countries which prompted them to approve the outcome of the protracted negotiating process. Accordingly, on 16 December 1966, the two Covenants were adopted by the General

¹⁸⁶ John Loretz, “Nuclear weapons abolition – a fundamental human right in a democratic world”, January 7, 2009, International Physicians for the Prevention of Nuclear War, <https://peaceandhealthblog.com/>, [accessed 30 April 2017].

¹⁸⁷ Peter Weiss and John Burroughs, “Weapons of mass destruction and human rights”, Disarmament forum, 3, 2004, https://www.peacepalacelibrary.nl/ebooks/files/UNIDIR_pdf-art2139.pdf, [accessed 29 April 2017].

Assembly by consensus¹⁸⁸. Article 6(1) of the Covenant on Civil and political rights providing that “every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life” clearly goes against the mere idea of use or threat to use nuclear weapons¹⁸⁹.

4.3.4. Convention on the Prevention and Punishment of the Crime of Genocide

The Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the UN General Assembly on 9 December 1948¹⁹⁰, defines genocide as different crimes such as killing members of the group or deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, committed with intent to destroy in whole or in part, a national, ethnical, racial or religious group, as such. Common argument for limiting the scope of the definition of genocide argues that there is a genocide “if and only if an intent exists to destroy, in whole or in part, a specific group or subgroup” which significantly diminishes the prescriptive force of the Genocide Convention in that it ignores the “prevention” element of the Convention and focuses mainly on punishment sphere¹⁹¹. However, having regard to the ability of nuclear weapons to wipe out blocks of the population ranging from hundreds of thousands to millions, there can be no doubt that the weapon targets, in whole or in part, the national group of the State at which it is directed¹⁹². Indiscriminate and fatal effects of the nuclear weapons that are impossible to contain in time or space and therefore hardly avoidable in any case of its use against a populated area, therefore do go against the Convention’s provisions which are pro-

¹⁸⁸ Christian Tomuschat, International Covenant on Civil and Political Rights, Audiovisual Library of International Law, <http://legal.un.org/avl/ha/iccpr/iccpr.html>, [accessed 29 April 2017].

¹⁸⁹ International Covenant on Economic, Social and Cultural Rights, United Nations Human Rights Office of the High Commissioner, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>, [accessed 29 April 2017].

¹⁹⁰ William A. Schabas, “Convention on the Prevention and Punishment of the Crime of Genocide”, Audiovisual Library of International Law, <http://legal.un.org/avl/ha/cppcg/cppcg.html>, [accessed 29 April 2017].

¹⁹¹ Winston P. Nagan, “Nuclear arsenals, International Lawyers, and the Challenge of the Millennium”, The Yale Journal of International Law, Vol. 24, 2, 1999, accessed March 29, 2017, <http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1106&context=yjil>.

¹⁹² Dissenting Opinion of judge Weeramantry, appended to the *Advisory Opinion Concerning Legality of the Threat or Use of Nuclear Weapons*, International Court of Justice (ICJ), 9 July 2004, 429-555, <http://www.icj-cij.org/docket/files/95/7521.pdf>, [accessed 26 January 2017].

hibiting genocide, complicity in genocide and conspiracy, direct and public incitement or attempt to commit genocide.¹⁹³

4.3.5. Conclusion

Nuclear weapons cannot be used in a way that respects the body of human rights law. Human rights law, therefore, provides an additional value in the promotion of prohibition of nuclear weapons and in case these weapons would actually be used again, would provide for a ground to seek remedy on the basis of its breaches. “As judge Weeramantry pointed out, from a theological point of view the effect of nuclear weapons is so profound, so long-term and widespread, that they undermine the very notion of human dignity that human rights is based on¹⁹⁴.

4.4. Environmental Law

The idea of protecting the environment in times of armed conflict is much older than 21st or even 20th Century. Early development of such rules was prompted foremost by the need and necessity to protect natural resources essential for human survival such as clean water but due to the limited power of early methods of warfare, the risk they posed to the environment was also limited. However, with the development of 20th Century’s warfare such as nuclear weapons the level of potential damage to environment multiple increased.

Environment enjoys protection both in peaceful times and during conflicts from both customary and treaty law. Customary law as one of the *ius in bello* principles in addition to the principles of necessity and humanity distinguishes the principle of environmental protection¹⁹⁵ which provides that states have an obligation to respect and protect the environment during armed conflicts and are bound by the obligation “that

¹⁹³ Convention on the Prevention and Punishment of the Crime of Genocide (1948), December 9 1948, 78 UNTS 169, <http://www.hrweb.org/legal/genocide.html>, [accessed 29 April 2017].

¹⁹⁴ Louise Doswald-Beck, “Human rights and nuclear weapons”, in “Nuclear weapons under international law”, ed. Gro Nyustén, Stuart Casey-Maslen and Annie Golden Bersagel, (Cambridge: Cambridge University Press, 2014, 460.

¹⁹⁵ Erik Koppe, “The Use of Nuclear Weapons and the Protection of the Environment during International Armed conflict, (Oxford and Portland, Oregon: HART Publishing, 2008), 117-118.

activities within their jurisdiction and control respect the environment of other States or of areas beyond national control¹⁹⁶. This principle is widely perceived as gaining on its importance after the 1972 Stockholm Declaration and as later reflected in the conclusion in 1977 of the Convention on the prohibition of environmental modification techniques as well as in two environmental protection provisions in 1977 Additional Protocol I to the Geneva Conventions 1949¹⁹⁷. Moreover, the Rio Declaration and the General Assembly resolution, although non-binding are authoritative documents, worth of mentioning and considering as sources of international law applying to use or threat to use nuclear weapons¹⁹⁸.

4.4.1. Additional Protocol I of 1977 to the Geneva Convention of 1949

Article 35 (3) of the Additional Protocol I to the Geneva Conventions explicitly prohibits “to employ methods or means of warfare which are intended or may be expected to cause widespread, long-term, and severe damage to the natural environment¹⁹⁹”. Moreover, Article 55 of the Protocol reinforces that rule by stating that “care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes the prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.” Furthermore, it prohibits the “attacks against the natural environment by way of reprisals”.

Moreover, Article 2 means that that the military forces which occupy a foreign territory must respect the provisions of the first Protocol even when there are no current

¹⁹⁶ Djamchid Momtaz, “The use of nuclear weapons and the protection of the environment the contribution of the International Court of Justice”, in “International Law, International Court of Justice and Nuclear Weapons”, ed. Laurence Boisson de Chazournes and Philippe Sands (Cambridge: Cambridge University Press, 1999), 354.

¹⁹⁷ Erik Koppe, “The Use of Nuclear Weapons and the Protection of the Environment during International Armed conflict, (Oxford and Portland, Oregon: HART Publishing, 2008), 118.

¹⁹⁸ Dinah Shelton, “Stockholm Declaration (1972) and Rio Declaration (1992), July 2008, Oxford Public International Law, <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1608>, [accessed 8 May 2017].

¹⁹⁹ Gro Nystuen, “Legal aspects of nuclear weapons”, ILPI – UNIDIR Vienna Conference Series, <http://nwp.ilpi.org/wp-content/uploads/2014/12/No-6-Legal-aspects-of-nuclear-weapons.pdf>, [accessed 12 January 2017].

hostilities on such territory²⁰⁰. In addition, both Article 35 and 55 prohibit the use of means and methods of warfare that are either intended or expected to damage the environment meaning that it does not prohibit only attacks intended to damage the environment but also those actions which might damage the environment as collateral damage, irrespective of the kind of weapons used²⁰¹.

Contrary to some NWS arguing that the Protocol does not apply to nuclear weapons, the 2005 study by the International Committee of the Red Cross (ICRC) on Customary Law asserts that the prohibition of deploying means of warfare that cause widespread, long-term and severe damage to the environment does amount to a norm of customary law and that the “lack of scientific certainty as to the effects on the environment of certain military operations does not absolve a party to the conflict from taking such precautions²⁰²”.

4.4.2. Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD)

Approved on 18 May 1977, the Convention, according to its Article I, provides that each State Party undertakes “not to engage in military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State Party”. States Parties shall also not assist, encourage or induce any State, group of States or international organisation to engage in activities contrary to this prohibition.²⁰³

²⁰⁰ Alexandre Kiss, International Humanitarian Law and the Environment, Environmental Policy and Law, 31/4-5- (2001), <http://content.iospress.com/download/environmental-policy-and-law/epl31-4-5-12?id=environmental-policy-and-law%2Fep31-4-5-12>, [accessed 12 May 2017].

²⁰¹ Erik Koppe, “The Use of Nuclear Weapons and the Protection of the Environment during International Armed conflict, (Oxford and Portland, Oregon: HART Publishing, 2008), 152.

²⁰² Gro Nystuen, Legal aspects of Nuclear Weapons, December 8, 2014, ILPI-UNIDIR Vienna Conference Series, <https://www.files.ethz.ch/isn/186106/legal-aspects-of-nuclear-weapons-en-621.pdf>, [accessed 21 January 2017].

²⁰³ Alexandre Kiss, International Humanitarian Law and the Environment, Environmental Policy and Law, 31/4-5- (2001), <http://content.iospress.com/download/environmental-policy-and-law/epl31-4-5-12?id=environmental-policy-and-law%2Fep31-4-5-12>, , [accessed 12 May 2017].

4.4.3. Stockholm Declaration

It is often argued that the principle of environmental protection emerged during the 1970s stemming from a worldwide concern for the environment as reflected in the 1972 Stockholm Declaration. Principle 21 of Stockholm Declaration states that: “States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.”²⁰⁴ Principle 21 is today generally recognized as expressing a basic norm of customary international environmental law²⁰⁵

All the non-binding declarations with a global character, which expressed the common concern of humanity, linked environmental protection to the prohibition or regulation of military activities. Along with that line, the sensitive issue of the use of nuclear weapons was addressed, in vague terms, in Principle 26 by providing: “Man and his environment must be spared the effects of nuclear weapons and other means of mass destruction. States must strive to reach a prompt agreement, in the relevant organs, on the elimination and complete destruction of such weapons”²⁰⁶. Although no decisive legal conclusions can be drawn from the Stockholm Declaration, it gave a signal of what was the concern and what was to come in the Rio Declaration (1992)²⁰⁷.

4.4.4. Rio Declaration

Following such developments, the 1992 Declaration of Rio de Janeiro on Environment and Development was well founded to state in its principle 24 that “war is in-

²⁰⁴ United Nations Conference on the Human Environment, 15 December 1972, A/RES/2994, <http://www.un-documents.net/unchedec.htm>, [accessed 12 January 2017].

²⁰⁵ Dinah Shelton, “Stockholm Declaration (1972) and Rio Declaration (1992), July 2008, Oxford Public International Law, <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1608>, [accessed 8 May 2017].

²⁰⁶ Report of the United Nations Conference on the Human Environment, 5-16 June 1972, United Nations, <http://www.un-documents.net/aconf48-14r1.pdf>, [accessed 15 May 2017].

²⁰⁷ Protection of the environment in relation to armed conflicts, Annex E, A/66/10, International Law Commission, <http://legal.un.org/docs/?path=../ilc/reports/2011/english/annex.pdf&lang=EFSRAC>, [accessed 22 May 2017].

herently destructive of sustainable development” and that “States shall, therefore, respect international law providing protection for the environment in times of armed conflict and co-operate in its further development, as necessary.” Yet it can be regretted that such statement was not followed by a corresponding chapter in Agenda 21, which only declares that “measures in accordance with international law should be considered to address, in times of armed conflict, large-scale destruction of the environment that cannot be justified by international law”.²⁰⁸

Moreover, directly relevant to use or threat to use of nuclear weapons is principle 2 which repeats the formulation of Principle 21 of Stockholm Declaration which in accordance with the UN Charter and the principles of international law balances sovereignty with the duty to prevent transboundary environmental harm, but adds the word ‘developmental’ in providing that States have the right to exploit their resources in accordance with their own environmental and developmental policies²⁰⁹.

4.5.5. General Assembly resolution 47/37

General Assembly Resolution adopted on 25 November 1992, invited the International Committee of the Red Cross (ICRC) to report on its own as well as activities of other relevant bodies with regard to the protection of the environment in times of armed conflict. Furthermore, the ICRC report calls for an application of the Martens clause which states that in cases not covered by specific provisions, civilians and combatants remain under the protection and authority of the principles of international law derived from established customs, from the principles of humanity and from the dictates of public conscience. It finds this clause indisputably valid in the context of environmental protection during times of armed conflict²¹⁰.

²⁰⁸ Alexandre Kiss, International Humanitarian Law and the Environment, Environmental Policy and Law, 31/4-5- (2001), <http://content.iospress.com/download/environmental-policy-and-law/epl31-4-5-12?id=environmental-policy-and-law%2Fep31-4-5-12>, , [accessed 12 May 2017].

²⁰⁹ Rio Declaration, 14 June 1992, Rio de Janeiro, UN Doc. A/CONF.151/26 (vol. I) / 31 ILM 874 (1992), <http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm>, [accessed 12 January 2017].

²¹⁰ Alexandre Kiss, International Humanitarian Law and the Environment, Environmental Policy and Law, 31/4-5- (2001), <http://content.iospress.com/download/environmental-policy-and-law/epl31-4-5-12?id=environmental-policy-and-law%2Fep31-4-5-12>, , [accessed 12 May 2017].

4.5.6. Conclusion

In the light of the above, nuclear weapons use or threat to use cannot be deemed to be only “restricted” under environmental law but directly in non-compliance with the cited provisions. Taking into consideration its devastating capabilities and consequences one cannot avoid, restrict nor use discriminately or irrespective to the environment, use of nuclear weapons would undoubtedly cause “widespread, long-term, and severe damage to the natural environment”, as prohibited by Article 35 (3) and Article 55 of the Additional Protocol I. Moreover, these prohibitions apply equally when damage to the environment is not the object of the attack, such being the case of nuclear weapons²¹¹. In the words of the International Court of Justice, “these are powerful constraints for all the States having subscribed to these provisions²¹²”.

The ICJ also discards the often argued issue of applicability of environmental law during armed conflict but focuses on the question of whether the obligations stemming from these treaties were intended to be the obligations of total restraint during military conflict. To this end, the Court finds that applicability of the right to self-defence is not exclusive to the obligations to protect the environment but nonetheless, environmental considerations and respect to the environment have to be taken into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives²¹³.

The argument that there is a lack of scientific certainty on the effects of nuclear weapons on the environment clearly does not hold water either. More frequent argument that these principles are not explicit enough to apply to nuclear weapons or that nuclear weapons are intentionally left uncovered while the same rules do apply to other kinds of weapons, all being less detrimental than the nuclear weapons is equally incongruent. As judge Weeramantry pointed out in its dissenting opinion to the Advisory Opinion on Legality of nuclear weapons: “If there are general duties arising under customary international law, it clearly matters not that the various envi-

²¹¹ Erik Koppe, “The Use of Nuclear Weapons and the Protection of the Environment during International Armed conflict, (Oxford and Portland, Oregon: HART Publishing, 2008).

²¹² *Advisory Opinion Concerning Legality of the Threat or Use of Nuclear Weapons*, International Court of Justice (ICJ), 8 July 1996, <http://www.icj-cij.org/docket/index.php?sum=498&p1=3&p2=4&case=95&p3=5> [accessed 26 January 2017].

²¹³ Ibid.

ronmental agreements do not specifically refer to damage by nuclear weapons. The same principles apply whether we deal with belching furnaces, leaking reactors or explosive weapons. The mere circumstance that coal furnaces or reactors are not specifically mentioned in environmental treaties cannot lead to the conclusion that they are exempt from the incontrovertible and well- established standards and principles laid down therein²¹⁴”.

Thus, the inevitably vast damage that nuclear weapons cause to the environment represents a rampant breach of State obligation²¹⁵ and therewith adds another dimension to the illegality of nuclear weapons. The therewith abundance of just described provisions amply demonstrate there is no legal gap in the prohibition of use or threat to use nuclear weapons under the purview of environmental law.

4.5. UN General Assembly and Security Council resolutions

While flawed, the International Court of Justice does offer adjudicative functions, the UN Security Council arguably exercises both executive and legislative functions, and the UN General Assembly can be seen to exercise some legislative functions, not least control over the finances of the organization.”²¹⁶ Whereas resolutions adopted by Security Council acting under Chapter VII of the Charter are generally considered binding, in accordance with the Article 25 of the Charter, not all of them are intended to have legal effects²¹⁷. However, where they do have it is often only within the internal legal order of the United Nations. Relatively few Security Council resolutions have external legal effects, though these are most often the most significant²¹⁸. On the other hand, General Assembly resolutions are in principle “recommendations”

²¹⁴ Dissenting Opinion of judge Weeramantry, appended to the *Advisory Opinion Concerning Legality of the Threat or Use of Nuclear Weapons*, International Court of Justice (ICJ), 9 July 2004, 429-555, <http://www.icj-cij.org/docket/files/95/7521.pdf>, [accessed 26 January 2017].

²¹⁵ Ibid.

²¹⁶ Chandra Lekha Sriram, “International law, International Relations theory and post-atrocity justice: towards a genuine dialogue”, *International Affairs (Royal Institute of International Affairs 1944-)* Vol. 82, No. 3 (May, 2006), pp. 467-478, <https://www.jstor.org/stable/pdf/3874262.pdf>, [accessed 26 March 2017].

²¹⁷ Marko Divac Öberg, “The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ”, November 1, 20015, *European Journal of International Law*, 16 (5): 879-906, <https://academic.oup.com/ejil/article/16/5/879/496072/The-Legal-Effects-of-Resolutions-of-the-UN#>, [accessed 6 May 2017].

²¹⁸ Michael C. Wood, “The Interpretation of Security Council resolutions”, April 28, 1995, *Max Planck Yearbook of United Nations Law*, http://www.mpil.de/files/pdf2/mpunybw_wood_2.pdf, [accessed 6 May 2017].

which are not of binding character, according to Article 10 of the UN Charter²¹⁹, at least not in the operational realm of international peace and security which is the sphere relevant for purposes of this study. Article 11 of the UN Charter authorizes the General Assembly to consider “the principles governing disarmament and the regulation of armaments,” and empowers it to make recommendations based on these principles to member states and the Security Council²²⁰. Nonetheless, both Security Council and General Assembly resolutions carry an authoritative weight even if non-binding, and show the current status of emerging political will.

4.5.1. UN Security Council Resolutions 687 and 1441

Among Security Council resolutions most relevant for the prohibition of use or threat to use nuclear weapons belong resolutions 687 and 1441. Resolution 687 called for a permanent ceasefire agreement and it required Iraq to destroy all of its chemical, biological and nuclear weapons capability as well as missiles with a range of more than 150 kilometers and to allow verification by inspectors from the UN Special Commission (UNSCOM) and the International Atomic Energy Agency (IAEA)²²¹. Following the non-compliance with that one and a number of other resolutions on Iraqi disarmament obligations, resolution 1441 in November 2002, was passed by a unanimous 15-0 vote, gave Iraq a “final opportunity” to comply with its disarmament requirements under previous Security Council resolutions. Iraq’s failure to provide an adequate accounting of its prohibited weapons programs or to convince UN inspectors that its weapons of mass destruction had been destroyed as Baghdad claimed in March 2003 led to the US-led invasion of Iraq²²².

4.5.2. UN Security Council Resolution 984

²¹⁹ Stephen M. Schwebel, “What Weight to Conquest?” in “Justice in International Law”, (Cambridge: Cambridge University Press, 1994).

²²⁰ UN General Assembly First Committee, Reaching Critical Will, <http://www.reachingcriticalwill.org/disarmament-fora/unga>, [accessed 6 May 2017].

²²¹ United Nations Security Council Resolution 687 (1991), April 3, 1991, S/RES/687, <https://www.un.org/Depts/unmovic/documents/687.pdf>, [accessed 6 May 2017].

²²² Daryl Kimball, Disarming Saddam-A Chronology of Iraq and UN Weapons Inspections From 2002-2003, July 2003, Arms Control Association, <https://www.armscontrol.org/factsheets/iraqchron>, [accessed 6 May 2017].

Security Council resolution 984 from April 1995 is important to mention in the context of threat or use nuclear weapons and its prohibition as it recognized that “in case of aggression with nuclear weapons or the threat of such aggression against a non-nuclear-weapon State Party to the Treaty on the Non-Proliferation of Nuclear Weapons, any State may bring the matter immediately to the attention of the Security Council to enable the Council to take urgent action to provide assistance, in accordance with the Charter, to the State victim of an act of, or object of a threat of, such aggression; and recognizes also that the nuclear-weapon State permanent members of the Security Council will bring the matter immediately to the attention of the Council and seek Council action to provide, in accordance with the Charter, the necessary assistance to the State victim²²³”. By giving NNWS negative assurances against the Nuclear Non-Proliferation Treaty, Security Council explicitly prohibited use or threat to the use nuclear weapons against NNWS.

4.5.3. UN Security Council Resolution 1887

Furthermore, resolution 1887 from September 2009 reaffirms the “need for all Member States to fulfil their obligations in relation to arms control and disarmament and to prevent proliferation in all its aspects of all weapons of mass destruction²²⁴. That Security Council meeting is touted as a historic summit meeting presided by President Barack Obama of the United States on which, by unanimously adopting resolution in its first comprehensive action on nuclear issues since the mid-1990s, Council members emphasized that the body had a primary responsibility to address nuclear threats and that all situations of non-compliance with nuclear treaties should be brought to its attention²²⁵.

4.5.5. UN General Assembly 1653

²²³ UN Security Council, *Security Council resolution 984 (1995) [Use of nuclear weapons]*, 11 April 1995, S/RES/984 (1995), <http://unscr.com/en/resolutions/984>, [accessed 6 May 2017].

²²⁴ UN Security Council, *Security Council resolution 1887 (2009) [on nuclear non-proliferation and nuclear disarmament]*, 24 September 2009, S/RES/1887 (2009), <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/NKorea%20SRES%201887.pdf>, [accessed 6 May 2017].

²²⁵ Historic Summit of Security Council Pledges Support for Progress on Stalled Efforts to End Nuclear Weapons Proliferation, September 24 2009, SC/9746, <http://www.un.org/press/en/2009/sc9746.doc.htm>, [accessed 6 May 2017].

In 1961, the UN General Assembly adopted resolution 1653 (XVI) which recalled that the use of weapons of mass destruction, causing unnecessary human suffering, was in the past prohibited as being contrary to the laws of humanity and to the principles of international law, by international declarations and binding agreements such as the Declaration of St. Petersburg of 1868, the Declaration of the Brussels Conference of 1874, the Conventions of the Hague Peace Conferences of 1899 and 1907 and the Geneva Protocol of 1925, to which the majority of nations are still parties". Furthermore, it declares the use of nuclear weapons to be "a direct violation of the Charter of the United Nations", "contrary to the rules of international law and to the laws of humanity", "a crime against mankind and civilization", and therefore a matter of "permanent prohibition"²²⁶. It also supports all the arguments on incompatibility of use or threat of nuclear weapons to any of the humanitarian principles and rules by declaring that "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 rules of humanity"²²⁷.

4.5.7. Conclusion

As mentioned, UN Security Council resolutions are important as they have considerable authority and they are legally binding on the UN member States. However, Security Council could be seen as a not fully democratic body, as the five states that were granted the special status of Permanent Member States at the Security Council also known as P5, have veto power over any decisions²²⁸. Thus, SC decisions are not reflective of the full body of the law but only that part of the law that the P5 will agree to acknowledge and enforce.

²²⁶ Burns H. Weston, "Nuclear Weapons Versus International Law: A Contextual Reassessment", McGill Law Journal, Vol. 28, 1983, <http://www.lawjournal.mcgill.ca/userfiles/other/7673710-westou.pdf>, [accessed 20 March 2017].

²²⁷ General Assembly resolution 1653, Declaration on the prohibition of the use of nuclear and thermonuclear weapons, A/RES/16/53 (28 November 1961), undocs.org/A/RES/16/53, [accessed 24 May 2017].

²²⁸ Sahar Okhovat, "The United Nations Security Council: Its Veto Power and Its Reform", December 2011, University of Sydney, Centre for Peace and Conflict Studies, http://sydney.edu.au/arts/peace_conflict/docs/working_papers/UNSC_paper.pdf, [accessed 18 May 2017].

On the other hand, UN General Assembly resolutions, in general, are not binding and do not by themselves determine the law. However, they constitute an important part of emerging legal norms, especially if widely supported and reinforced over time by subsequent resolutions. Therefore, the numerous and mostly well-supported UN-GA resolutions supporting the objective of the complete elimination of nuclear weapons, were important in the ICJ's affirmation that the obligation to achieve nuclear disarmament was not merely an NPT obligation, but a universal customary norm²²⁹. Nonetheless, the above cited UN General Assembly resolutions condemning threat and use of nuclear weapons as illegal were never supported by all nuclear-armed States and so make its rise to the level of a customary norm questionable²³⁰. Nonetheless, a strong argument can be made that the absence of any use of a nuclear weapon since the bombings of Hiroshima and Nagasaki suggest that such a practice has become "customary". Even conceding this argument, the fact that fifty-five countries supported the stance on any use of nuclear weapons being unlawful certainly presents cogent evidence as to the present state of customary international law²³¹.

4.6. ICJ Jurisprudence

4.6.1. International Court of Justice's Advisory Opinion on Nuclear Weapons

4.6.2.1. Background

In early 1990s, international civil society led by the International Association Lawyers against Nuclear Arms (IALANA), the International Peace Bureau and International Physicians for the Prevention of Nuclear War and eventually joined by hundreds of NGOs, launched a campaign called "the World Court Project" with the aim of obtaining a declaration from the ICJ on illegality of nuclear weapons. The same branch of

²²⁹ Elizabeth J. Shafer, Good Faith Negotiation, the Nuclear Disarmament Obligation of Article VI of the NPT, and Return to the International Court of Justice, Presented at International Seminar, "Abolition of Nuclear Weapons, War and Armed Forces," University of Costa Rica Faculty of Law and the International Association of Lawyers Against Nuclear Arms, January 26, 2008, San Jose, Costa Rica, <http://lcnp.org/wcourt/goodfaith-shafer.pdf>, [accessed 26 March 2017].

²³⁰ Stephen M. Schwebel, The Effect of Resolutions of the U.N. General Assembly on Customary International Law, Proceedings of the Annual Meeting (American Society of International Law), Vol. 73, April 26-28, 1979), <http://www.jstor.org/stable/pdf/25658015.pdf?refreqid=excelsior%3A345e67b2d2f614f3087837bf04ae4ee3>, [accessed 21 May 2017].

²³¹ David M. Corwin, "The Legality of Nuclear Arms Under International Law", Dickinson Journal of International Law, Vol. 5 No. 2, 1987, Penn State International Review, accessed February 14, 2017, <http://elibrary.law.psu.edu/cgi/viewcontent.cgi?article=1057&context=psilr>.

civil society lobbied the UN member states to submit a draft resolution to the World Health Organization (WHO) and to the General Assembly requesting an advisory opinion from the Court. In response to the WHO's question "In view of the health and environmental effects, would the use of nuclear weapons by a State in war or other armed conflict be a breach of its obligations under international law including the WHO Constitution?" The Court rejected that request on jurisdictional grounds. However, in regard to the General Assembly's request from Resolution 49/75 K adopted on 20 December 1994, the Court accepted its jurisdiction and the invitation and involved in determining the position of nuclear weapons against a number of legal rules and instruments.²³²

The Court's opinion canvasses a wide range of areas of international law directly or indirectly relevant to the problem in examining the relationships between nuclear weapons and humanitarian law, the law of human rights and the law of environment, beside the law relating to the permissible use of force in international law. It also covers the interpretation of treaty obligations and the expectations generated by variously situated commitments to determine whether the required *opinio iuris* is there to ground obligations in customary international law²³³.

On July 8, 1996, the Court rendered its Advisory Opinion ruling by the narrowest of majorities that the threat or use of nuclear weapons "would generally be contrary to the rules of international law applicable in armed conflict" but subject to one apparent exception. The ambiguity of the Court's main conclusions can also be observed in the headlines of some leading daily newspapers on the following morning, reading "International Court Fudges Nuclear Arms Ruling; No Ban..." (*Guardian*), "Use or Threat of Nuclear Arms "Unlawful" (*Financial Times*), "Hague Court Declines to Give Ruling" (*The times*)²³⁴.

4.6.2.2. Opinion's *Dispositif*

²³² Kati Kulovesi, "Legality or otherwise? Nuclear Weapons and the Strategy of Non Liquefaction", Finnish Yearbook of International Law, Vol. X, 1999, 56.

²³³ Winston P. Nagan, "Nuclear arsenals, International Lawyers, and the Challenge of the Millennium", The Yale Journal of International Law, Vol. 24, 2, 1999, [accessed 29 March 2017].

²³⁴ Laurence Boisson de Chazournes and Philippe Sands, "International Law, the International Court of Justice and Nuclear Weapons" (Cambridge, UK: Cambridge University Press, 1999), 1.

The Court decided unanimously on the following four issues:

“There is in neither customary nor conventional international law any specific authorization of the threat or use of nuclear weapons”²³⁵; “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”²³⁶; “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”²³⁷; “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”²³⁸;

and almost unanimously (by eleven votes to three) on: *“There is in neither customary nor conventional international law any comprehensive and universal prohibition of the threat or use of nuclear weapons as such”²³⁹.*

The actual answer to the question posed to the Court barely passed the voting with the President’s casting vote, by seven votes to seven. The Court’s final word as ambiguous as it can be read as follows:

“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

²³⁵ Paras. 105(2) A.

²³⁶ Paras. 105(2) C.

²³⁷ *Advisory Opinion Concerning Legality of the Threat or Use of Nuclear Weapons*, International Court of Justice (ICJ), 8 July 1996, para. 105(2)D, <http://www.icj-cij.org/docket/index.php?sum=498&p1=3&p2=4&case=95&p3=5> [accessed 26 January 2017].

²³⁸ Ibid. Paras.105(2) F.

²³⁹ Ibid. Paras.105(2) B.

*nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake*²⁴⁰”.

4.6.2.3. Court’s Reasoning

The Court concluded that the most directly relevant applicable law governing the question posed to it, is that “relating to the use of force enshrined in the United Nations Charter and the law applicable in armed conflict which regulates the conduct of hostilities, together with any specific treaties on nuclear weapons that the Court might determine to be relevant”²⁴¹.

Nevertheless, the entitlement to resort to self-defence under Article 51 is subject to conditions of necessity and proportionality, as stated in the *Nicaragua v. United States of America* case and described in detail earlier in this study. The Court, therefore, concludes that the proportionality principle does not in itself exclude the use of nuclear weapons in self-defence in all circumstances but that a lawful use of force must meet the requirements of the law applicable in armed conflict, in particular principles and rules of humanitarian law²⁴².

However, at this point, the Court for the first time involves the “deterrence doctrine” in the opinion and notes that “in order to lessen or eliminate the risk of unlawful attack, States sometimes signal that they possess certain weapons to use in self-defence against any State violating their territorial integrity or political independence”. The Court goes on by saying that whether the signalled use of force falls within the “threat” from Article 2.4. of the UN Charter “depends upon various factors” but does not go on to explain which would those factors be. Then it turns to the notions of “threat” and “use” of force and the fact that they under Article 4.2. stand together and that therefore, “*if the use of force itself in a given case is illegal – for whatever reason – the threat to use such force will likewise be illegal*”.

²⁴⁰ Ibid. Para. 105.(2)E

²⁴¹ *Advisory Opinion Concerning Legality of the Threat or Use of Nuclear Weapons*, International Court of Justice (ICJ), 8 July 1996, para. 34, <http://www.icj-cij.org/docket/index.php?sum=498&p1=3&p2=4&case=95&p3=5> [accessed 26 January 2017].

²⁴² Ibid. Para. 39-42.

The Court implies its consent with some states' statements that possession of nuclear weapons is in itself an unlawful threat to use force but it restraints such unlawfulness to cases when the particular use of force envisaged would be "directed against the territorial integrity or political independence of a State, or against the purposes of the United Nations or whether, in the event that it was intended as a means of defence, it would necessarily violate the principles of necessity and proportionality"²⁴³.

In regard to resorting to customary international law to determine whether a prohibition of the threat or use of nuclear weapons as such flows from that source of law, the Court turns primarily to the actual practice and *opinio iuris* of states. By way of doing so, the Court finds a clear division between states holding the view that the use of nuclear weapons is illegal and those asserting the legality of threat and use of nuclear weapons. The former refer to a consistent practice of non-utilization of nuclear weapons by states since 1945 as an expression of an *opinio iuris* on the part of those who possess such weapons. The latter, however, invoke the doctrine and practice of deterrence in support of their argument and argue that the reason nuclear weapons have not been used since 1945 is only due to the fact that "circumstances that might justify their use have fortunately not arisen".

Having examined General Assembly resolutions such as earlier described Resolution 1653 (XVI) and many others recalling the content of resolution 1653 (XVI), and requesting the member States to conclude a convention prohibiting the use of nuclear weapons in any circumstance, according to the Court "reveals 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". However, the Court concludes that "the emergence, as *lex lata*, of a customary rule specifically prohibiting the use of nuclear weapons as such is hampered by the continuing tensions between the nascent *opinio iuris* on the one hand, and the still strong adherence to the practice of deterrence on the other"²⁴⁴.

²⁴³ Ibid. Para. 47-50.

²⁴⁴ *Advisory Opinion Concerning Legality of the Threat or Use of Nuclear Weapons*, International Court of Justice (ICJ), 8 July 1996, para. 68-73, <http://www.icj-cij.org/docket/index.php?sum=498&p1=3&p2=4&case=95&p3=5> [accessed 26 January 2017].

As a prime principle of humanitarian law applicable in armed conflict, the Court argues the principle of distinction between combatants and non-combatants, prohibition of causing unnecessary suffering to combatants. The Court, likewise refers, in relation to these principles, to the Martens clause, described earlier in this study too. Moreover, the Court reiterates the universality and presence of humanitarian rules included in the Regulations annexed to the Hague Convention IV of 1907 that already Nuremberg International Military Tribunal had found in 1945 as “recognized by all civilized nations and regarded as being declaratory of the laws and customs of war²⁴⁵”.

When determining whether the “recourse to nuclear weapons” would be illegal in any circumstance as to the law applicable in armed conflict, the Court states 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 circumstance²⁴⁶”. The Court, does not, however, explain or exemplify which the elements that would or would not suffice to enable it to conclude with certainty would be. Moreover, whichever these “missing elements” were, the Court had a full authority – and duty – to demand and acquire any information that might bring more clarity to the case²⁴⁷.

Finally, the Court points out that it cannot “lose sight of the fundamental right of every State to survival, and thus its right to resort to self-defence, in accordance with Article 51 of the Charter, when its survival is at stake” nor can it “ignore the practice referred to as “policy of deterrence” to which an appreciable section of the international community adhered for many years²⁴⁸”.

4.6.2.5. Paragraph 105(2)E: a de facto *non liquet*

²⁴⁵ Para. 85-86.

²⁴⁶ *Advisory Opinion Concerning Legality of the Threat or Use of Nuclear Weapons*, International Court of Justice (ICJ), 8 July 1996, para. 95, <http://www.icj-cij.org/docket/index.php?sum=498&p1=3&p2=4&case=95&p3=5> [accessed 26 January 2017].

²⁴⁷ Burns H. Weston, “Nuclear Weapons and the World Court: Ambiguity’s Consensus”, *Transnational Law & Contemporary Problems*, Vol. 7: 389, 1997, accessed May 11, 2017, <http://heinonline.org/HOL/LandingPage?handle=hein.journals/tlcp7&div=24&id=&page=>.

²⁴⁸ *Advisory Opinion Concerning Legality of the Threat or Use of Nuclear Weapons*, International Court of Justice (ICJ), 8 July 1996, para. 96, <http://www.icj-cij.org/docket/index.php?sum=498&p1=3&p2=4&case=95&p3=5> [accessed 26 January 2017].

Moreover, the Court definitely did itself (and humanity) a disservice when adopting the essentially *non liquet* position, as held, beside many international lawyers also by judges Higgins, Koroma and Schwebel²⁴⁹. Vice-President's dissenting opinion went that far to state that when it comes to the supreme interests of State, the Court discarded the legal progress of the Twentieth Century, provisions of the UN Charter and proclaimed "in terms redolent of Realpolitik, its ambivalence about the most important provisions of modern international law. If that was to be its ultimate holding, the Court would have done better to have drawn on its undoubted discretion not to render an Opinion at all"²⁵⁰. Judge Koroma in its dissenting opinion put forward his well-grounded statement that "it is wholly incoherent in the light of the material before the Court to say that it cannot rule definitively on the matter now before it in view of the current state of the law and because of the elements of facts at its disposal, for neither the law nor the facts are so imprecise or inadequate as to prevent the Court from reaching a definitive conclusion on the matter. Moreover, even if the Court was to declare a *non liquet* in the present case, what he did not explicitly do, had he applied the existing law, he could not have found a *non liquet* in the present case. As this study has also convincingly shown up to this point, the *corpus juris* on the matter is not only considerable but is sufficiently clear and precise for the Court to have been able to make a definitive finding"²⁵¹.

What both he and judge Higgins²⁵² have clearly pointed out, the fact that the Court reached a conclusion of general incompatibility with humanitarian law" and then effectively pronounced a *non liquet* is not only ambiguous but utterly contradictory. For that reason, judge Higgins calls it correctly, "an abstention from decision rather a qualification of decision". In addition, president Bedjaoui stressed that this *non liquet* is not to be taken as a green light for the threat or use of nuclear weapons under any

²⁴⁹ Burns H. Weston, "Nuclear Weapons and the World Court: Ambiguity's Consensus", *Transnational Law & Contemporary Problems*, Vol. 7: 387, 1997, <http://heinonline.org/HOL/LandingPage?handle=hein.journals/tlcp7&div=24&id=&page=>, [accessed 11 May 2017].

²⁵⁰ Dissenting Opinion of judge Schwebel, appended to the *Advisory Opinion Concerning Legality of the Threat or Use of Nuclear Weapons*, International Court of Justice (ICJ), 8 July 1996, 322, <http://www.icj-cij.org/docket/files/95/7515.pdf>, [accessed 16 February 2017].

²⁵¹ Ibid. 558.

²⁵² Dissenting Opinion of judge Higgins, appended to the *Advisory Opinion Concerning Legality of the Threat or Use of Nuclear Weapons*, International Court of Justice (ICJ), 8 July 1996, 590, <http://www.icj-cij.org/docket/files/95/7525.pdf>, [accessed 16 February 2017].

circumstance²⁵³". Finally, as judge Weeramantry categorically objected, the existing law is "sufficiently clear on this matter to have enabled the Court to make a definite pronouncement without leaving the vital question as to whether sufficient principles are not already in existence to determine it"²⁵⁴

4.6.2.6. Appraisal of the Court's opinion

Touted as a "historic" decision due to it being the first time ever that an international tribunal has ruled on this portentous issue does not spare it of being also one fraught with an unequivocal ambiguity to that level that one is left in wonder as to whether the Court was "hopelessly misguided or brilliantly politic". Although perhaps slightly overstated, to say that "all the interested parties got all that they needed even if they did not get all that they wanted"²⁵⁵ when looking at all the supplemented declarations and opinions, gives a good taste of the level of perplexity that this opinion has achieved.

In that spirit, whereas some international lawyers praise the opinion as "doing a great deal to strengthen the prescriptive force of international law and to consolidate expectations clearly discernible about the scope and character of legal regulation" and providing "a framework for an informed discourse with an important role for international lawyers in the centre of this global conversation"²⁵⁶, others vehemently oppose such stance, declaring Court's opinion as finding the "elusive middle ground between

²⁵³ Peter Weiss, "The World Court Tackles Fate of the Earth: An Introduction to the ICJ Advisory opinion on the Legality of the Threat and Use of Nuclear Weapons", *Transnational Law & Contemporary Problems*, Vol. 7: 325, <http://heinonline.org/HOL/LandingPage?handle=hein.journals/tlcp7&div=21&id=&page=>, [accessed 2 April 2017].

²⁵⁴ Saul Mendlovitz and Merav Datan, "Judge Weeramantry's Grotian Quest", *Transnational Law & Contemporary Problems*, (1997): 403, accessed 11 May 2017, <http://heinonline.org/HOL/LandingPage?handle=hein.journals/tlcp7&div=25&id=&page=>.

²⁵⁵ Burns H. Weston, "Nuclear Weapons and the World Court: Ambiguity's Consensus", *Transnational Law & Contemporary Problems*, Vol. 7: 371, 1997, <http://heinonline.org/HOL/LandingPage?handle=hein.journals/tlcp7&div=24&id=&page=>, [accessed 11 May 2017].

²⁵⁶ Winston P. Nagan, "Nuclear Arsenals, International Lawyers and the Challenge of the Millennium", *Yale Journal of International Law*, Vol. 24, Issue 2, 1999, <http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1658&context=yjil>, [accessed 8 May 2017].

geopolitical deference and defiance” and “repudiating the moral consensus of international society and translating this moral consensus into a political mandate²⁵⁷”.

Nevertheless, on the point of strong ambiguity as to what the Court has exactly prescribed, lawyers universally widely agree. To that end, although there are some international lawyers justifying the ambiguity by stating that matters of international concern are vested with both political and legal importance, especially in spheres of international peace, security and claims to self-defence²⁵⁸, the author is, however, more inclined to conform with opinions of lawyers such as Weston, Weiss, Mendlovitz and Datan, and their critics.

Still, regardless of the Court’s vague and gawky formulation, it can be argued that the force of the holding that threat or use is generally illegal is thus overwhelming when viewed in the context of the entire opinion. Whereas leaving the threat and use still potentially open to the narrow gap of cases of “extreme circumstances”, the Court explicitly stated that the threat or use in such circumstances are subjected to the requirements of humanitarian law. As it stated, a “fundamental” and “intransgressible” rule is that “States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets²⁵⁹”. The arguments that some of the NWS (United States and the United Kingdom) tried to make in defence of the legality of threat or use in “extreme circumstances” such as the use of a low-yield and “relatively clean and reasonably accurate nuclear weapon” whose defensive use might save lives and protect property within the meaning of military necessity²⁶⁰, the Court rejected them²⁶¹. As

²⁵⁷ Richard Falk, “The Nuclear Weapons Advisory Opinion and the New Jurisprudence of Global Civil Society”, 7 *Transnat’l L. & Contemp. Probs.*: (Fall, 1977), accessed May 19, 2017, http://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/tlcp7§ion=22.

²⁵⁸ Winston P. Nagan, “Nuclear Arsenals, International Lawyers and the Challenge of the Millenium”, *Yale Journal of International Law*, Vol. 24, Issue 2, 1999, <http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1658&context=yjil>, [accessed 8 May 2017].

²⁵⁹ *Advisory Opinion Concerning Legality of the Threat or Use of Nuclear Weapons*, International Court of Justice (ICJ), 8 July 1996, para. 78-79, <http://www.icj-cij.org/docket/index.php?sum=498&p1=3&p2=4&case=95&p3=5> [accessed 26 January 2017].

²⁶⁰ Written Statement of the Government of the United Kingdom of Great Britain and Northern Ireland, June 15, 1996, appended to the *Advisory Opinion Concerning Legality of the Threat or Use of Nuclear Weapons*, International Court of Justice (ICJ), 8 July 1996, <http://www.icj-cij.org/docket/files/95/8802.pdf>, [accessed 10 March 2017].

²⁶¹ Peter Weiss, “The World Court Tackles Fate of the Earth: An Introduction to the ICJ Advisory opinion on the Legality of the Threat and Use of Nuclear Weapons”, 7 *Transnational Law & Contemporary Problems*, (1997):324, accessed April 3, 2017,

Weston argues, the idea of “clean bombs” and “surgical strikes” especially in relation to strategic warfare, “exist more in the minds of military planners than they do in reality” and it does not take into consideration a likely escalation spiral once the process of nuclear reprisal and counter-reprisal set into motion.²⁶²

The strength of the general illegality conclusion can further be observed from the voting pattern. Whereas the entire paragraph was voted for by seven of fourteen judges and was adopted based on the casting vote of the Court’s president, judges’ separate statements show that while the extreme circumstance/survival of the state provision was intensely controversial, support for general or categorical illegality was broad and deep²⁶³. Moreover, three judges (Koroma, Shahabuddeen and Weeramantry) declined to vote for paragraph 2E because it did not definitely hold threat or use of nuclear weapons to be categorical – in every circumstance, illegal. Hence, altogether ten judges supported at least a holding of general illegality²⁶⁴. Furthermore, in the view of the Committee on International Security and Arms Control of the U.S. National Academy of Sciences, as the ICJ unanimously agreed that the threat or use of nuclear weapons is strictly limited by generally accepted laws and humanitarian principles that restrict the use of force meaning that “any threat or use of nuclear weapons must be limited to, and necessary for, self-defence; it must not be targeted at civilians, and be capable of distinguishing between civilian and military targets; and it must not cause unnecessary suffering to combatants, or harm greater than that unavoidable to achieve military objectives.” Taking all that into account, the Committee concluded that “the inherent destructiveness of nuclear weapons, combined with the unavoidable risk that even the most restricted use of such weapons

<http://heinonline.org/HOL/LandingPage?handle=hein.journals/tlcp7&div=21&id=&page=>, [accessed 2 April 2017].

²⁶² Burns H. Weston, “Nuclear Weapons and the World Court: Ambiguity’s Consensus”, *Transnational Law & Contemporary Problems*, Vol. 7: 379, 1997, <http://heinonline.org/HOL/LandingPage?handle=hein.journals/tlcp7&div=24&id=&page=>, [accessed 11 May 2017].

²⁶³ John Burroughs, “The Legal Framework for Non-Use and Elimination of Nuclear Weapons”, February 2006, *Lawyers’ Committee on Nuclear Policy*, <http://lcnp.org/disarmament/Gpeacebrfpaper.pdf>, [accessed 19 May 2017].

²⁶⁴ Burns H. Weston, “Nuclear Weapons and the World Court: Ambiguity’s Consensus”, *Transnational Law & Contemporary Problems*, Vol. 7: 383, 1997, <http://heinonline.org/HOL/LandingPage?handle=hein.journals/tlcp7&div=24&id=&page=>, [accessed 11 May 2017].

would escalate to broader attacks, makes it *extremely unlikely that any contemplated threat or use of nuclear weapons would meet these criteria*²⁶⁵.

Regardless of being able to discern these plausible arguments, there is undoubtedly much ambiguity and not well or- not at all - argument points in Court's opinion left. One of the most prominent and most frequently posed questions is when "an extreme circumstance of self-defence, in which the very survival of a State would be at stake" might be said to exist. The Court did not clarify these and related issues perhaps as it would probably have to concede far greater latitude to the nuclear weapons states than it cared to admit²⁶⁶.

To rule in general theoretical terms appears to have been the only way to meet the necessary votes needed from, for instance, judges Fleischhauer and Vereschetin (each of whose countries, Germany and Russia, benefitted for first-use threats)²⁶⁷. The same motive must have underpinned the Court urge to not only not condemn the practice of nuclear deterrence but to defend it as potentially an expression of a customary international law that could not be ignored²⁶⁸. Actually, the Court concluded pretty clearly that "the emergence, as *lex lata*, of a customary rule specifically prohibiting the use of nuclear weapons as such is hampered by the continuing tensions between the nascent *opinio iuris* on the one hand, and the still strong adherence to the practice of deterrence on the other²⁶⁹". By doing so, the Court again directly contradicted its own statement from the outset of the opinion, where it stated that the political aspects of the question as well as "the political nature of the motives which may be said to have inspired the request and the political implications that the opinion given might have are of no relevance to the establishment of its jurisdiction

²⁶⁵ Committee on International Security and Arms Control, National Academy of Sciences, *The Future of U.S. Nuclear Weapons Policy* (Washington, D.C.: National Academy Press, 1997), p. 87

²⁶⁶ Burns H. Weston, "Nuclear Weapons and the World Court: Ambiguity's Consensus", *Transnational Law & Contemporary Problems*, Vol. 7: 387, 1997, [http://heinonline.org/HOL/LandingPage?handle=hein.journals/tlcp7&div=24&id=&page=](http://heinonline.org/HOL/LandingPage?handle=hein.journals/tlcp7&div=24&id=&page=,), [accessed 11 May 2017].

²⁶⁷ Burns H. Weston, "Nuclear Weapons and the World Court: Ambiguity's Consensus", *Transnational Law & Contemporary Problems*, Vol. 7: 387, 1997, [http://heinonline.org/HOL/LandingPage?handle=hein.journals/tlcp7&div=24&id=&page=](http://heinonline.org/HOL/LandingPage?handle=hein.journals/tlcp7&div=24&id=&page=,), [accessed 11 May 2017].

²⁶⁸ *Ibid.* 386.

²⁶⁹ *Advisory Opinion Concerning Legality of the Threat or Use of Nuclear Weapons*, International Court of Justice (ICJ), 8 July 1996, para. 68-73, <http://www.icj-cij.org/docket/index.php?sum=498&p1=3&p2=4&case=95&p3=5> [accessed 26 January 2017].

to give such an opinion²⁷⁰. From that perspective, which is the most relevant one, one can persuasively argue that the Opinion “asks less than the nuclear powers have already undertaken to do” and that in the end, the residual and vestigial NATO first-use threat was “quietly grandfathered”. Had the Court been more powerful and had “more facts at its disposal”, it could have pronounced at least first use a violation of the customary international law of states, as it is shown in their present-day declarations and practice, notwithstanding exceptions such as unspoken Israeli nuclear threat or the NWS outside of purview of the NPT²⁷¹.

Finally, it is worth mentioning paragraph 2(F) of the Court’s *dispositif* which unanimously affirmed the existence of “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”. Such “emphatic” declaration, clearly *sua sponte*, does not respond to any part of the question posed by the General Assembly²⁷² and may be understood as equally a consequence and a reflection of the considerable ambiguity of its main substantive holding. It can be concluded that the Court felt compelled to rescue nuclear sanity from the jaws of its own imprecision and perplexity²⁷³.

To conclude, by emphasizing that nuclear weapons are not exempt from the rules of humanitarian law, and still delivering the *highly-controversial* opinion, the Court has shown that it has been guided more by the deterrence doctrines practices of the nuclear states than the international law sources. Still, by emphasizing the relevance of the rules of humanitarian law it has also brought nuclear weapons into the legal arena²⁷⁴.

²⁷⁰ Ibid, paras.13.

²⁷¹ Jeremy J. Stone, “Less than meets the eye”, *Bulletin of Atomic Scientists*, Sep/oct 1996, 43-45., <https://books.google.at/books?id=pAsAAAAAMBAJ&pg=PA1&lpg=PA1&dq=jeremy+stone+less+than+meets+the+eye+bulletin&source=bl&ots=3ey9mWbCPH&sig=E6QHAXb04xTFleeiz6NwC91ISTo&hl=en&sa=X&ved=0ahUKEwj68oWUr73UAhWMa1AKHcJjA5QQ6AEIJjAB#v=onepage&q=jeremy%20stone%20less%20than%20meets%20the%20eye%20bulletin&f=false>, [accessed 8 February 2017].

²⁷² Peter Weiss, “The World Court Tackles Fate of the Earth: An Introduction to the ICJ Advisory opinion on the Legality of the Threat and Use of Nuclear Weapons”, *Transnational Law & Contemporary Problems*, Vol. 7: 372, <http://heinonline.org/HOL/LandingPage?handle=hein.journals/tlcp7&div=21&id=&page=>, [accessed 2 April 2017].

²⁷³ Ibid. 394.

²⁷⁴ Douglas Roche, “Illegal in any circumstances whatsoever,” in “At the nuclear precipice. Catastrophe or transformation”, ed. Richard Falk and David Krieger (New York: Palgrave Macmillan, 2008), xvii.

Going beyond the mere obligation to “pursue negotiations on nuclear disarmament” of Article VI of the NPT the deeming that such negotiations must also be concluded, marked at that time the highest-level legal push ever given to governments to get on with nuclear disarmament²⁷⁵.

5. Nuclear deterrence vs. International law

As seen the conclusion of the ICJ Advisory opinion on Nuclear Weapons and state practice reality, regardless of their status under the international law, the concept of nuclear deterrence seems to have gained more weight in contrast to the law governing the threat or use of nuclear weapons. It shows that no matter how cogent and persuasive legal arguments that the use or threat to use nuclear weapons would be illegal are, it seems unlikely to persuade those in control of the foreign and defence policies of the nuclear powers to eliminate their nuclear arsenals²⁷⁶. This chapter is about to explain how nuclear deterrence doctrine is undermining the international law prohibiting the use or threat of nuclear weapons and under what legal basis, if any.

5.1. Concept of nuclear deterrence

Nuclear deterrence is a theory of international relations that states that nations are holding nuclear weapons in order to not be subject to attack (foremost, nuclear) or another undesired action and to deter it from attacking one's own state or allies, for the prospect of a retaliatory nuclear strike is too terrible to contemplate²⁷⁷. Deterrence rested on a delicate psychological balance and, if it failed, would bring unparalleled disaster not only to the states concerned, but also to the wider world²⁷⁸.

²⁷⁵ Ibid.

²⁷⁶ Paul C. Warnke, review of the “Nuclear Weapons and Law”, ed. by Arthur S. Miller and Martin Feinridger, 10 *Yale Journal of International Law*, no. 1 (1984): 253, accessed April 4, 2017, <http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1322&context=yjil>.

²⁷⁷ Sue Wareham Oam, “Nuclear Deterrence Theory – A Threat to Inflict Terror”, *Flinders Law Journal*, (2013), accessed May 3, 2017, <http://www.austlii.edu.au/au/journals/FlinLawJl/2013/9.pdf>.

²⁷⁸ Marianne Hanson, „A Pivotal Moment for Global Nuclear Arms Control and Disarmament Policies: The Contribution of Robert O'Neill”, in “War, Strategy and History”, ed. by Daniel Marston and Tamara Leahy, ANU Press (2019'6), accessed June 2, 2017, <http://www.jstor.org/stable/pdf/j.ctt1dgn5sf.18.pdf?refreqid=search%3A3ff61b8ef38b115ff65dae8bc79cf396>

A credible nuclear deterrent implies an eventual wish to use it and therefore the belief in the legitimacy of nuclear weapons as a means of defence. This belief, characteristic for the NWS, argues that the doctrine has changed the meaning of the legality of nuclear weapons, for it no longer relates to the intrinsic nature of the nuclear weapons, but, it now concerns the way these weapons may be used, directing them “exclusively at military objectives and safeguarding the civil population”²⁷⁹. Moreover, over the past few decades, the assumption that they are nothing more than newer and better munitions has led to the futile chase for strategic superiority and unthinking acceptance of the principle that more of them means more security²⁸⁰.

5.2. Nuclear weapons states’ doctrines and negative security assurances

Out of altogether nine NWS today, only Israel maintains the official policy of nuclear ambiguity - non-admitting and non-denying that it possesses nuclear weapons²⁸¹. The remaining eight countries have in one way or another informed their counterparts, and public in general, of an approximate number of its deployed nuclear warheads or at least, what kind of policy of deterrence the country is pursuing and under which circumstances they rule out the use of nuclear weapons²⁸².

As mentioned earlier, the NPT-acknowledged NWS (Russia, China, France, Britain, United States) have given assurances of non-use of nuclear weapons to NNWS parties to the NPT, NWFZ treaties and a few individual states. Protocols on non-use are in effect for the Latin American (Treaty of Tlatelolco) and South Pacific (Treaty of Raratonga) NWFZs²⁸³. There is a strong argument that NSA made in declarations by the NWS are legally binding, especially because they were made with the intent of inducing NNWSs to agree to the indefinite extension of the NPT. Assurances made in other forms are clearly binding. Nonetheless, the NWS are arguing the op-

²⁷⁹ Paul de Visscher, “Legal aspects concerning the installation of the First Nuclear Missiles on Belgian Soil”, 20, *Israel Law Review*, 1985, 137-145.

²⁸⁰ Paul C. Warnke, review of the “Nuclear Weapons and Law”, ed. by Arthur S. Miller and Martin Feinridger, 10 *Yale Journal of International Law*, no. 1 (1984): 259, accessed April 4, 2017, <http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1322&context=yjil>.

²⁸¹ Julian Borger, „The truth about Israel’s secret nuclear arsenal“, *The Guardian*, January 15 2014, accessed June 20, 2016, <https://www.theguardian.com/world/2014/jan/15/truthisraels-secret-nuclear-arsenal>.

²⁸² Nuclear Doctrine, *NuclearFiles.org*, accessed May 10, 2017, http://www.nuclearfiles.org/menu/key-issues/nuclear-weapons/issues/policy/nuclear-doctrine_print.htm.

²⁸³ John Burroughs, “The Legal Framework for Non-Use and Elimination of Nuclear Weapons”, February 2006, *Lawyers’ Committee on Nuclear Policy*, accessed May 19, 2017, <http://lcn.org/disarmament/Gpeacebrfpaper.pdf>.

posite, regarding them as only political commitments, as it is any other statement in regard to their state's nuclear posture²⁸⁴. Such actions show that today's political realities of nuclear doctrines bind the nuclear powers more tightly than the court or law demands²⁸⁵.

5.3. North Atlantic Treaty and the Article 5

No political system can “function alone”: it lacks legitimacy. All the legitimacy NWS mostly have is based on the argument that the *opinio iuris* of the international community, especially with regard with the five NWS, is not converging in the direction of outlawing these nuclear weapons²⁸⁶. There is one more source that belongs to be included here as it represents the strongest, not to say the only, conventional treaty source of international law that prescribes use of weapons including nuclear weapons – the North Atlantic Treaty.

Deriving its authority from the Article 51 of the UN Charter, which reaffirms the inherent right of independent states to individual or collective defence the Treaty provides an accord that “an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, (...), will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area²⁸⁷”. Although the Treaty does not contain an explicit reference to nuclear weapons, at the NATO's last summit in July 2016, the member states of the North Atlantic Alliance have reiterated its nuclear posture as follows: “As a means to prevent conflict and war, credible deterrence and defence is essential. Therefore, deterrence and defence, based on an appropriate mix of nuclear, conventional, and missile defence capabilities, remains a core element of our overall strategy. A robust deterrence and defence posture strengthens

²⁸⁴ Ibid.

²⁸⁵ Jeremy J. Stone, “Less than meets the eye”, Bulletin of Atomic Scientists, Sep/oct 1996, 44., <https://books.google.at/books?id=pAsAAAAAMBAJ&pg=PA1&lpg=PA1&dq=jeremy+stone+less+than+meets+the+eye+bulletin&source=bl&ots=3ey9mWbCPH&sig=E6QHAXb04xTFleeiz6NwC91ISTo&hl=en&sa=X&ved=0ahUKEwj68oWUr73UAhWMA1AKHcJjA5QQ6AEIJAB#v=onepage&q=jeremy%20stone%20less%20than%20meets%20the%20eye%20bulletin&f=false>, [accessed 8 February 2017].

²⁸⁶ North Atlantic Treaty, April 4, 1949, 34 UNTS 243; 43 AJILs 159, accessed May 18, 2017, http://www.nato.int/cps/iw/natohq/official_texts_17120.htm?selectedLocale=en.

²⁸⁷ Ibid.

Alliance cohesion, including the transatlantic link, through an equitable and sustainable distribution of roles, responsibilities, and burdens. NATO must continue to adapt its strategy in line with trends in the security environment – including with respect to capabilities and other measures required – to ensure that NATO's overall deterrence and defence posture is capable of addressing potential adversaries' doctrine and capabilities, and that it remains credible, flexible, resilient, and adaptable²⁸⁸.

5.4. Conclusion

In the light of the above said, even with such a little legal basis, especially when compared to the law applicable to the threat or use nuclear weapons, nuclear deterrence doctrine continues to coexist with the illegality of threat or use of nuclear weapons in a separate corner of the same realm. As much as this analysis shows them separated, they are interdependent. The big question at that point is only which of the two sides is dependent²⁸⁹. This study has shown that the prohibition of use has been respected since the first time it was breached in August 1945. Nevertheless, it is virtually impossible to prove due to which of the two “powers” that was the case – international law prohibiting the use or nuclear deterrence successfully deterring it²⁹⁰. In the case of a threat, however, it is more than clear that nuclear deterrence is still in the lead. To change that, it will clearly take more than the law can offer at the moment.

6. Humanitarian Initiative and Further Negotiations for Complete Nuclear Disarmament

The critical dilemma faced by critics of nuclearism is that international law is clearly pointing to the illegality of nuclear weapons besides being reinforced by even clearer

²⁸⁸ Warsaw Summit Communique, North Atlantic Treaty Organization, July 8-9, 2016, accessed May 18, 2017, http://www.nato.int/cps/en/natohq/official_texts_133169.htm.

²⁸⁹ Kazuko Hirose Kawaguchi, “The Legality of the Threat or Use of Nuclear Weapons and the Logic of Nuclear Deterrence: A Legal-sociological analysis”, 93Proceedings of the Annual meeting (American Society of International Law (March, 1999), accessed May 18, 2017, <http://www.jstor.org/stable/pdf/25659313.pdf?loggedin=true>.

²⁹⁰ Daniel Moran, “Beyond Deterrence”, review of “Deterrence” by Lawrence Freedman (Cambridge MA: Polity Press, 2004) and “Reshaping Rogue States: Preemption, Regime Change, and U.S. Policy toward Iran, Iraq, and North Korea”, ed. by Alexander T. J. Lennon and Camille Eiss (Cambridge MA: Polity Press, 2004), 7International Studies Review, No. 2 (June, 2005), accessed May 19, 2017, <https://www.jstor.org/stable/pdf/3699651.pdf?refreqid=excelsior%3A8c72de29e28d74f15df361cab0bf518f>.

imperatives of “international morality and elementary prudence” whereas international politics continues to move decisively in an opposite direction²⁹¹.

The five NPT nuclear weapon states are opposing any new developments in the direction of the prohibition of use or threat of nuclear weapons by reiterating the supremacy and sufficiency of the existing nuclear non-proliferation system and the stalemate of the negotiations under the Non-Proliferation Treaty (NPT). The NPT, being negotiated and signed in 1968, reflects a Cold War state of mind²⁹². As a complex bargain being almost fifty years old, it is not surprising that besides preventing nuclear proliferation, the NPT seems to be too obsolete to introduce more significant steps toward complete nuclear prohibition and abolition²⁹³.

Nevertheless, the 2010 NPT Review Conference resulted in a document which, although having stated what seemed to be obvious (“catastrophic humanitarian consequences of any use of nuclear weapons” and the need “for all States at all times to comply with applicable international law, including international humanitarian law”), marked the establishment of an initiative which, focusing on the humanitarian dimension of the need to prohibit nuclear weapons use and threat, under the leadership of Norwegian government and Conference in Oslo in 2013, followed by the Mexican and Austrian follow-up conferences in Nayarit and Vienna, succeeded to attract more government delegations than the NPT Preparatory Committee meetings in 2013 and 2014. The Austrian government, at the conclusion of the conference it hosted, submitted a document providing the answer for the prohibition and elimination of nuclear weapons and calling on states and other stakeholders to join²⁹⁴. So far over 120

²⁹¹ Richard Falk, “Non-Proliferation Treaty Illusions and International Lawlessness”, in “At the nuclear precipice. Catastrophe or transformation”, ed. Richard Falk and David Krieger (New York: Palgrave Macmillan, 2008), 42.

²⁹² Michael Rühle, “Enlightenment in the Second Nuclear Age.” *International Affairs (Royal Institute of International Affairs 1944-)* 83, no. 3 (2007): 511-22. <http://www.jstor.org/stable/4541756> [accessed 26 January 2017]

²⁹³ “Nuclear Weapons Under International Law: An Overview”, Geneva Academy of International Law and Human Rights, International Law and Policy Institute (October 2014), <https://www.geneva-academy.ch/joomlatools-files/docman-files/Nuclear%20Weapons%20Under%20International%20Law.pdf>, [accessed 26 January 2017]

²⁹⁴ Pledge presented at the Vienna Conference on the Humanitarian Impact of Nuclear Weapons by Austrian Deputy Foreign Minister Michael Linhart, Austrian Foreign Ministry, December 2014, file:///Users/maksinorepic/Desktop/HINW14_Austrian_Pledge.pdf, [accessed 26 January 2017]

states have formally endorsed the initiative²⁹⁵. Formed under the name “Austrian pledge”, the initiative was soon renamed in “Humanitarian Pledge”.²⁹⁶ In 2013 the UN General Assembly decided under Resolution 68/32 to convene a *UN High-Level Conference on Nuclear Disarmament* no later than 2018 in order to support the total elimination of nuclear weapons, including through negotiations for a nuclear weapons convention²⁹⁷, modelled on comparable bans on chemical and biological weapons and landmines²⁹⁸.

The first round of the UN Conference to Negotiate a Legally Binding Instrument to Prohibit Nuclear Weapons, Leading Towards their Total Elimination negotiations were held in UN New York Headquarters in March 2017 and with the participation of governments, international organizations and civil society resulted in a draft treaty which was released on May 22, 2017. The second round of negotiations began on one day before the submission of the thesis on June 15, 2017, and will last until July 7, 2017²⁹⁹. Civil society is hoping the negotiations will result in the adoption of an agreed treaty³⁰⁰.

From at least 113 states joining the negotiations, it is clear that none of the nine NWS will support it and those states under the US “nuclear umbrella” also seem to be skeptical for now. Without the participation of the states that actually possess nuclear weapons, critics argue that the treaty cannot succeed. Proponents, however, argue that the nuclear weapons ban will create “moral suasion”-in the vein of the cluster and landmine conventions – for NWS to disarm and for nuclear weapons

²⁹⁵ Vienna pledge supporting states, Austrian Foreign Ministry, April 2016, file:///Users/maksinorepic/Desktop/HINW14vienna_update_pledge_support.pdf, [accessed 26 January 2017]

²⁹⁶ Gro Nystuen, Stuart Casey-Maslen, Annie Golden Bersagel, „Nuclear Weapons under International Law”, (Cambridge: Cambridge University Press), 28 August 2014.

²⁹⁷ Resolution A/68/32 adopted by the General Assembly on 5 December 2013, <http://www.un.org/en/events/nuclearweaponelimination/pdf/4-International-Day-for-the-Total-Elimination-of-Nuclear-Weapons-Resolution-A-68-32.pdf>, [accessed 26 January 2017]

²⁹⁸ Ben Doherty, “Negotiations to ban nuclear weapons begin, but Australia joins US boycott”, March 27, 2017, *The Guardian*, accessed April 2, 2017, <https://www.theguardian.com/world/2017/mar/28/negotiations-to-ban-nuclear-weapons-begin-but-australia-joins-us-boycott>.

²⁹⁹ UN Conference to Negotiate a Legally Binding Instrument to Prohibit Nuclear Weapons, Leading Towards their Total Elimination,

³⁰⁰ “The nuclear ban is coming. Draft treaty released.”, May 27, 2017, UNFOLD ZERO, accessed May 27, 2017, <http://www.unfoldzero.org/the-nuclear-ban-is-coming-draft-treaty-released/>.

states to disarm, and establish an international customary norm prohibiting nuclear weapons' development, possession, and use³⁰¹.

7. Conclusion

Based on the legal analysis of the extensive corpus of the applicable international law sources, the following conclusions can be made in response to the question whether there is a legal gap in the prohibition of the threat or use of nuclear weapons.

Law of armed conflict and humanitarian law rules and principles are currently the most relevant international law source for the prohibition of both use and threat to use nuclear weapons. Taking into consideration the nature of nuclear weapons and the extent of their lethality, any sort of their use amounts to a flagrant breach of several convention provisions. Most prominent of those are certainly the rule of the distinction between combatants and non-combatants, the rule of proportionality, the rule of "precautions in attack", the prohibition on means of warfare of a nature to cause superfluous injury and unnecessary suffering and the protection of the natural environment. Regarding the prohibition of the threat to use nuclear weapons, Additional Protocol I to the Geneva Convention *explicitly* includes the "threat" to commit any of the forbidden acts as illegal as the commitment of the prohibited acts, supporting another sphere of the illegality of nuclear weapons – threat to use nuclear weapons. Moreover, another provision directly applicable to the threat or use of nuclear weapons is Martens clause included in various treaties including the four Geneva Conventions of 1494 which ensures that until a complete code of the laws of war has been issued, "the inhabitants and belligerents remain under the protection of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of public conscience"³⁰². Therefore, regardless

³⁰¹ Ben Doherty, "Negotiations to ban nuclear weapons begin, but Australia joins US boycott", March 27, 2017, *The Guardian*, accessed April 2, 2017, <https://www.theguardian.com/world/2017/mar/28/negotiations-to-ban-nuclear-weapons-begin-but-australia-joins-us-boycott>.

³⁰² Gro Nystuen and Kjølsv Egeland, „A ‘Legal Gap’? Nuclear Weapons Under International Law”, March 2016, Arms Control Association, accessed January 12, 2017, https://www.armscontrol.org/ACT/2016_03/Features/A-Legal-Gap-Nuclear-Weapons-Under-International-Law.

of objecting states, the absence of a treaty or an explicit provision mentioning nuclear weapons does not mean that nuclear weapons are unregulated by international law as there is a universal acceptance of international humanitarian law principles. Any use of nuclear weapons would be excessive in relation to the concrete and direct military advantage anticipated³⁰³.” Even those weapons with fairly low yields are capable of harming non-combatants as there is no possibility of discrimination. Furthermore, even in a scenario of nuclear weapons targeted to a remote and legitimate military aim, due to its radiation effects on future generations as well as the effects inflicting on the environment, the principle of discriminate attacks cannot be met³⁰⁴.

Disarmament laws such as treaties establishing nuclear weapons-free zones, although regional and not yet universally ratified, especially contribute to the general illegality of any aspect of nuclear weapons as they are the only sources, at this point in time, which *explicitly* prohibit testing, use, manufacture, production or acquisition by any means whatsoever as well as "receipt, storage, installation, deployment and any form of possession of any nuclear weapons, directly or indirectly, on behalf of anyone else or in any other way³⁰⁵.” Moreover, their Protocols offer, different sorts of negative and positive security assurances between nuclear and non-nuclear weapons states, although mostly restricted by different reservations.

The International law of human rights and the environmental law would also be violated by the threat or use of nuclear weapons, in any circumstance whatsoever. Among them, the right to life is undoubtedly the most brutally endangered, followed by the right to peace and dignity and worth of human being. Furthermore, in protection of the environment, customary law rule, included also in Additional Protocol I to the Geneva Conventions, which provides that states have an obligation to respect and protect the environment during armed conflicts and are bound by the obligation “that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control” could never be respected by the use of nuclear weapons.

³⁰³ Rule 14, ICRC Customary International Humanitarian Law Study; Art. 51, Additional Protocol I.

³⁰⁴ Dissenting Opinion of judge Weeramantry, appended to the *Advisory Opinion Concerning Legality of the Threat or Use of Nuclear Weapons*, International Court of Justice (ICJ), July 9, 2004, 429-555, accessed January 26, 2017, <http://www.icj-cij.org/docket/files/95/7521.pdf>.

³⁰⁵ Treaty for the prohibition of nuclear weapons in Latin America and the Caribbean, Mexico City, February 14, 1967, in force April 22, 1968, 634 UNTS 281, Art. 1.

However, ICJ in its landmark case on the legality of nuclear weapons, under the political pressure of the nuclear weapons states, instead of being guided by the abundance of international law resources more than sufficient to deliver a clear statement, the Court decided to pronounce a *de facto non liquet* and, beside stating a general illegality of threat or use nuclear weapons, left the case of “extreme circumstance of self-defence, in which the very survival of a State would be at stake” as an exception in which it cannot conclude definitely whether the threat or use of nuclear weapons would be illegal.

Sadly, we are leaving in the world where the primacy of geopolitics often suppresses the relevance of international law in areas where politics and their actors in a position to exert this kind of overbearing influence can shape the way in which the conflicts are perceived, resolved or perpetuated³⁰⁶. The Court’s opinion showed that a nuclear deterrence doctrine is powerful and established enough to surpass and undermine the authority of international law, which is indeed, everything but unclear in the case of legality of threat or use nuclear weapons.

Nevertheless, currently ongoing negotiations on a “Legally Binding Instrument to Prohibit Nuclear Weapons, leading towards their complete elimination” give some faith and optimism on the prospects of the future of complete nuclear disarmament and explicit prohibition of all kinds of nuclear weapons activities. Although nuclear weapons’ use or threat is, as demonstrated, already prohibited by various instruments, only a conclusion of a treaty prohibiting explicitly any aspect of nuclear weapons could defeat the deeply rooted nuclear deterrence doctrines. Still, in order to reach that point, nuclear weapons powers need to be offered viable alternatives for changing their security strategies. In any case, incentives will certainly come easier along once the nuclear weapons ban becomes an established international customary norm prohibiting nuclear weapons’ development, possession, and use.

³⁰⁶ Richard Falk, “Non-Proliferation Treaty Illusions and International Lawlessness”, in “At the nuclear precipice. Catastrophe or transformation”, ed. Richard Falk and David Krieger (New York: Palgrave Macmillan, 2008), 39.

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Abstract

Over seventy years after the bombing of Hiroshima and Nagasaki, the world is witnessing heavy modernizing of nuclear arsenals, nuclear testing and a larger number of nuclear weapons states than ever before. The aim of this thesis is to identify whether there is, in the overall corpus of international law, an existing legal gap in the prohibition of the threat or use of nuclear weapons.

In order to assess that, an in-depth legal analysis of the existing legal framework directly or indirectly relevant for the legality of the threat or use of nuclear weapons is undertaken. The thesis first examines the characteristics, effects, and consequences that the use of nuclear weapons inflicts and then turns to assessing the legality of such use or threat to use against the provisions of the relevant international law sources.

The outcome of the analysis shows that although there is no source an explicit prohibition to be found, the threat or use of nuclear weapons would constitute a violation of provisions of various international law instruments on human rights, environmental, disarmament, arms control laws and foremost, laws of armed conflict and rules and principles of international humanitarian law, such as the rule of distinction, the rule of proportionality, the rule of “precautions in attack” and the prohibition on means of warfare of a nature to cause superfluous injury and unnecessary suffering. Nuclear weapons cannot possibly be used without violating international law and their use or threat to use is therefore illegal.

For explaining the contradiction between the reality of existing and growing nuclear threat from nuclear capacities of nuclear weapons states, nuclear deterrence theory of international relations is employed. Nevertheless, currently, ongoing negotiations on a treaty explicitly prohibiting all aspects of nuclear weapons sheds some optimism on the prospects of the future of complete nuclear disarmament. Nonetheless, as the initiative is for now supported by virtually all non-nuclear weapons states, it will certainly take some time, concessions, incentives and a lot of civil society pressure before international law defeats the nuclear deterrence doctrine.

Keywords: legal gap, *lacuna*, *non liquet*, non-proliferation, nuclear disarmament, arms control, use or threat to use, nuclear war, nuclear weapons, nuclear weapons states, nuclear weapon - free zones, NPT, international humanitarian law, law of armed conflict, environmental law, human rights law, UN Charter, customary law, International Court of Justice, Advisory Opinion, legality of threat or use of nuclear weapons, nuclear deterrence theory, nuclear ban treaty.

Abstrakt

Die vorliegende Arbeit wird eine eventuell vorliegende Rechtslücke des Internationalen Rechts im Bereich des Verbots der Nutzung oder Androhung der Nutzung von Nuklearwaffen identifizieren. Um die Rechtmäßigkeit der Nutzung oder der Androhung der Nutzung jener nuklearen Waffen auszuwerten, werden die Effekte jener als Verstoß gegen die relevanten Vorgaben des internationalen humanitären-, Gewohnheits-, Abrüstungs-, Nichtverbreitungs-, Rüstungskontroll-, Menschenrechts- und Umweltrechts angenommen. Als Fazit stellt sich heraus, dass die Nutzung oder Androhung der Nutzung von Nuklearwaffen niemals mit international gültigem humanitärem Recht vereinbar ist, weshalb diese Arbeit die Theorie der nuklearen Abschreckung darlegt, um zu erklären weshalb diesbezüglich ein Art „Ungehorsam“ unter den mit Atomwaffen ausgestatteten Staaten herrscht.

Keywords: Rechtslücke, *lacuna*, *non liquet*, nukleare Abrüstung, Rüstungskontrolle, Nutzung oder Androhung der Nutzung, nuklearer Krieg, Nuklearwaffen, Nuklearwaffenstaaten, nuklearwaffenfreie Zonen, Nichtverbreitungsvertrag, Internationales Humanitäres Recht, Recht des bewaffneten Konflikts, Umweltrecht, Menschenrechte, VN Charta, Gewohnheitsrecht, Internationaler Strafgerichtshof, beratende Meinung, Rechtmäßigkeit der Nutzung oder Androhung der Nutzung von Nuklearwaffen, Theorie der nuklearen Abschreckung, Vertrag zum Verbot von Nuklearwaffen.

The pledge of honesty

On my honor as a student of the Diplomatic Academy of Vienna, I submit this work in good faith and pledge that I have neither given nor received unauthorized assistance on it.

Vienna, 16 June 2017