

# *Fordham International Law Journal*

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*Volume 20, Issue 1*

1996

*Article 5*

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## Nuclear Weapons and the Laws of War: Does Customary International Law Prohibit the use of Nuclear Weapons in all Circumstances?

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# Nuclear Weapons and the Laws of War: Does Customary International Law Prohibit the use of Nuclear Weapons in all Circumstances?

Jill M. Sheldon

## **Abstract**

This Note argues that customary international law does not prohibit the use of nuclear weapons in self-defense. Part I describes the characteristics of nuclear weapons, including their destructive capabilities and health effects. Part I also discusses the development of the laws of war and the process by which a generally accepted principle or practice ascends to customary international law. Further, Part I presents existing treaties concerning non-proliferation and other nuclear weapons-related issues. Part II examines the application of the laws of war to nuclear weapons use and the resulting conflict over the legality of the use of nuclear weapons. Part III argues that the international community has neither expressly consented to nor evidenced their intent to accept a ban on nuclear weapons use. Customary international law, therefore, does not contain a rule forbidding the use of nuclear weapons in all circumstances. This Note concludes that prospective measures designed to deter the use and proliferation of nuclear weapons are more effective than a decision determining the legality of nuclear weapons.

## NOTE

### NUCLEAR WEAPONS AND THE LAWS OF WAR: DOES CUSTOMARY INTERNATIONAL LAW PROHIBIT THE USE OF NUCLEAR WEAPONS IN ALL CIRCUMSTANCES?

*Jill M. Sheldon\**

#### INTRODUCTION

Nuclear weapons<sup>1</sup> have the capacity to cause vast destruction<sup>2</sup> and protracted illnesses,<sup>3</sup> yet no specific treaty declares their use illegal.<sup>4</sup> The laws of war<sup>5</sup> establish limits on the means

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1. See Treaty for the Prohibition of Nuclear Weapons in Latin America, Feb. 14, 1967, 634 U.N.T.S. 281, 332, 6 I.L.M. 521, 523 [hereinafter Treaty of Tlatelolco] (defining nuclear weapons). Article V defines a nuclear weapon as "any device which is capable of releasing nuclear energy in an uncontrolled manner and which has a group of characteristics that are appropriate for use for warlike purposes." *Id.* at 332, 6 I.L.M. at 523; see Treaty on the Southeast Asia Nuclear Weapon-Free Zone, Dec. 15, 1995, art. 1(c), 35 I.L.M. 635, 640 [hereinafter Southeast Asia Treaty] (defining nuclear weapon as "explosive device capable of releasing nuclear energy in an uncontrolled manner but does not include the means of transport or delivery of such device if separable from and not an indivisible part thereof"). According to Article 1 of the treaty establishing a nuclear weapons-free zone in Africa, a nuclear explosive device means, "any nuclear weapon or other explosive device capable of releasing nuclear energy, irrespective of the purpose for which it could be used. The term includes such a weapon or device in unassembled and partly assembled forms." African Nuclear-Weapon-Free Zone Treaty, June 21-23, 1995, art. 1(c), 35 I.L.M. 698, 706 [hereinafter African Treaty].

2. See PAUL P. CRAIG & JOHN A. JUNGERMAN, *NUCLEAR ARMS RACE: TECHNOLOGY AND SOCIETY* 141-44 (1990) (discussing immediate effects of nuclear weapons). The destructive effects of nuclear explosions include burns from thermal radiation and deaths from immediate radiation exposure and flying debris. *Id.* at 141-43.

3. See *id.* at 344-48 (describing radiation effects of nuclear explosions). Long-term health effects of exposure to radiation include anemia, cataracts, leukemia, hypothyroidism, birth defects, increased infant mortality, and genetic damage. *Id.*

4. See Legality of the Threat or Use of Nuclear Weapons, 35 I.L.M. 809, 824, ¶¶ 57, 58 (July 8, 1996) [hereinafter Legality Opinion] (finding that ban on recourse to nuclear weapons does not appear in treaties relating to weapons of mass destruction, and noting that international community has not produced treaty prohibiting nuclear weapons use); Burns H. Weston, *Nuclear Weapons Versus International Law: A Contextual Reassessment*, 28 MCGILL L.J. 542, 546 (1983) (acknowledging that no treaty explicitly bans manufacture, stockpiling, deployment, or actual use of nuclear weapons).

5. See HILAIRE MCCOUBREY & NIGEL D. WHITE, *INTERNATIONAL LAW AND ARMED CONFLICT* 189, 196 (1992) (discussing application of laws of war to states' initial resort to war and to belligerents' conduct during armed conflict). The laws of war consist of treaties, custom, general principles of law recognized by the international community,

and methods of warfare, however, by regulating the conduct of belligerents and by limiting the weapons that may be used during armed conflict.<sup>6</sup> The laws of war potentially prohibit nuclear weapons as a means of war.<sup>7</sup> Further, the use of nuclear weapons must comply with provisions of the U.N. Charter relating to self-defense<sup>8</sup> and the use or threat of force in armed conflict.<sup>9</sup> Since the U.S. use of nuclear weapons during World War II,<sup>10</sup> legal scholars have disagreed as to whether the use of nuclear weapons is illegal under customary international law.<sup>11</sup>

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and principles of law enunciated by jurists and judicial decisions. Nuremberg Trial, 6 F.R.D. 69, 109 (1946).

6. MCCOUBREY & WHITE, *supra* note 5, at 189.

7. See Malcolm N. Shaw, *Nuclear Weapons and International Law*, in NUCLEAR WEAPONS AND INTERNATIONAL LAW 1, 2 (Istvan Pogany ed., 1987) (discussing application of general principles of laws of war concerning methods of warfare to nuclear weapons use); 2 LASSA OPPENHEIM, INTERNATIONAL LAW 347-48 (Hersch Lauterpacht ed., 7th ed. 1952) [hereinafter 2 OPPENHEIM] (proposing that legality of nuclear weapons use depends on consideration of distinction between combatants and noncombatants, principles of humanity, and existing international documents that limit use of violence in war).

8. U.N. CHARTER art. 51 (providing that member states have right to self-defense until Security Council takes measures necessary to maintain international peace and security).

9. *Id.* art. 2(4) (prohibiting threat or use of force).

10. See JOHN KEEGAN, THE SECOND WORLD WAR 584 (1990) (discussing atomic bombings of Hiroshima on August 6, 1945 and Nagasaki on August 9, 1945); see also JULIUS STONE, LEGAL CONTROLS OF INTERNATIONAL CONFLICT 344 (1954) (discussing international community's reaction in 1945 to U.S. use of atomic weapons). *But see* Elbert Thomas, *Atomic Bombs in International Society*, 39 A.J.I.L. 736, 736 (1945) (supporting uses of atomic bomb during World War II). The hostilities of World War II commenced without formal declarations of war between Japan and China in 1937, Germany and Poland in 1939, and Japan and the United States in 1941. 2 OPPENHEIM, *supra* note 7, at 292-93; see B.H. LIDDELL HART, HISTORY OF THE SECOND WORLD WAR 16 (1971) (discussing events preceding outbreak of World War II). The British and French Governments declared war against Germany on Sept. 3, 1939, and German forces invaded Russia on June 22, 1941. *Id.* at 16, 141. The British Government formally declared war against Japan on December 8, 1941. 2 OPPENHEIM, *supra* note 7, at 296 n.1. The war in Europe officially ended on May 8, 1945, and Japan officially surrendered on Sept. 2, 1945. HART, *supra*, at 680, 698.

11. See STONE, *supra* note 10, at 344 (stating that in immediate post-World War II period, some nations did not question legality of U.S. use of nuclear weapons); Elbert Thomas, *Atomic Warfare and International Law*, 40 AM. SOC'Y INT'L L. PROC. 84, 85 (1946) (contending that atomic bomb rendered laws of war obsolete). Customary international law refers to the laws governing relations between states. 1 LASSA OPPENHEIM, INTERNATIONAL LAW 4-5 (Hersch Lauterpacht ed., 8th ed. 1955) [hereinafter 1 OPPENHEIM]. It includes treaties, custom, general principles of law recognized by nations, judicial decisions of states acknowledging and enforcing this law, and writings of jurists. See Statute of the International Court of Justice, June 26, 1945, art. 38(1), 59 Stat. 1055,

On July 8, 1996, the International Court of Justice<sup>12</sup> ("ICJ" or "Court") contributed to the international community's divisiveness over the legality of nuclear weapons use.<sup>13</sup> In response to a request by the U.N. General Assembly,<sup>14</sup> the ICJ issued an advisory opinion<sup>15</sup> ("Legality Opinion") on July 8, 1996 which condemned only the first use of nuclear weapons.<sup>16</sup> The ICJ,

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1060, 3 Bevens 1179, 1187 [hereinafter ICJ Statute] (listing sources of international law).

12. See U.N. CHARTER art. 7 (establishing ICJ as principle organ of United Nations). Article 92 of the U.N. Charter provides that the ICJ shall function according to the Statute of the International Court of Justice. *Id.* art. 92.

13. See *World Court Condemns Use of Nuclear Weapons*, N.Y. TIMES, July 9, 1996, at A8 (noting split among states testifying before ICJ between countries such as France, Russia, and United States that urged ICJ to reject request and Australia and New Zealand which argued for ban on nuclear weapons); *N-Arms Not Illegal, But Court Limits Use*, SEATTLE TIMES, July 9, 1996, at A7 (stating that anti-nuclear groups disagreed on significance of ICJ's ruling); Christopher Bellamy, *D-day for Nuclear Arms Powers Threat*, INDEPENDENT, July 8, 1996, at 9 (noting that approximately 30 of 45 states offering evidence before ICJ argued for illegality, and that France, Russia, United Kingdom, and United States argued that ICJ should decline to rule on legality issue). The ICJ usually consists of fifteen judges, but the death of one judge reduced the panel to an even fourteen. Bellamy, *supra*, at 9. The Court's decision reflected the controversy over the legality issue, as seven judges decided in favor, and seven against. Legality Opinion, *supra* note 4, ¶ 105(2)(E), at 831. In the event of an even panel, the ICJ President casts the deciding vote. ICJ Statute, *supra* note 11, art. 12(4), at 1056, 3 Bevens at 1181. To reach a majority on the issue of legality of nuclear weapons use, President Mohammed Bedjaoui cast two votes. Jonathan C. Randal, *World Court: Nuclear Arms Mostly Illegal*, WASH. POST, July 9, 1996, at A12.

14. See U.N. CHARTER art. 96(1) (allowing General Assembly to request advisory opinions from ICJ on any legal question). The General Assembly is the parliamentary organ of the United Nations which may pass non-binding resolutions. MALCOLM N. SHAW, INTERNATIONAL LAW 58 (3d ed. 1991).

15. ICJ Statute, *supra* note 11, art. 65, at 1062, 3 Bevens at 1190 (empowering ICJ to render advisory opinions). By rendering advisory opinions, the ICJ assists other U.N. organs in settling disputes and provides guidance on legal questions. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 731 (4th ed. 1990). Legality opinions have no binding effect on the international community. Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, 1950 I.C.J. 65, 71 (Mar. 30).

16. Legality Opinion, *supra* note 4, ¶ 105(2)(E), at 831. In 1993, the World Health Assembly of the World Health Organization ("WHO") and the U.N. General Assembly individually petitioned the ICJ for advisory opinions on the legality of nuclear weapons. See Legality of the Threat or Use of Nuclear Weapons, 1995 I.C.J. 3, 3-4 (Order of Feb. 1) (discussing requests for advisory opinion). In Resolution 75K, the General Assembly requested that the ICJ render an advisory opinion on the issue, "[i]s the threat or use of nuclear weapons in any circumstance permitted under international law?" G.A. Res. 75K, U.N. GAOR, 49th Sess., Supp. No. 49, at 71, U.N. Doc. A/49/699 (1994). The World Health Assembly requested an opinion on the question whether, "[i]n 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?" 1995 I.C.J. at 4. For jurisdictional reasons, the ICJ

however, refused to provide examples of when the use of nuclear weapons in self-defense would comply with Article 51 of the U.N. Charter<sup>17</sup> and with customary international law relating to armed conflict.<sup>18</sup> In its Legality Opinion, the ICJ considered principles traditionally reserved for conventional weapons, such as provisions of the U.N. Charter relating to the use of force,<sup>19</sup> the laws of war regulating conduct of hostilities during warfare,<sup>20</sup> and relevant treaties specific to nuclear weapons.<sup>21</sup> The Court refrained from declaring that the use of nuclear weapons would contravene customary international law in all circumstances.<sup>22</sup> Moreover, the Court declined to determine the legality of using nuclear weapons in an extreme situation of self-defense which threatens a state's survival.<sup>23</sup>

This Note argues that customary international law does not prohibit the use of nuclear weapons in self-defense. Part I describes the characteristics of nuclear weapons, including their destructive capabilities and health effects. Part I also discusses the development of the laws of war and the process by which a generally accepted principle or practice ascends to customary international law. Further, Part I presents existing treaties con-

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determined that it could not respond to this request. *See World Court Condemns Use of Nuclear Weapons*, *supra* note 13, at A8 (reporting that ICJ dismissed WHO request as outside WHO's scope); *N-Arms Not Illegal, But Court Limits Use*, *supra* note 13, at A7 (discussing ICJ rejection of WHO request because WHO has authority only to address health concerns, not international law).

17. U.N. CHARTER art. 51. Article 51 provides, "[n]othing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security." *Id.*

18. Legality Opinion, *supra* note 4, ¶ 95, at 829. The Court considered that it did not have "sufficient elements to enable it to conclude with certainty that the use of nuclear weapons would necessarily be at variance with the principles and rules of law applicable in armed conflict in any circumstance." *Id.*

19. *See id.* ¶¶ 37-50, at 822-23 (discussing U.N. Charter provisions relating to threat or use of force); *see also* U.N. CHARTER art. 2(4) (prohibiting threat or use of force); *id.* art. 51 (recognizing right of individual or collective self-defense); *id.* art. 42 (permitting Security Council to take military enforcement actions).

20. *See* Legality Opinion, *supra* note 4, ¶ 53, at 823 (discussing prohibition against poison); *id.* ¶¶ 74-97, at 827-30 (analyzing legality of nuclear weapons use in terms of humanitarian law and law of neutrality).

21. *Id.* ¶¶ 57-63, at 824-26 (discussing treaties limiting acquisition, manufacture, possession, deployment, testing, and proliferation of nuclear weapons).

22. *Id.* ¶ 95, at 829.

23. *Id.* ¶ 97, at 830. The Court stated that it could not "reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a State in an extreme circumstance of self-defence, in which its very survival would be at stake." *Id.*

cerning non-proliferation and other nuclear weapons-related issues. Part II examines the application of the laws of war to nuclear weapons use and the resulting conflict over the legality of the use of nuclear weapons. Part III argues that the international community has neither expressly consented to nor evidenced their intent to accept a ban on nuclear weapons use. Customary international law, therefore, does not contain a rule forbidding the use of nuclear weapons in all circumstances. This Note concludes that prospective measures designed to deter the use and proliferation of nuclear weapons are more effective than a decision determining the legality of nuclear weapons.

### I. CAPABILITIES OF NUCLEAR WEAPONS AND CUSTOMARY INTERNATIONAL LAW RELATING TO THE LAWS OF WAR

Despite the potentially disastrous effects of nuclear weapons,<sup>24</sup> the international community has not reached a consensus on the legality of nuclear weapons use.<sup>25</sup> In the absence of a specific treaty banning nuclear weapons, the legality of nuclear weapons use depends on principles of customary international law.<sup>26</sup> Legal scholars have compared the use of nuclear weapons to other means and methods of warfare for which prohibitions exist within the laws of war.<sup>27</sup> The international community has made efforts to contain nuclear weapons through General As-

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24. See NAGENDRA SINGH & EDWARD McWHINNEY, *NUCLEAR WEAPONS AND CONTEMPORARY INTERNATIONAL LAW* 17-27 (2d ed. 1989) (discussing destructive and health effects caused by explosions of nuclear weapons during World War II). Some health effects of nuclear explosions include radiation sickness, injuries from flying debris, and burns from thermal radiation. CRAIG & JUNGEMAN, *supra* note 2, at 141-43.

25. Legality Opinion, *supra* note 4, ¶¶ 57, 58, at 824 (finding that treaties relating to weapons of mass destruction do not include ban on recourse to nuclear weapons, and stating that international community has not produced treaty prohibiting nuclear weapons use); Weston, *supra* note 4, at 546 (noting that no treaty specifically prohibits manufacture, stockpiling, deployment, or actual use of nuclear weapons).

26. STONE, *supra* note 10, at 343; 2 OPPENHEIM, *supra* note 7, at 347-48.

27. See Nicholas Grief, *The Legality of Nuclear Weapons*, in *NUCLEAR WEAPONS AND INTERNATIONAL LAW* 22 (Istvan Pogany ed., 1987) (applying principles of international humanitarian law to determine if any rule of international law prohibits nuclear weapons use); ELLIOTT L. MEYROWITZ, *PROHIBITION OF NUCLEAR WEAPONS: THE RELEVANCE OF INTERNATIONAL LAW* 21-22 (1990) (analogizing to conventional and customary international law to evaluate legality of nuclear weapons); Shaw, *supra* note 7, at 1 (stating that other rules of international law apply to nuclear weapons despite lack of treaty condemning nuclear weapons).

sembly resolutions and multilateral treaties.<sup>28</sup>

### A. *Characteristics of Nuclear Weapons and Status of Nations Possessing Nuclear Weapons*

The nuclear explosions at Hiroshima<sup>29</sup> and Nagasaki<sup>30</sup> and the accidental explosion of the Chernobyl nuclear reactor<sup>31</sup> illustrate the potential destructive capabilities and medical effects of nuclear energy.<sup>32</sup> In the immediate post-World War II period, the international community sought to control the further spread of nuclear energy.<sup>33</sup> Nations entered into international treaties which characterized states according to the formal possession of nuclear weapons in an attempt to monitor nuclear weapons proliferation.<sup>34</sup>

#### 1. Destructive Capabilities of Nuclear Weapons

The effects of nuclear explosions include blast effects, thermal radiation, initial nuclear radiation, electromagnetic pulse, and radioactive fallout.<sup>35</sup> Upon detonation, a nuclear explosion heats the air to approximately eighteen million degrees and produces a fireball which travels at the speed of light.<sup>36</sup> A hurricane-type wind follows this heat wave and can reach a speed of

28. See SINGH & McWHINNEY, *supra* note 24, at 216 (stating that law of nuclear disarmament consists of General Assembly resolutions, treaties, and various national court judgments).

29. See Charles E. Glover, *Hiroshima Remembered: World War II: 50 Years Later*, ATLANTA J. & CONST., Aug. 6, 1995, at 6C (providing detailed description of atomic bombing of Hiroshima on August 6, 1945).

30. See *id.* (describing explosion of atomic bomb at Nagasaki on August 9, 1945).

31. See Richard Stone, *The Explosions that Shook the World*, SCIENCE, Apr. 19, 1996, at 352 (describing causes and effects of nuclear reactor explosion at Chernobyl, Ukraine).

32. See Nell McCafferty, *Life After Chernobyl*, AUDUBON, May 1996, at 66, 70-71 (comparing health effects caused by nuclear reactor explosion at Chernobyl to atomic bombings at Hiroshima and Nagasaki).

33. See CRAIG & JUNGEMAN, *supra* note 2, at 22 (discussing creation in 1946 of U.N. Atomic Energy Commission intended to eliminate all weapons of mass destruction, including nuclear weapons).

34. See Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968, arts. I, II, 21 U.S.T. 483, 487, 729 U.N.T.S. 161, 171 (entered into force Mar. 5, 1970) [hereinafter NPT] (distinguishing between nuclear weapons states and non-nuclear weapons states).

35. CRAIG & JUNGEMAN, *supra* note 2, at 255.

36. Tom Reinken, *Attack on Hiroshima; Dropping the Bomb*, L.A. TIMES, Aug. 6, 1995, at A4. The shock wave following a nuclear explosion results from the heating of large quantities of energy released in a small volume of air which generates hot gases at high pressures. CRAIG & JUNGEMAN, *supra* note 2, at 256.



over 150 miles per hour.<sup>37</sup> After the initial explosion, fission products released from the core continue to emit beta particles and gamma radiation, causing what is known as nuclear fallout.<sup>38</sup>

The international community first witnessed the destructive capabilities of nuclear weapons during World War II.<sup>39</sup> The U.S. Air Force dropped a uranium-based atomic bomb on Hiroshima on August 6, 1945,<sup>40</sup> destroying four square miles of Hiroshima<sup>41</sup> and causing in excess of 80,000 deaths.<sup>42</sup> On August 9, 1945, three days after the bombing of Hiroshima, the U.S. Air Force dropped a plutonium-based atomic bomb on Nagasaki.<sup>43</sup> This bomb destroyed one and one-half square miles of Nagasaki<sup>44</sup> and caused in excess of 40,000 deaths.<sup>45</sup> The nuclear bombs at Hiroshima and Nagasaki detonated in the atmosphere causing the fallout to spread away from the areas of explosion and, thus, reducing the amount of radioactive fallout in the two cities.<sup>46</sup> In comparison, the 1986 accidental explosion and fire in a nuclear reactor at the Chernobyl Atomic Energy Station in Chernobyl, Ukraine<sup>47</sup> produced 200 times the amount of radioactive fallout

37. CRAIG & JUNGERMAN, *supra* note 2, at 257.

38. SINGH & McWHINNEY, *supra* note 24, at 18.

39. See KEEGAN, *supra* note 10, at 584 (discussing U.S. use of atomic bombs during World War II). On July 24, 1945, U.S. President Harry Truman authorized the use of atomic weapons against Japan. Walter Pincus, *Truman and the Bomb: What the Record Shows*, INT'L HERALD TRIB., July 17, 1995.

40. HART, *supra* note 10, at 696. An atomic bomb requires approximately 18 pounds of plutonium or about 55 pounds of enriched uranium. William Drozdiak, *Nuclear Watchdog Seeks More Bite*, WASH. POST, June 10, 1996, at A14.

41. SINGH & McWHINNEY, *supra* note 24, at 17.

42. HART, *supra* note 10, at 696. The bomb killed approximately one-quarter of Hiroshima's population. *Id.* Other estimates suggest that between 80,000 and 140,000 people died immediately and that the bombing caused 100,000 serious injuries. CRAIG & JUNGERMAN, *supra* note 2, at 17-18. Any casualty figures for the bombings of Hiroshima and Nagasaki are approximate due to the loss of population records as a result of the bombings. *Id.* at 18.

43. CRAIG & JUNGERMAN, *supra* note 2, at 18.

44. SINGH & McWHINNEY, *supra* note 24, at 17.

45. CRAIG & JUNGERMAN, *supra* note 2, at 18. Estimates provide that the bomb caused between 40,000 and 70,000 immediate deaths and injured about the same number. *Id.* Reports suggest the bomb killed approximately one-sixth of Nagasaki's population. SINGH & McWHINNEY, *supra* note 24, at 17.

46. Casey Bukro, *Fallout From '60s A-Tests Worse Than Chernobyl*, CHI. TRIB., June 22, 1986, at C3. Generally, winds carry radiation away from an explosion's source and the radiation becomes more diluted as it spreads. Boyce Rensberger, *Partial Core Meltdown Suspected*, WASH. POST, Apr. 29, 1986, at A1.

47. *The Accident at Chernobyl Nuclear Power Station*, BBC Summary of World Broadcasts, June 24, 1986, at 1, available in LEXIS, News Library, Curnws File. The explosion

than that of both atomic bombs at Hiroshima and Nagasaki combined.<sup>48</sup>

## 2. Health Effects of Nuclear Explosions

The health effects of nuclear explosions<sup>49</sup> consist of direct effects, including injuries from the explosion itself and the resulting radiation, and indirect effects, including blast damage.<sup>50</sup> The primary casualty effects of nuclear weapons include burns, blasts, ionizing radiation, and thermal radiation.<sup>51</sup> In the vicinity of the nuclear explosion, the immediate health consequences of the blast effects include lung damage and eardrum rupture.<sup>52</sup> The crushing or burning effects of a nuclear explosion<sup>53</sup> could cause more deaths than radiation-related illnesses, such as can-

of the Chernobyl nuclear reactor occurred on April 26, 1986 at 1:23 a.m. Norman Colin, *Hazy Picture of Chernobyl Emerging*, *SCIENCE*, June 13, 1986, at 1331; see CHILDREN OF CHORNOBYL RELIEF FUND, HEALTH-RELATED IMPACT OF THE EXPLOSION AT THE CHORNOBYL ATOMIC ENERGY STATION 1 (Jan. 1996) [hereinafter CHORNOBYL RELIEF FUND] (on file with *Fordham International Law Journal*) (providing fact-sheet on health effects of radiation caused by explosion of nuclear reactor at Chernobyl Atomic Energy Station).

48. Andrew Melnykovich, *Fallout Zone a Lab for Radiation Studies, Scientists Sift Knowledge on Humans, Environment*, *COURIER J.*, Apr. 22, 1996, at 6A; see Caroline Drees, *Impacts of Chernobyl to be a Mystery for 50 Years*, *REUTERS*, Apr. 10, 1996, available in LEXIS, News Library, Curnws File (stating that WHO reported statistics comparing effects of nuclear explosions at Hiroshima, Nagasaki, and Chernobyl).

49. See CRAIG & JUNGERMAN, *supra* note 2, at 335-52 (discussing biological and medical effects of radioactivity). The health effects of nuclear explosions may not appear for days, weeks, or years after the initial exposure, especially in cases where the radiation exposure causes cancer. INTERNATIONAL COMMITTEE OF THE RED CROSS, *WEAPONS THAT MAY CAUSE UNNECESSARY SUFFERING OR HAVE INDISCRIMINATE EFFECTS* 20 (1973) [hereinafter ICRC REPORT]; Drees, *supra* note 48, at 1. Scientists have traditionally assumed that cancers, other than leukemia, remain latent for at least ten years. Ann MacLachlan, *Rising Children's Thyroid Cancers Indicate Growing Chernobyl Link*, *NUCLEONICS WEEK*, Sept. 10, 1992, at 1, 8. Members of the WHO suggest, however, that the carcinogenic effects of radioactive fallout damage the thyroid gland of children and fetuses exposed to radiation more severely than they previously thought. *Id.* at 8.

50. See SINGH & MCWHINNEY, *supra* note 24, at 17-27 (discussing direct and indirect effects of nuclear weapons).

51. ICRC REPORT, *supra* note 49, at 20. Thermal radiation refers to the means by which energy from a nuclear explosion is delivered to an object. CRAIG & JUNGERMAN, *supra* note 2, at 270. Ionization is process of separating one or more electrons from an atom or molecule. *Id.* at 336. Ionizing radiation damages cells in living organisms and can cause the production of oxidants which act as poisons. *Id.* Unlike thermal radiation, ionizing radiation may cause effects extending over a period of days, weeks, or years until symptoms appear. ICRC REPORT, *supra* note 49, at 20.

52. CRAIG & JUNGERMAN, *supra* note 2, at 262.

53. SINGH & MCWHINNEY, *supra* note 24, at 18.

cer.<sup>54</sup> At Hiroshima and Nagasaki, most fatal injuries resulted from indirect effects of blast damage, such as lacerations from flying glass fragments or injuries from being thrown against buildings.<sup>55</sup> The physical damage to living organisms depends on the types of contaminants to which they are exposed after an explosion.<sup>56</sup> Some long-term illnesses associated with the bombings at Nagasaki and Hiroshima include blood disorders, such as anemia, cataracts, and leukemia.<sup>57</sup>

The 1986 Chernobyl accident provides recent data on the health effects of nuclear weapons.<sup>58</sup> Researchers reported that

54. See *Inherited Damage Is Found in Chernobyl Area Children*, N.Y. TIMES, Apr. 25, 1996, at A8 [hereinafter *Inherited Damage*] (positing that many cancers caused by radiation from Chernobyl accident resulted from exposure to radioactive isotope cesium-137 not released by bombs at Nagasaki and Hiroshima); Lidia Wasowicz, *Genetic Legacy of Chernobyl Disaster*, UPI, Apr. 24, 1996, available in LEXIS, News Library, Curnws File (describing cesium-137 as relatively long-lasting radioactive isotope which is main source of radiation risk for people living in contaminated areas after nuclear explosion).

55. SINGH & McWHINNEY, *supra* note 24, at 18. Indirect effects of the Hiroshima and Nagasaki bombs included internal hemorrhaging and damage to the lungs, stomach, and intestines. *Id.* The blast damage also caused the crushing or burying of people by debris, injuries from flying objects, and burns from objects which had been directly or indirectly ignited by the blast. *Id.*

56. See McCafferty, *supra* note 32, at 70 (stating that radioactive iodine-131 dissipates over several days, but other contaminants such as cesium-137 and strontium-90 have half-lives of 30 years). Cesium's longer half-life causes radiation poisoning to the entire body over an extended period of time because it seeps into the topsoil, becomes part of the food chain, and is ultimately ingested by humans. Nigel Williams, *Leukemia Studies Continue to Draw a Blank*, SCIENCE, Apr. 19, 1996, at 358. Conversely, iodine's short half-life causes a short, intense dose of radiation which the human body absorbs in the thyroid gland, causing thyroid cancer. *Id.* Living organisms may suffer radiation damage from gamma rays if they were close to the nuclear explosion. CRAIG & JUNGEMAN, *supra* note 2, at 336. Gamma rays also cause radiation damage as they are released during radioactive fallout. *Id.*

57. CRAIG & JUNGEMAN, *supra* note 2, at 344-46. A significant correlation between the nuclear bombings at Hiroshima and Nagasaki also existed for other cancers, such as thyroid cancer, breast cancer, lung cancer, and cancer of the salivary gland. *Id.* at 347.

58. Ann MacLachlan, *Defining the Chernobyl Damage Still Eludes Experts Everywhere*, NUCLEONICS WEEK, May 2, 1996, at 12. Some scientists dispute the number of fatal casualties, including cancer rates, associated with the Chernobyl explosion. See Elizabeth Manning, *Washington*, UPI, Apr. 17, 1996, available in LEXIS, News Library, Curnws File (discussing disputes among scientists and reports as to numbers of deaths caused by radiation); Melnykovich, *supra* note 48, at 6A (listing other factors contributing to increase in Ukrainian health problems, including stress, alcoholism, smoking, poor diet, and widespread pollution). Whereas the ministry of health in the Ukraine reported approximately 125,000 deaths due to the accident, the Bulletin of Atomic Scientists reported 6000 fatal casualties. Manning, *supra*. A victims' group, Chernobyl Union, claimed more than 150,000 people died in the Ukraine alone, yet Greenpeace Ukraine reported more than 32,000 related deaths. Scott Shane, *Chernobyl's Persistent*

since this accident, levels of thyroid cancer among children in the vicinity of the Chernobyl nuclear reactor had risen to eighty times higher than the normal rate.<sup>59</sup> A 1994 study reported that exposure to radioactive fallout during pregnancy may cause birth defects.<sup>60</sup> This study also indicated that, since the 1986 accident, birth defects in contaminated regions have increased by 1.8 times the normal rate of birth defects, from 3.87 per 1,000 live births to 6.97 per 1,000 live births.<sup>61</sup> Other illnesses associated with radiation exposure include hair loss,<sup>62</sup> gastritis, leukemia,<sup>63</sup> and enlarged thyroid glands.<sup>64</sup> Additionally, direct effects

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*Fallout*, BALTIMORE SUN, Apr. 14, 1996, at 2A. Data compiled by the WHO indicates that the blast caused 3 immediate deaths, excessive radiation killed 28 fire-fighters attempting to extinguish the fire ignited by the blast, and radiation caused 11 additional deaths. Michael Baker, *Chernobyl Accident Not as Deadly as Portrayed*, WISCONSIN STATE J., Apr. 24, 1996, at 11A; see Shane, *supra*, at 2A (stating that most scientists at gathering in Vienna supported findings that Chernobyl accident directly caused less than 50 deaths).

59. Douglas A. Levy, *Thyroid Cancer Cases Jump Near Chernobyl*, UPI, Sept. 2, 1992, available in LEXIS, News Library, Arcnws File; see Steve Connor, *Big Rise in Child Cancer Incidence Near Chernobyl*, INDEPENDENT, Sept. 3, 1992, at 5 (stating that, due to Chernobyl accident, children in Belarus were 80 times more likely to develop thyroid cancer than children elsewhere in world); *Cancers After Chernobyl*, N.Y. TIMES, Nov. 21, 1995, at C5 (discussing WHO report that thyroid cancer among children has increased one-hundred-fold); Gina Kolata, *A Cancer Legacy From Chernobyl*, N.Y. TIMES, Sept. 3, 1992, at A6 (reporting data from Ukraine and Belarus indicated higher rate of thyroid cancer than expected among children exposed to radiation from Chernobyl explosion). Thyroid cancer is usually the first cancer to appear after exposure to radiation. Connor, *supra*. Thyroid cancer results from the thyroid gland's absorption of large doses of iodine-131 and other iodine isotopes. See Michael Balter, *Children Become the First Victims of Fallout*, SCIENCE, Apr. 19, 1996, at 357-60 (discussing correlation between increased incidents of thyroid cancer and radiation released by Chernobyl nuclear reactor explosion).

60. See *Rise in Birth Defects Near Chernobyl*, UPI, July 13, 1994, available in LEXIS, News Library, Arcnws File (discussing evidence linking birth defects to radiation from Chernobyl explosion). Yukio Sato, specializing in radioactivity-caused malformations at the University of Hiroshima, conducted a study on birth defects in Belarus. *Id.*

61. *Id.*

62. See CRAIG & JUNGERMAN, *supra* note 2, at 336 (describing hair loss as caused by intense exposure to beta radioactivity).

63. See Williams, *supra* note 56, at 358 (discussing leukemia as key early indicator of radiation effects). After studying the Chernobyl nuclear accident, some scientists questioned the link between leukemia and the accident. *Medics Dispute Chernobyl Disease Link*, UPI, July 14, 1994, available in LEXIS, News Library, Curnws File; see Manning, *supra* note 58 (stating that increase in leukemia among children in Chernobyl area probably resulted from increased detection and not from radiation exposure). *But see Chernobyl Study Raises Radiation Concerns*, CHARLESTON GAZETTE, July 25, 1996, at 4C (reporting elevated leukemia rate among children in utero at time of Chernobyl explosion). One researcher noted the difficulty of determining a correlation between increased incidents of leukemia and the Chernobyl explosion because cancer data from the affected regions was compiled using outdated techniques. Williams, *supra* note 56,

of radiation poisoning include an increased infant mortality rate,<sup>65</sup> shorter life expectancy,<sup>66</sup> a higher infertility rate,<sup>67</sup> and genetic mutations.<sup>68</sup>

### 3. Categorization of Nations According to Nuclear Capabilities

The Treaty on the Non-Proliferation of Nuclear Weapons<sup>69</sup> ("NPT") categorizes signatories to the treaty as either "haves" or "have-nots," depending on whether these states formally possess nuclear weapons.<sup>70</sup> The five declared nuclear weapons states are

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at 358 (noting poor quality of data available because previous Soviet record keeping did not conform to international guidelines).

64. Mireya Navarro, *A Haven for the Ailing Children From Chernobyl*, N.Y. TIMES, Oct. 6, 1995, at A4.

65. See Peter J. Howe, *Boston Sperm Bank to Help Fight Infertility in Ukraine*, BOSTON GLOBE, Jan. 26, 1996, at 1 (stating that in Ukraine infant deaths have out-paced births since 1990, and reporting that one of every five Ukrainian babies dies). Partially as a result of infant mortality, Ukraine and Belarus reported negative population growth in 1994. CHORNOBYL RELIEF FUND, *supra* note 47, at 2. In the Ukraine, the infant mortality rate is double the average infant mortality rate in Europe. *Id.*

66. See MacLachlan, *supra* note 58, at 13 (discussing high mortality rate among initial accident recovery workers). Since the Chernobyl reactor explosion, Soviet officials reported a degenerated state of health for accident recovery workers. *Id.* Officials also reported that these workers experienced an increased mortality rate by eight times the rate before the explosion and a rate greater than the general working-age population. *Id.*

67. See Howe, *supra* note 65, at 1 (discussing massive infertility crisis in Ukraine and link between radiation and infertility). The increase in the infant mortality rate since 1990 led Ukrainian health officials to conduct fertility testing. *Id.* Of those tested, 50% of males between ages 13 and 29 have fertility problems, representing the highest infertility rate in the world. *Id.*

68. See *Inherited Damage*, *supra* note 54, at A8 (discussing scientific reports of inherited genetic damage in people exposed to nuclear fallout at Chernobyl); see also CRAIG & JUNGEMAN, *supra* note 2, at 347-48 (describing genetic damage suffered by survivors of the Hiroshima and Nagasaki atomic bombings). Scientists reported that families exposed to the Chernobyl radioactive fallout are twice as likely to have children with genetic mutations. Wasowicz, *supra* note 54.

69. See NPT, *supra* note 34, arts. I, II, at 487, 729 U.N.T.S. at 171 (prohibiting contracting parties from transferring or receiving nuclear weapons or nuclear explosive devices). As of January 1, 1995, 171 countries had signed the NPT. See THE UNITED NATIONS AND NUCLEAR NON-PROLIFERATION 185-86 (United Nations ed., 1995) [hereinafter NUCLEAR NON-PROLIFERATION] (listing states party to NPT).

70. See NPT, *supra* note 34, arts. I, II, at 487, 729 U.N.T.S. at 171 (classifying contracting parties as either nuclear weapons states or non-nuclear weapons states). Article IX defines a nuclear weapons state as one which had manufactured and exploded nuclear weapons or nuclear devices before January 1, 1967. *Id.* art. IX(3), at 492-93, 729 U.N.T.S. at 174. The NPT drew international criticism because it inherently discriminates against non-nuclear weapons states by allowing the haves to retain nuclear weapons while prohibiting the have-nots from acquiring nuclear weapons. KATHLEEN C. BAILEY, STRENGTHENING NUCLEAR NONPROLIFERATION 7 (1993); see *Nuclear Poker - India*,

China, France, Russia, the United Kingdom, and the United States.<sup>71</sup> All states other than the five nuclear powers comprise the "have-nots," or non-nuclear weapons states.<sup>72</sup>

a. The "Haves"

Under the NPT, nuclear weapons states may not transfer nuclear weapons to non-nuclear weapons states,<sup>73</sup> and must refrain from assisting, encouraging, or inducing non-nuclear weapons states to manufacture or acquire nuclear weapons.<sup>74</sup> A nuclear weapons state is any state that exploded a nuclear device before January 1, 1967.<sup>75</sup> China, France, Russia, the United Kingdom, and the United States meet this requirement and, thus, qualify as nuclear weapons states.<sup>76</sup>

(1). China

The Chinese nuclear program began in the 1950's during a period of cooperation with the former Soviet Union.<sup>77</sup> On October 16, 1964, China conducted its first atomic bomb test<sup>78</sup> and later exploded a hydrogen bomb in 1967.<sup>79</sup> China has sharply criticized the other four nuclear powers for continuing to develop their nuclear programs while denying nuclear technology

ECONOMIST, Dec. 23, 1995, at 40 (describing India's criticism of NPT as establishing system of nuclear apartheid which allows nuclear weapons states to retain nuclear arsenals while excluding non-nuclear weapons states).

71. Peter Grier, *Much Arm-Twisting Ahead in Nuclear Test Talks*, CHRISTIAN SCI. MONITOR, July 1, 1996, at 4.

72. See NPT, *supra* note 34, art. II, at 487, 729 U.N.T.S. at 171 (setting forth rights and obligations of non-nuclear weapons states).

73. *Id.* art. I, at 487, 729 U.N.T.S. at 171.

74. *Id.* art. I, at 487, 729 U.N.T.S. at 171.

75. See *id.* art. IX(3), at 492-93, 729 U.N.T.S. at 174 (defining nuclear weapons state). The United States tested the first atomic bomb in the Alamogordo Desert on July 16, 1945. CRAIG & JUNGERMAN, *supra* note 2, at 17. In August 1949, the Soviet Union exploded its first atomic bomb. *Id.* at 24. The United Kingdom exploded its first atomic weapon on October 3, 1952 off northwestern Australia. *Key Events in Nuclear Disarmament, 1945-96*, FACTS ON FILE WORLD NEWS DIGEST, Sept. 12, 1996, at 655, available in LEXIS, News Library, CURNWS File [hereinafter *Key Events in Nuclear Disarmament*]. France detonated its first atomic bomb on February 13, 1960, and China conducted its first nuclear weapons test explosion on October 16, 1964. *Id.*

76. See Grier, *supra* note 71, at 4 (stating that China, France, Russia, United Kingdom, and United States constitute nuclear weapons states).

77. CRAIG & JUNGERMAN, *supra* note 2, at 35.

78. *Key Events in Nuclear Disarmament*, *supra* note 75, at 655.

79. CRAIG & JUNGERMAN, *supra* note 2, at 37.

used for peaceful purposes to developing countries.<sup>80</sup> Nevertheless, China conducted a series of underground nuclear tests in 1995, before the 1996 negotiations on a comprehensive test ban treaty.<sup>81</sup> The Chinese Government has pledged not to use nuclear weapons first against any state.<sup>82</sup>

(2). France

Since President Charles de Gaulle's leadership during the 1960's, the French Government viewed nuclear weapons as vital to France's autonomy from its European allies.<sup>83</sup> Under President Jacques Chirac, however, the French Government recently expressed a willingness to coordinate a nuclear deterrence policy with its European neighbors.<sup>84</sup> President Chirac has maintained that nuclear weapons form part of French deterrence policy and are not combat weapons.<sup>85</sup> After the dissolution of the Soviet Union, France retired certain non-strategic nuclear weapons from its weapons arsenal.<sup>86</sup> Recently, France reduced its nuclear arsenal to weapons aboard submarines and bombers when it shut down eighteen land-based nuclear missiles.<sup>87</sup> Despite these reductions, France conducted a series of nuclear tests in 1995, provoking criticism from the international community.<sup>88</sup>

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80. Patrick E. Tyler, *China Rebukes Four Other Nuclear Powers on Arms Control*, N.Y. TIMES, Nov. 17, 1995, at A14; see NPT, *supra* note 34, art. IV(2), at 489-90, 729 U.N.T.S. at 173 (providing that contracting parties shall cooperate with respect to exchanging equipment, materials, and scientific and technological information for peaceful uses of nuclear weapons).

81. Tyler, *supra* note 80, at A14. Prior to the testing, U.S. reconnaissance satellites detected preparations at the Lop Nor testing range in western China. *Id.* The Chinese Government conducted another underground nuclear explosion in July 1996 to ensure the safety and reliability of its weapons. John F. Harris, *5 World Powers Promise to Stop Nuclear Testing; Comprehensive Ban on Blasts Is Signed at United Nations*, WASH. POST, Sept. 25, 1996, at A1.

82. Jeremy J. Stone, *Customary Law Is Anti-Nuclear*, INT'L HERALD TRIB., Nov. 13, 1995.

83. See HENRY KISSINGER, DIPLOMACY 609-12 (1994) (examining French President Charles de Gaulle's objective of establishing nuclear force independent of United Kingdom and United States).

84. David S. Yost, *France's Nuclear Dilemmas*, FOREIGN AFF., Jan./Feb. 1996, at 108, 111-12.

85. *Id.* at 116.

86. Tariq Rauf, *Nuclear Disarmament: Review of Article VI*, in THE FUTURE OF THE NON-PROLIFERATION TREATY 69 (John Simpson & Darryl Howlett eds., 1995).

87. *France Shuts Down Leg of its Nuclear Defense*, N.Y. TIMES, Sept. 17, 1996, at A8.

88. Ian Geoghegan, *New Zealand Urges World Nuclear Arms Ban*, REUTERS, Nov. 9, 1995, available in LEXIS, News Library, Curnws File; see Don MacKay, *Nuclear Testing:*

## (3). Russia

The dissolution of the former Soviet Union<sup>89</sup> caused the international community to question whether Russia or the non-Russian republics controlled the former Soviet Union's nuclear arsenals.<sup>90</sup> Before the breakup, the Soviet Government stored more than 7000 nuclear warheads in Belarus, Kazakhstan, and Ukraine.<sup>91</sup> In June 1996, Ukraine surrendered its inherited nuclear weapons,<sup>92</sup> and Belarus and Kazakhstan agreed to consolidate their nuclear weapons with Russia's weapons.<sup>93</sup> Kazakhstan has since become a nuclear weapons-free state,<sup>94</sup> and Belarus recently turned over all Soviet nuclear weapons located in Belarus to Russia.<sup>95</sup>

## (4). The United Kingdom

The U.K. Government maintains a policy of deterrence towards nuclear weapons.<sup>96</sup> In 1958, the U.K. Government acknowledged that no specific treaty banned nuclear weapons

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*New Zealand and France in the International Court of Justice*, 19 FORDHAM INT'L L.J. 1857, 1857-58 (1996) (examining opposition in South Pacific to resumed French nuclear weapons testing). France conducted another nuclear test in January 1996. Harris, *supra* note 81, at A1.

89. See George Bunn & John B. Rhineland, *The Arms Control Obligations of the Former Soviet Union*, 33 VA. J. INT'L L. 323, 325 (1993) (stating that Soviet Union dissolved into 14 independent republics).

90. BAILEY, *supra* note 70, at 14 n.1; see Bunn & Rhineland, *supra* note 89, at 334-38 (discussing obligations of former Soviet Union under NPT undertaken by new republics); Doug Bandow, *Let 'Em Have Nukes*, N.Y. TIMES, Nov. 13, 1994, at 56 (stating that after Soviet Union breakup, number of declared nuclear states increased from five to eight due to possession of nuclear weapons by Belarus, Kazakhstan, and Ukraine). Since the Soviet Union's dissolution, the International Atomic Energy Agency ("IAEA"), the agency charged with developing peaceful applications of nuclear energy, has noticed a rise in the trafficking of nuclear materials used to make nuclear bombs. Drozdiak, *supra* note 40, at A14.

91. BAILEY, *supra* note 70, at 37, 64. Before its dissolution, the Soviet Union had an estimated 27,000 nuclear weapons. Bunn & Rhineland, *supra* note 89, at 323.

92. Anthony Goodman, *Ukraine Worried About Potential Nuclear Neighbors*, REUTERS, Sept. 26, 1996, available in LEXIS, News Library, Curnws File.

93. Drozdiak, *supra* note 40, at A14; see Steven Erlanger, *U.S. Presses Shaky Belarus to Honor A-Weapons Pact*, N.Y. TIMES, Oct. 12, 1996, at 5 (stating that Russian military officers control Belarus' 18 nuclear warheads). The former Soviet republics of Armenia, Estonia, and Lithuania either possess nuclear reactors or have nuclear research centers. Bandow, *supra* note 90, at 56.

94. Erlanger, *supra* note 93, at 5.

95. *Belarus Deal Dead; Crisis May Worsen*, CHI. TRIB., Nov. 24, 1996, at 16.

96. Christopher Bellamy, *World Takes First Steps to Ban the Bomb*, INDEPENDENT, July 9, 1996, at 1. According to the U.K. Attorney General, nuclear weapons have contrib-



use.<sup>97</sup> Unlike U.S. policy, U.K. policy does not declare that in the absence of a specific treaty prohibiting nuclear weapons use, the use of nuclear weapons would be legal.<sup>98</sup> The U.K. Government instead declares that any determination of the legality of nuclear weapons use must involve the application of recognized principles of international law.<sup>99</sup> Accordingly, the U.K. Government contends that the legality of nuclear weapons use depends on the circumstances of each case.<sup>100</sup>

#### (5). The United States

In a 1955 naval manual, the U.S. Government stated that the use of nuclear weapons against enemy combatants and military objects is legally permissible until an express rule of international law prohibits their use.<sup>101</sup> In its manual on land warfare, the Department of the Army issued a similar statement which provided that nuclear weapons use did not violate international law in the absence of a specific agreement declaring their use illegal.<sup>102</sup> During the Persian Gulf War,<sup>103</sup> the U.S. Government implied a threat to use nuclear weapons if Iraq attacked its forces with weapons of mass destruction.<sup>104</sup> The U.S. Government con-

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uted to ensuring international security over the last 50 years. Stephen Kinzer, *World Court Weighs Legality of Atomic War*, N.Y. TIMES, Nov. 20, 1995, at A6.

97. THE MANUAL OF MILITARY LAW: PART III THE LAW OF WAR ON LAND ¶ 113 (1958), quoted in Shaw, *supra* note 7, at 2 [hereinafter U.K. MILITARY MANUAL].

98. Grief, *supra* note 27, at 22. According to the U.K. Navy's legal advisor, no rule of international law establishes a per se ban on nuclear weapons use. David Fairhall & Richard Norton-Taylor, *International Court Fudges Nuclear Arms Ruling; No Ban, But Britain Would Have Ignored Any Adverse Verdict*, GUARDIAN, July 9, 1996, at 2.

99. U.K. MILITARY MANUAL, *supra* note 97, ¶ 113, at 2.

100. Bellamy, *supra* note 13, at 9.

101. U.S. DEP'T OF THE NAVY, LAW OF NAVAL WARFARE, NWIP 10-2, § 613, at 6-4 (1955) [hereinafter NAVAL MANUAL].

102. U.S. DEP'T OF THE ARMY, THE LAW OF LAND WARFARE ¶ 34(b), at 18 (1956) [hereinafter ARMY FIELD MANUAL]. According to a legal advisor for the U.S. State Department, the U.S. Government currently contends that customary international law does not per se prohibit nuclear weapons use. Jennifer Scott, U.S., *Britain Argue for Nuclear Arms as Deterrent*, REUTERS, Nov. 15, 1995, available in LEXIS, News Library, Curnws File.

103. See DILIP HIRO, DESERT SHIELD TO DESERT STORM, THE SECOND GULF WAR 319-79 (1992) (describing air campaign on January 16-17, 1991 as beginning of Persian Gulf War). The Persian Gulf War began on January 16, 1991 and lasted six weeks. *Id.* at 319.

104. See William M. Arkin, *Calculated Ambiguity: Nuclear Weapons and the Gulf War*, WASH. Q., Autumn 1996, at 3, 5 (discussing U.S. policy of "calculated ambiguity" which theoretically gave Iraqi Government impression that U.S. military would use nuclear weapons in self-defense). U.S. Secretary of State James Baker stated that he conveyed the impression that any Iraqi use of chemical or biological weapons might provoke a

tinues to hold nuclear weapons for deterrence and self-defense.<sup>105</sup>

### b. The "Have-Nots," Nuclear Threshold States, and Rogue Actors

Within the "have-nots" category, the international community distinguishes between countries lacking a nuclear weapons program,<sup>106</sup> countries with informal or clandestine ownership of nuclear weapons,<sup>107</sup> and nuclear threshold states.<sup>108</sup> A nuclear threshold nation is a state that possesses both the technology and knowledge to quickly assemble nuclear weapons, but whose leaders have publicly denied nuclear ambitions.<sup>109</sup> If a non-nu-

nuclear response. JAMES A. BAKER, III, *THE POLITICS OF DIPLOMACY: REVOLUTION, WAR AND PEACE*, 1989-1992 359 (1995). The United States and its Western European allies employed policies of deterrence which involved threatening to use nuclear weapons in response to an attack by the Soviet Union or its allies. See KISSINGER, *supra* note 83, at 608-10 (discussing threatened use of nuclear weapons through deterrence policies during Cold War). During the Korean War, the United States implied that it would use nuclear weapons to end the conflict. McGEORGE BUNDY, *DANGER AND SURVIVAL: CHOICES ABOUT THE BOMB IN THE FIRST FIFTY YEARS* 240-44 (1988).

105. Scott, *supra* note 102. The U.S. opposition to the ICJ advisory opinion reflects its attitude towards the legality of nuclear weapons. See *U.S. Defends Nuclear Arms*, *GUARDIAN*, Nov. 16, 1995, at 17 (discussing U.S. reaction to request for ICJ Legality Opinion). The U.S. Government urged the ICJ to throw out the two requests for the advisory opinion by claiming that nuclear weapons were "vital for global security." *Id.*

106. See Bronwen Maddox, *Survey of World Nuclear Industry*, *FIN. TIMES*, Dec. 7, 1995, at 40 (discussing technological connection between civil and military nuclear power programs). A state's possession of a civil nuclear reactor may provide the technology, but not automatically the means, to construct a nuclear bomb. *Id.* A challenge for countries with nuclear capabilities is to expand the growth of the industry without a corresponding increase in nuclear weapons proliferation. *Id.* For example, before Brazil signed the Treaty of Tlatelolco establishing a nuclear weapons-free zone in Latin America, Brazil had parallel civil and military nuclear weapons programs with links between the two. See Wyn Bowen & Andrew Koch, *Non-proliferation Is Embraced by Brazil*, *JANE'S INTELLIGENCE REV.*, June 1, 1996, at 283 (discussing past proliferation concerns of Brazil's nuclear weapons program). The Brazilian military sought to divert technology and research from the civil program to the military program. *Id.*

107. See Drozdiak, *supra* note 40, at A14 (stating that India, Israel, and Pakistan are three undeclared nuclear powers); Bandow, *supra* note 90, at 56 (stating that India, Israel, and Pakistan either have nuclear weapons or have ability to quickly assemble them); John R. Redick et al., *Nuclear Rapprochement: Argentina, Brazil, and the Nonproliferation Regime*, *WASH. Q.*, Winter 1995, at 107, 107 (discussing possession of nuclear explosive devices by India, Israel, and Pakistan).

108. See BAILEY, *supra* note 70, at 5 (stating that nations declining to join NPT included nations building nuclear weapons).

109. Grier, *supra* note 71, at 4. The IAEA has raised concerns about the potential for increased nuclear proliferation because some sophisticated developing nations may possess the know-how, if not the materials, to produce nuclear weapons. Drozdiak,

clear weapons state who has ratified the NPT receives or manufactures nuclear weapons, this state has violated the NPT.<sup>110</sup>

Despite efforts to limit the possession of nuclear weapons to declared nuclear weapons states,<sup>111</sup> nuclear weapons proliferation has spread to non-nuclear weapons states.<sup>112</sup> Countries that have developed or attempted to develop nuclear weapons programs include Argentina,<sup>113</sup> Brazil,<sup>114</sup> India,<sup>115</sup> Israel,<sup>116</sup> Paki-

*supra* note 40, at A14. According to experts, about 40 nations possess the ability to develop nuclear weapons, including Iran, Libya, and Taiwan. *Id.*

110. NPT, *supra* note 34, art. II, at 487, 729 U.N.T.S. at 171.

111. *See id.* art. I, at 487, 729 U.N.T.S. at 171 (prohibiting nuclear weapons states from transferring nuclear weapons or nuclear explosive devices to non-nuclear weapons states, and forbidding nuclear weapons states from assisting, encouraging, or inducing non-nuclear weapons states to acquire nuclear weapons or nuclear explosive devices).

112. *See* Tim Weiner, *Mass Weapons Are Spreading, Pentagon Warns*, N.Y. TIMES, Apr. 12, 1996, at A5 (stating that, in recent report, U.S. Pentagon officials outlined threat of spread of weapons of mass destruction, including nuclear weapons); Drozdak, *supra* note 40, at A14 (discussing alleged various stages of nuclear weapons development by Argentina, Brazil, India, Iran, Iraq, Israel, Libya, North Korea, Pakistan, and Taiwan).

113. *See* Redick et al., *supra* note 107, at 108 (stating that until 1990's, surveys of nuclear proliferation considered Argentina as nuclear threshold state). Until the 1990's, Argentina rejected the NPT and the Treaty of Tlatelolco, which created a nuclear weapons-free zone in Latin America. *Id.* Before this time, the Argentine Government could have converted its civil nuclear program to a military program by establishing facilities such as a gas diffusion enrichment facility, a reprocessing plant, a fuel fabrication facility, and a pilot-scale heavy water facility. *Id.* The Argentine air force once had a project to produce a nuclear capable missile with a range of 1200 kilometers. *Id.* Argentina also supplied Iran with nuclear fuels pursuant to IAEA safeguards, and helped modify one of Iran's research reactors. *Iran's Nuclear Ambitions*, JANE'S INTELLIGENCE REV., June 1, 1995, at 10. Recently, however, the Argentine Government ended its military nuclear weapons program and renounced nuclear weapons. Drozdak, *supra* note 40, at A14.

114. *See* Bowen & Koch, *supra* note 106, at 283 (describing past evidence of Brazil's military nuclear weapons program). The Brazilian Government began developing a civil nuclear power facility in 1957, and the Brazilian military began pursuing a parallel military nuclear weapons facility during the 1970's. *Id.* After President Fernando Collor de Mello publicly made efforts to gain civilian control over the military in 1989, he disclosed the existence of a deep shaft dug at a military base apparently intended for nuclear testing. *Id.* In 1991, Brazil's Commission for Congressional Investigation revealed that the military began designing and developing two nuclear weapons in 1977. *Id.* The commission also reported that Brazil sold eight tons of natural uranium to Baghdad in 1981 which U.N. inspectors later discovered in Iraq. *Id.* Since 1991, the Brazilian Government has adopted measures to conform with nuclear non-proliferation, including its 1994 ratification of the Treaty of Tlatelolco which established a nuclear weapons-free zone in South America. Redick et al., *supra* note 107, at 109.

115. Redick et al., *supra* note 107, at 107; *see* Alison Mitchell, *Clinton, at U.N., Signs Treaty Banning All Nuclear Testing*, N.Y. TIMES, Sept. 25, 1996, at A1 (stating that India has clandestine nuclear weapons program). The Indian Government stated that it has chosen not to build an atomic bomb, but has the resources to construct one. Nelson Graves, *India Nuclear Test Report Sends Out Shock Waves*, REUTERS, Dec. 16, 1995, available

stan,<sup>117</sup> South Africa,<sup>118</sup> South Korea,<sup>119</sup> and Taiwan.<sup>120</sup> Countries presently presumed to possess clandestine nuclear weapons or countries seeking to develop nuclear weapons programs include Iran,<sup>121</sup> Iraq,<sup>122</sup> and North Korea.<sup>123</sup> Countries allegedly

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in LEXIS, News Library, Curnws File. India conducted a single nuclear test in 1974, and U.S. newspapers reported that India might have been preparing for a test in late 1995. *Id.* India has criticized the five nuclear powers as seeking to retain a system of nuclear apartheid by legitimizing nuclear weapons while monopolizing them. See Grier, *supra* note 71, at 4 (quoting Prakash Shah, India's U.N. ambassador, in connection with comprehensive test ban treaty negotiations). Even though India led the campaign to end nuclear testing during the 1950's, India refrained from criticizing the 1995 French nuclear test for 11 days. *Disarmament: India Jittery on Nuclear Test Ban Treaty*, INTER PRESS SERVICE, Nov. 30, 1995, available in LEXIS, News Library, Curnws File. India has refused to sign the Comprehensive Test Ban Treaty, which bans test explosions of nuclear devices, because the treaty does not contain a provision for the complete elimination of all nuclear arsenals. R. Jeffrey Smith, *Pact's Effect Is Likely Smaller Than Hoped*, WASH. POST, Sept. 25, 1996, at A28.

116. Bandow, *supra* note 90, at 56; see *Israel Signs Nuclear Test Ban Treaty*, REUTERS, Sept. 25, 1996, available in LEXIS, News Library, Curnws File (describing Israel as having nuclear weapons program). In 1979, U.S. satellites detected data indicating that a probable nuclear test took place in the South Atlantic. BAILEY, *supra* note 70, at 51. U.S. officials believed that Israel had conducted the test and possessed nuclear weapons. *Id.* The Israeli Government, however, has never confirmed or denied foreign reports that it possesses 200 nuclear warheads. *No Change in Israel's Nuke Position*, XINHUA NEWS AGENCY, Dec. 24, 1995, available in LEXIS, News Library, Curnws File [hereinafter *Israel's Nuke Position*].

117. Redick et al., *supra* note 107, at 107; see Grier, *supra* note 71, at 4 (describing Pakistan as nuclear threshold state); Mitchell, *supra* note 115, at A1 (describing Pakistan as having covert nuclear program); Bandow, *supra* note 90, at 56 (stating that Pakistan either has atomic arsenal or has ability to quickly assemble one); James Bone, *Nuclear Powers Sign Pact to Outlaw Test Explosions*, TIMES, Sept. 25, 1996 (discussing Pakistan's refusal to sign Comprehensive Test Ban Treaty and stating that Pakistan is nuclear threshold state).

118. See Lynne Duke, *U.S. to Help S. Africa Boost Energy, Create Jobs*, WASH. POST, Aug. 26, 1995, at A16 (discussing South Africa's international isolation partially resulting from its secret development of nuclear weapons). Between 1979 and 1989, the South African Government built six nuclear weapons and partially assembled a seventh. Redick et al., *supra* note 107, at 107. During this time, the South African Government also conducted research on developing nuclear weapons. *Id.* In 1993, South Africa announced that it had built nuclear weapons only after it had already destroyed its six nuclear weapons. BAILEY, *supra* note 70, at 5.

119. See Bandow, *supra* note 90, at 56 (stating that South Korea abandoned nuclear ambitions during 1970's at U.S. urging).

120. See BAILEY, *supra* note 70, at 6 (describing Taiwan as developing clandestine nuclear weapons program during 1970's, but abandoning its efforts after intense U.S. pressure).

121. See David Albright, *An Iranian Bomb? Development of Nuclear Weapons*, BULL. OF THE ATOMIC SCIENTISTS, July, 1995, at 21 (discussing suspicions of Iranian nuclear weapons facilities); Drozdak, *supra* note 40, at A14 (describing Iran as state possessing ability to develop nuclear weapons); *Iran's Nuclear Ambitions*, *supra* note 113, at 10 (discussing evidence of Iran's fledgling nuclear weapons research program); Kenneth R. Timmer-

maintaining stockpiles of nuclear weapons-related materials, such as plutonium or enriched uranium,<sup>124</sup> include India,<sup>125</sup>

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man, *Tehran's A-Bomb Program Shows Startling Progress*, WASH. TIMES, May 8, 1995, at A1 (stating that Iran could develop nuclear weapons capabilities within three to five years). The Iranian Government has officially denied any nuclear ambitions and has called for regional disarmament. *Iran's Nuclear Ambitions*, *supra* note 113, at 10. Yet, Iran could potentially divert technology from its civil nuclear power program to a military weapons program. Chris Hedges, *Iran May Be Able to Build an Atomic Bomb in 5 Years*, U.N. and Israeli Officials Fear, N.Y. TIMES, Jan. 5, 1995, at A10. Western intelligence agencies have compiled reports of suspicious procurement efforts and efforts to obtain nuclear materials, technology, and scientists as evidence of Iranian ambitions to develop nuclear weapons, but they have not discovered any clandestine nuclear weapons facilities. Albright, *supra*, at 21; see *Iran's Nuclear Ambitions*, *supra* note 113, at 10 (describing Iran's goals since mid-1980's as obtaining nuclear fuels, training personnel, acquiring reactors, and researching enrichment techniques); Hedges, *supra*, at A10 (discussing Iranian efforts to collect nuclear material and equipment, including neutron source reactor and isotope separator). In January 1995, Russia agreed to assist Iran with the completion of a nuclear power plant to be used presumably for civil purposes. Albright, *supra*, at 22. Although the IAEA will strictly monitor the nuclear power plant, it would be possible for Iran to divert plutonium, a by-product of nuclear reactors, for weapons purposes. *Id.* at 22-23. Russia and Iran also signed a secret pact providing for future contracts for research reactors and the development of a uranium mine. *Id.* at 22. In 1990, China and Iran signed a 10-year nuclear cooperation agreement allowing Iranian engineers to train in China. *Iran's Nuclear Ambitions*, *supra* note 113, at 10. In 1992, China also agreed to sell Iran two nuclear reactors, but it is uncertain when the reactors will become operational. *Id.*

122. See Drozdiak, *supra* note 40, at A14 (stating that Iraq's secret nuclear weapons program became known after Persian Gulf War); Bandow, *supra* note 90, at 56 (stating that Persian Gulf War interrupted Iraq's efforts to acquire nuclear weapons); R. Jeffrey Smith, *U.N. Says Iraqis Prepared Germ Weapons in Gulf War*, WASH. POST, Aug. 26, 1995, at A1 (discussing Iraqi admissions to U.N. Ambassador Rolf Ekeus about crash efforts to build nuclear weapons after invading Kuwait). Before the Persian Gulf War, IAEA inspectors failed to detect suspicious activity in Iraq. Drozdiak, *supra* note 40, at A14. Nuclear inspectors discovered evidence of Iraq's program after laboratory examinations of hostages' clothing revealed trace amounts of isotopes related to enriched uranium. *Id.* To monitor Iraq's program in the future, IAEA agents placed sensors in nearby rivers which will detect isotopes as by-products of the nuclear program. *Id.*

123. See Drozdiak, *supra* note 40, at A14 (describing samples taken by nuclear inspectors of nuclear facility in Yongbun and U.S. satellite photographs as establishing evidence of North Korean nuclear program); Redick et al., *supra* note 107, at 108 (describing North Korea as nuclear threshold state). In a 1994 deal between North Korea and the United States, North Korea agreed to dismantle its civil nuclear reactors which produced waste necessary for nuclear weapons. *North Korea Threatens to Pull Out of A-Pact*, N.Y. TIMES, Nov. 16, 1996, at 5 [hereinafter *North Korea*]. In connection with this agreement, the United States agreed to assist with the construction of two modern reactors which produce less waste than the older reactors. *Id.*

124. See *North Korea*, *supra* note 123, at 5 (discussing materials required to construct nuclear weapons).

125. See FRANK BARNABY, *HOW NUCLEAR WEAPONS SPREAD, NUCLEAR-WEAPONS PROLIFERATION IN THE 1990s* 68-69 (1993) (describing fuel cycle of India's nuclear program). India has reserves of 50,000 tons of uranium, uranium mines and mills, a ura-

Israel,<sup>126</sup> Pakistan,<sup>127</sup> and South Africa.<sup>128</sup> Additionally, Algeria,<sup>129</sup> Libya,<sup>130</sup> and Syria<sup>131</sup> have indicated an interest in acquiring nuclear weapons from other nations.<sup>132</sup> Recently, Argentina,<sup>133</sup> Brazil,<sup>134</sup> and South Africa<sup>135</sup> have made efforts to dis-

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nium conversion plant, a pilot uranium enrichment plant, and plutonium reprocessing plants. *Id.*

126. *See id.* at 81 (describing Israel's nuclear program). Israel produces an estimated 100 tons of uranium each year from uranium deposits in the Negev desert and has capabilities to produce plutonium at a reactor located at the Dimona Nuclear Research Center. *Id.*

127. *See id.* at 75-77 (discussing Pakistan's nuclear program). Pakistan has a secret uranium enrichment plant at Kahuta and has an estimated, but uncertain, 20,000 tons of uranium resources. *Id.* at 75, 77.

128. *See id.* at 111-12 (stating that South Africa has uranium reserves of about 40,000 tons, but that as of 1991, South Africa has decreased its operable uranium mines from 14 to 5).

129. Bandow, *supra* note 90, at 56. In January 1986, Algeria purchased approximately 6600 pounds of uranium dioxide, used to produce plutonium or highly enriched uranium, from Argentina. LEONARD S. SPECTOR & JACQUELINE R. SMITH, NUCLEAR AMBITIONS, THE SPREAD OF NUCLEAR WEAPONS 1989-1990 205 (1990). U.S. officials believe that Algeria transferred some of this material to Iran. *Id.* Algeria has two nuclear reactors, but the Government denied that it ever intended to use them for military purposes. *Algeria Renounces Nuclear Arms, Joins NPT*, REUTERS, Jan. 12, 1995, available in LEXIS, News Library, Curnws File. By signing the NPT, however, Algeria formally renounced nuclear weapons. *Id.*

130. *See* Drozdiak, *supra* note 40, at A14 (describing Libya as potentially possessing incentive and means to become undeclared nuclear power).

131. Bandow, *supra* note 90, at 56. *But see* SPECTOR & SMITH, *supra* note 129, at 144 (stating that Syria has never been seriously considered to have nuclear ambitions).

132. BAILEY, *supra* note 70, at 64; *see* Bandow, *supra* note 90, at 56 (describing Algeria, Libya, and Syria as "potential threshold states" because they all have interest in acquiring nuclear weapons). Countries may express an interest in developing their own nuclear weapons program, but may lack the funds or technology to conduct nuclear research. Maddox, *supra* note 106, at 40.

133. Drozdiak, *supra* note 40, at A14; *see* Kathleen Hart, *Clinton Submits New U.S.-Argentina Nuclear Cooperation Pact to Congress*, NUCLEAR FUEL, Mar. 25, 1996, at 15 (quoting U.S. President Clinton as praising Argentina's efforts to demonstrate its commitment to exclusively peaceful uses of nuclear energy); Robin Wright, *Argentine Military's Change of Mission a Sign of the Times*, L.A. TIMES, Mar. 1, 1996, at A21 (discussing demilitarization and increased peacekeeping efforts of current Argentine Government). The Argentine Government has conformed to the non-proliferation regime and has renounced nuclear weapons testing. Redick et al., *supra* note 107, at 109. Additionally, Argentina and the United States recently signed an agreement providing for nuclear cooperation. Hart, *supra*, at 15. Although the two countries previously had a similar agreement, the United States suspended that agreement because Argentina did not adopt full IAEA safeguards. *Id.* Within Latin America, Brazil and Argentina signed a bilateral agreement in 1991 establishing a joint nuclear materials accounting and inspection system. Redick et al., *supra* note 107, at 109. Argentina also signed an agreement calling for the application of full IAEA safeguards to all nuclear materials and equipment. *Id.*

134. *See* Redick et al., *supra* note 107, at 109 (discussing measures taken by Brazil-

mantle their military nuclear weapons programs.<sup>136</sup> Argentina and Brazil also signed the Treaty of Tlatelolco establishing a nuclear weapons-free zone in South America.<sup>137</sup>

### B. Customary International Law

Customary international law refers to the body of law creating legal obligations binding on a state in its relationships with other states.<sup>138</sup> No single international organization exists to create, enforce, and interpret the body of international law.<sup>139</sup> Instead, customary international law derives from treaties,<sup>140</sup> cus-

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ian Government to comply with non-proliferation regime); Bowen & Koch, *supra* note 106, at 283 (describing Brazil's efforts to dismantle its military nuclear weapons capabilities, and mentioning Brazil's new status as member of non-proliferation community); Thomas W. Lippman, *U.S. Finds Relations With Brazil Have Come a Long Way Since Carter Era*, WASH. POST, Mar. 3, 1996, at A30 (quoting U.S. State Department spokesperson on Brazil's firm commitment to nuclear disarmament). Argentina and Brazil jointly agreed to renounce testing nuclear weapons, create a mutual inspection and verification agreement, comply with IAEA safeguards, and ratify the Treaty of Tlatelolco. Redick et al., *supra* note 107, at 109.

135. See George Lobsenz, *DOE Lifts Nuclear Restrictions on Four Emerging Markets*, ENERGY DAILY, Sept. 19, 1995 (discussing South Africa's public disclosure of abandoned nuclear weapons activities); Bandow, *supra* note 90, at 56 (stating that South Africa created six nuclear devices and later destroyed them); Redick et al., *supra* note 107, at 107 (describing South Africa as first state to unilaterally and voluntarily relinquish nuclear weapons). Recently, South Africa and the United States agreed to cooperate by using nuclear power peacefully. Duke, *supra* note 118, at A16.

136. Drozdiak, *supra* note 40, at A14.

137. Treaty of Tlatelolco, *supra* note 11, art. 4, at 332, 6 I.L.M. at 523.

138. 1 OPPENHEIM, *supra* note 11, at 4-5; see *United States v. Smith*, 18 U.S. 153, 161 (1820) (discussing recognition of rule of customary international law as universal law of society).

139. SHAW, *supra* note 14, at 58; see 1 OPPENHEIM, *supra* note 11, at 28 (noting that international community has no central law-making authority).

140. See ICJ Statute, *supra* note 11, art. 38(1)(a), at 1060, 3 Bevens at 1187 (providing that conventions comprise part of international law); 1 OPPENHEIM, *supra* note 11, at 27-28 (discussing treaties as source of customary international law). A treaty is a written agreement in which a contracting party accepts legal obligations to conduct itself in a particular manner or to establish relations with another state. SHAW, *supra* note 14, at 79-80. Treaties are also known as conventions, declarations, and covenants. *Id.* at 79. These terms all refer to the parties' willingness to create binding legal obligations for themselves. *Id.* Typically, a treaty binds only those states that are parties to it. 1 OPPENHEIM, *supra* note 11, at 28. A treaty creates law binding on all states when all or practically all members of the international community have acceded to the treaty. See *id.* (dividing international law deriving from treaties into two categories, law-making treaties binding only contracting parties and law-making treaties containing general principles of international law). Conversely, a treaty may be void and, thus, non-binding, if it conflicts with a peremptory norm of general international law. Vienna Convention on the Law of Treaties, art. 53, at 296, U.N. Doc. A/CONF.39/27, U.N. Sales No. E.70.V.5

tom,<sup>141</sup> general principles of law recognized by nations,<sup>142</sup> judicial decisions,<sup>143</sup> and scholarly writings.<sup>144</sup> These sources of law reflect the consensus of the international community as to particular rules or practices applicable in foreign relations.<sup>145</sup>

A provision of a convention or treaty may attain universal acceptance as binding customary international law, even though only a handful of states initially concluded the convention or treaty.<sup>146</sup> Similarly, if a rule or principle ascends to customary international law and subsequently becomes incorporated into a

(1969) [hereinafter *Treaty on Treaties*]. A peremptory norm, also known as *jus cogens*, represents fundamental and compelling law, or overriding principles of international law. See BROWNIE, *supra* note 15, at 512-15 (discussing principle of *jus cogens*). A new peremptory norm will void existing treaties if the norm conflicts with the treaties. *Treaty on Treaties*, *supra*, art. 64, at 297.

141. See ICJ Statute, *supra* note 11, art. 38(1)(b), at 1060, 3 Bevens at 1187 (providing that custom is source of international law); JAMES L. BRIERLY, *THE LAW OF NATIONS* 59-60 (6th ed. 1963) (discussing custom as source of international law).

142. See ICJ Statute, *supra* note 11, art. 38(1)(c), at 1060, 3 Bevens at 1187 (providing that sources of international law include general principles of law); 1 GEORG SCHWARZENBERGER, *INTERNATIONAL LAW* 458 (3d ed. 1957) [hereinafter 1 SCHWARZENBERGER] (stating that general principles of law recognized by nations constitute third type of law to which ICJ can resort when rendering decisions). No single rule enunciates the extent to which states must recognize a general principle before it becomes binding universally. See *id.* at 45 (discussing uncertainty surrounding number of nations required to make general principle universally binding). By assimilating a general principle of law into their own legal systems, states signal that they have recognized that principle as universally binding. See *Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. 4, 18 (Apr. 9) (applying general principles of law to admit circumstantial evidence because "all systems of law" had admitted such evidence, and international decisions had recognized this practice); 1 SCHWARZENBERGER, *supra*, at 45 (stating that principal legal systems must share general principle of law before law can qualify as one recognized by all nations). According to one Russian jurist, states must consent before a general principle of law becomes part of international law. Grigory I. Tunkin, *General Theory of Sources of International Law*, 19 *INDIAN J. INT'L L.* 474, 482 (1979).

143. ICJ Statute, *supra* note 11, art. 38(1)(d), at 1060, 3 Bevens at 1187; see BROWNIE, *supra* note 15, at 19-24 (discussing judicial decisions as informal source of international law). Judicial decisions provide persuasive evidence as to the state of international law. *Id.* at 19. Types of judicial decisions include decisions by arbitral tribunals, the European Court of Justice, national courts, ad hoc international tribunals, municipal courts, and the ICJ and its predecessor, the Permanent Court of International Justice. See *id.* at 19-24 (canvassing sources of judicial decisions).

144. See ICJ Statute, *supra* note 11, art. 38(1)(d), at 1060, 3 Bevens at 1187 (providing that teachings of most highly qualified publicists of various nations serve as subsidiary means for determining rules of international law).

145. BROWNIE, *supra* note 15, at 2.

146. SINGH & McWHINNEY, *supra* note 24, at 41; see 1 OPPENHEIM, *supra* note 11, at 28 (stating that principles from treaties may become universal law when non-contracting parties expressly consent or implicitly consent by recognizing principles through custom). The Genocide Convention and the Antarctica Treaty are examples



treaty or convention, that rule or principle will not lose its binding effect solely because a party withdraws from the convention or treaty or because the parties abrogate the convention.<sup>147</sup> Once a principle or rule has become customary international law, all states must abide by that law.<sup>148</sup>

In addition to treaty law as a source of customary international law, custom among nations may develop into rules of customary international law.<sup>149</sup> State practice is evidence of whether usage among states has developed into state practice accepted as law.<sup>150</sup> State practice does not need to be unanimous in order to become a customary rule, but should be extensive and virtually uniform.<sup>151</sup> Only when states regard the norm as embodying legal obligations requiring compliance does a generally accepted norm ascend to customary international law.<sup>152</sup> This element of customary international law, known as *opinio juris*, provides that states conform to a pattern of conduct due to

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of treaties expressing principles of customary international law. SHAW, *supra* note 14, at 81.

147. SINGH & McWHINNEY, *supra* note 24, at 39.

148. *See id.* at 40 (stating that customary laws relating to laws of war bind nations regardless of whether conventional law incorporated customary laws).

149. *See* ICJ Statute, *supra* note 11, art. 38(1)(b), at 1060, 3 Bevens at 1187 (providing that ICJ should apply custom as source of international law when rendering decisions).

150. *See* BRIERLY, *supra* note 141, at 59-60 (discussing elements of custom); Paquete Habana, 175 U.S. 677, 686-708 (1900) (canvassing international community's practice of exempting fishing vessels from capture as war prize to determine if usage had ripened into rule of international law). For a usage to develop into customary international law through state practice, states must express their consent in their observance of the usage. *See* S. S. Lotus (Fr. v. Turkey), 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7) (stating "[t]he rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law"); SINGH & McWHINNEY, *supra* note 24, at 38 (arguing that international acceptance of practice requires consent for practice to constitute binding rule); Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice, 1951-54: General Principles and Sources of Law*, 30 BRIT. Y.B. INT'L L. 1, 68 (1953) (contending that consent is latent in evolution of state practice into binding rule of law).

151. *See* North Sea Continental Shelf (F.R.G. v. Den., F.R.G. v. Neth.), 1969 I.C.J. 3, 43 (Feb. 20) (providing that passage of short, as opposed to long, period of time does not preclude formation of new rule so long as practice is extensive and virtually uniform).

152. *See* BRIERLY, *supra* note 141, at 59 (stating that usage becomes part of customary international law when those following that usage feel compelled to do so); *see also* SINGH & McWHINNEY, *supra* note 24, at 35 (discussing difference between usage and custom, where usage represents initial stage as habitual practice, and custom is source of international law when feeling of legal obligation attaches to usage).

a feeling of obligation.<sup>153</sup> A rule of customary international law may not bind states if they have expressly dissented to the rule's formation.<sup>154</sup>

At the International Peace Conference held at The Hague in 1907,<sup>155</sup> representatives adopted the Convention Respecting the Laws and Customs of War on Land ("1907 Hague Convention IV").<sup>156</sup> The preamble to this convention<sup>157</sup> ("Martens Clause") acknowledged that no complete code existed on the laws of war as of 1907.<sup>158</sup> Accordingly, the Martens Clause sets forth the default rule on sources of customary international law

153. See *North Sea Continental Shelf*, 1969 I.C.J. at 44 (holding "[t]he States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough."). It is often difficult to determine when states acknowledge that they must comply with a custom. See BRIERLY, *supra* note 141, at 60 (stating that evidence establishing custom may be diverse because states may take positions on particular issues which do not represent their settled opinions).

154. See *Asylum* (Colom. v. Peru), 1950 I.C.J. 266, 277-78 (Nov. 20) (holding that Peru was not bound to regional customary asylum rule because Peru repudiated asylum rule and refrained from ratifying conventions adopting this rule, and, thus, concluding that Colombian Government had not proven existence of custom on asylum rule); see also *Fisheries* (U.K. v. Nor.), 1951 I.C.J. 116, 138-39 (Dec. 18) (holding that Norwegian Government not obligated to follow rule of customary international law relating to maritime base-lines because it had consistently adopted contrary position). In the *Asylum* case, the ICJ found that to establish custom as international law, the Colombian Government had to prove "that the rule invoked by it is in accordance with a constant and uniform usage practised by the States in question, and that this usage is the expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial State." *Asylum*, 1950 I.C.J. at 276.

155. See JOZEF GOLDBLAT, *ARMS CONTROL AGREEMENTS 1* (1982) (discussing two International Peace Conferences held at The Hague in 1899 and 1907). Czar Nicholas II of Russia called for the first International Peace Conferences in 1899 to reduce armaments and preserve peace. DOCUMENTS ON THE LAWS OF WAR 35 (Adam Roberts & Richard Guelff eds., 1989) [hereinafter ROBERTS & GUELFF]. He later prompted members of the international community to convene a second conference in 1907. *Id.* at 43.

156. Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 205 Consol. T.S. 277, 2 A.J.I.L. Supp. 90 [hereinafter 1907 Hague Convention IV]. Representatives of 44 states adopted this convention at the second International Peace Conference held at The Hague in 1907. ROBERTS & GUELFF, *supra* note 155, at 43.

157. Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, pmbl., 36 Stat. 2277, at 2279-80, 205 Consol. T.S. 277, at 278-79, 2 A.J.I.L. Supp. 90, at 90-92 [hereinafter Martens Clause]. The Martens Clause appears in the preamble to the second convention adopted at the first International Peace Conference held at The Hague in 1899. See Convention Respecting the Laws and Customs of War on Land, July 29, 1899, pmbl., 32 Stat. 1803, at 1804-05, 187 Consol. T.S. 429, at 430-31, 1 A.J.I.L. Supp. 129, at 130-32 (setting forth Martens Clause).

158. Martens Clause, *supra* note 157, at 2279-80, 205 Consol. T.S. at 279, 2 A.J.I.L. Supp. at 91-92.

relating to the laws of war on land.<sup>159</sup> This default rule provides that in the absence of a specific international convention limiting a particular type of weapon or method of warfare, general principles of customary international law continue to bind states.<sup>160</sup>

### C. International Organizations

Despite the lack of an international organization empowered to create, enforce, and interpret international law,<sup>161</sup> two organs of the United Nations have addressed issues relating to nuclear weapons.<sup>162</sup> The General Assembly has passed numerous resolutions on the use<sup>163</sup> and testing of nuclear weapons<sup>164</sup> and nuclear disarmament.<sup>165</sup> Additionally, the ICJ recently rendered an advisory opinion on the legality of nuclear weapons use.<sup>166</sup>

159. *Id.* at 2279-80, 205 Consol. T.S. at 279, 2 A.J.I.L. Supp. at 91-92; see GEOFFREY BEST, *WAR AND LAW SINCE 1945* 250 (1994) (discussing Martens Clause as early expression of international law).

160. Martens Clause, *supra* note 157, at 2280, 205 Consol. T.S. at 279, 2 A.J.I.L. Supp. at 92. The Martens Clause states:

in cases not included in the [Hague] Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.

*Id.* at 2280, 205 Consol. T.S. at 279, 2 A.J.I.L. Supp. at 92.

161. SHAW, *supra* note 14, at 58.

162. See SINGH & McWHINNEY, *supra* note 24, at 289-91 (discussing efforts of General Assembly to address nuclear weapons issues through resolutions); Nicholas Rostow, *The World Health Organization, the International Court of Justice, and Nuclear Weapons*, 20 YALE J. INT'L L. 151, 151-52 & n.3 (1995) (discussing WHO and General Assembly requests for advisory opinion by ICJ on legality of nuclear weapons).

163. See, e.g., G.A. Res. 1653, U.N. GAOR, 16th Sess., Supp. No. 17, at 4-5, U.N. Doc. A/4942/Add.3 (1961) (providing that nuclear weapons use would violate U.N. Charter and laws of humanity).

164. See, e.g., G.A. Res. 2163, U.N. GAOR, 21st Sess., Supp. No. 16, at 11-12, U.N. Doc. A/6530 (1966) (requesting that nuclear weapons states halt nuclear weapons testing in all environments).

165. See, e.g., G.A. Res. 70C, U.N. GAOR, 50th Sess., at 90-91, U.N. Doc. A/50/590 (1995) (calling upon nuclear weapons states to seek nuclear disarmament); see also Legality Opinion, *supra* note 4, ¶ 71, at 826 (examining totality of General Assembly resolutions concerning nuclear weapons). The General Assembly may consider principles relating to disarmament and arms control. U.N. CHARTER art. 11.

166. Legality Opinion, *supra* note 4, ¶ 105(2)(E), at 831 (declining to decide if nuclear weapons use in self-defense would violate customary international law where state's very survival was at stake).

### 1. The United Nations

After World War II, representatives from fifty states<sup>167</sup> established the United Nations to safeguard international peace and security and to promote international cooperation.<sup>168</sup> The United Nations consists of six principal organs, including the Security Council, the General Assembly, and the ICJ.<sup>169</sup> Both the Security Council and the General Assembly may pass resolutions to further the principles of maintaining peace and security.<sup>170</sup> Whereas Security Council decisions bind member states,<sup>171</sup> General Assembly resolutions do not create legal obligations for member states.<sup>172</sup> While General Assembly resolutions do not bind member states, some legal scholars assert that General Assembly resolutions may express principles of customary international law depending on how the General Assembly adopts a resolution, such as by an overwhelming majority or a unanimous vote.<sup>173</sup>

### 2. The International Court of Justice

The U.N. Charter established the ICJ<sup>174</sup> after World War II to replace the Permanent Court of International Justice ("PCIJ").<sup>175</sup> The ICJ currently serves as the primary judicial or-

167. See 1 OPPENHEIM, *supra* note 11, at 402 (listing participating states).

168. See U.N. CHARTER art. 1 (setting forth purposes of United Nations). Delegates from 50 nations adopted the U.N. Charter at a conference held in San Francisco, California from April 25-June 26, 1945. 1 OPPENHEIM, *supra* note 11, at 402.

169. U.N. CHARTER art. 7. The additional organs are the Economic and Social Council, the Secretariat, and the Trusteeship Council. *Id.*

170. See *id.* art. 11 (empowering General Assembly to make recommendations); *id.* art. 24 (providing that Security Council acts as primary organ responsible for maintaining peace and security).

171. *Id.* art. 25; see SHAW, *supra* note 14, at 751 (discussing functions of Security Council). Article 25 provides, "[t]he Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter." U.N. CHARTER art. 25.

172. BROWNLIE, *supra* note 15, at 14; see SHAW, *supra* note 14, at 754 (describing General Assembly resolutions as "purely recommendatory" because resolutions in themselves "cannot establish binding legal obligations for member-states").

173. See BROWNLIE, *supra* note 15, at 14 (explaining that majority vote on particular resolution may constitute evidence of general principle of international law); SHAW, *supra* note 14, at 754 (asserting that states' voting patterns of approving or opposing General Assembly resolutions constitutes evidence of state practice); see also Legality Opinion, *supra* note 4, ¶ 70, at 826 (describing normative value of General Assembly resolutions).

174. U.N. CHARTER art. 92.

175. See BROWNLIE, *supra* note 15, at 716 (discussing similarities between PCIJ and

gan of the United Nations.<sup>176</sup> The ICJ consists of fifteen members of different nationalities serving nine year terms.<sup>177</sup> Members are elected by the Security Council and the General Assembly.<sup>178</sup> Each judge serves a term of nine years, and every three years elections are held for one-third of the panel.<sup>179</sup> If the ICJ reaches a split decision because an even panel resulted from the death or vacancy of one judge, the President of the ICJ has two votes and casts the deciding vote needed to attain a majority.<sup>180</sup>

The functions of the ICJ include deciding disputes between states<sup>181</sup> and providing judicial guidance for other U.N. organs in the form of advisory opinions.<sup>182</sup> According to Article 38(1) of the Statute of the International Court of Justice<sup>183</sup> ("ICJ Statute"), the Court must apply all sources of international law when it renders an advisory opinion.<sup>184</sup> The ICJ's decision in an advisory opinion has no binding effect on parties to the ICJ Statute.<sup>185</sup>

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ICJ, such as similar governing statutes, transferred jurisdiction between courts, and continuity of courts' jurisprudence). The United Nations replaced the League of Nations as the international organization charged with maintaining international peace, security, and cooperation. *See* SHAW, *supra* note 14, at 747-48 (discussing need for United Nations to remedy defects of League of Nations, such as League of Nations' inability to apply sanctions).

176. U.N. CHARTER art. 92. Article 92 provides, "[t]he International Court of Justice shall be the principal judicial organ of the United Nations. It shall function in accordance with the annexed Statute, which is based upon the Statute of the Permanent Court of International Justice and forms an integral part of the present Charter." *Id.*

177. ICJ Statute, *supra* note 11, arts. 3, 13(1), at 1055-56, 3 Bevens at 1179, 1181-82; *see* SHABTAI ROSENNE, *THE WORLD COURT WHAT IT IS AND HOW IT WORKS* 53 (5th ed. 1995) (discussing ICJ's organization); BROWNIE, *supra* note 15, at 717 (describing ICJ's election process).

178. ICJ Statute, *supra* note 11, art. 4, at 1055, 3 Bevens at 1179-80.

179. *Id.* art. 13(1), at 1056, 3 Bevens at 1181-82.

180. *See id.* art. 12(4), at 1056, 3 Bevens at 1181 (providing that if equality of votes occurs, eldest judge shall have tie-breaking vote).

181. *See id.* art. 35(1), at 1059, 3 Bevens at 1186 (providing that ICJ is available to states, which are parties to ICJ Statute, for dispute resolution).

182. *See id.* art. 65(1), at 1063, 3 Bevens at 1191 (empowering ICJ to render advisory opinions); ROSENNE, *supra* note 177, at 31-32 (discussing functions of ICJ).

183. ICJ Statute, *supra* note 11, art. 38(1), at 1060, 3 Bevens at 1187.

184. *Id.* art. 38(1), at 1060, 3 Bevens at 1187. According to Article 38(1), the sources of international law include international conventions, international custom, general principles of law recognized by nations, judicial decisions, and scholarly publications. *Id.* art. 38(1), at 1060, 3 Bevens at 1187.

185. *Id.* art. 59, at 1062, 3 Bevens at 1190; *see* SHAW, *supra* note 14, at 676-78 (discussing ICJ's advisory jurisdiction). According to the ICJ, its advisory opinion "is only of

### D. *The Laws of War*

The laws of war establish restrictions on the conduct of hostilities,<sup>186</sup> and attempt to balance the necessities of war with humanitarian principles.<sup>187</sup> In practice, the laws of war seek to monitor the objectives of war,<sup>188</sup> which generally are to overpower the enemy and to impose the victor's will on its enemy.<sup>189</sup> By regulating when states may initiate war and states' subsequent actions during war,<sup>190</sup> the laws of war seek to limit armed conflicts.<sup>191</sup>

#### 1. Sources of the Laws of War

As a continually evolving body of law, the laws of war consist of many sources within the larger body of customary international law.<sup>192</sup> Accordingly, states may declare weapons of mass destruction illegal by specific agreements<sup>193</sup> or through custom as evidenced by state practice.<sup>194</sup> States typically ban a particular weapon or method of warfare by concluding a treaty or conven-

an advisory character: as such, it has no binding force." Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, 1950 I.C.J. 65, 71 (Mar. 30).

186. 2 GEORG SCHWARZENBERGER, INTERNATIONAL LAW 10 (1968) [hereinafter 2 SCHWARZENBERGER].

187. See Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, 138 Consol. T.S. 298, 299, 1 A.J.I.L. Supp. 95, 96 [hereinafter St. Petersburg Declaration] (establishing that contracting parties pledge to "reconcile the necessities of war with the laws of humanity"); 2 SCHWARZENBERGER, *supra* note 186, at 10 (stating "[r]esort to force in any form is a step back in an ever continuing civilising process.").

188. See 2 OPPENHEIM, *supra* note 7, at 202 (contending that war and law are not inconsistent because international law recognizes breakdowns in peaceful relations and attempts to enforce remaining legal obligations).

189. 2 SCHWARZENBERGER, *supra* note 186, at 10.

190. MCCOUBREY & WHITE, *supra* note 5, at 189, 196 (describing difference between law in war and law against war).

191. Elliot L. Meyrowitz, *The Laws of War and Nuclear Weapons*, 9 BROOK. J. INT'L L. 227, 228 (1983).

192. See 2 OPPENHEIM, *supra* note 7, at 226 (stating that laws of war derive from law of nations relating to warfare). According to the International Military Tribunal at Nuremberg, the laws of war consist of treaties, universally recognized state custom and practice, and general principles of justice applied by jurists and practiced by military courts. Nuremberg Trial, 6 F.R.D. 69, 109 (1946).

193. Legality Opinion, *supra* note 4, ¶ 57, at 824; see W. MICHAEL REISMAN & CHRIS T. ANTONIOU, THE LAWS OF WAR xix (1994) (stating that recently treaties have been more frequently used as sources of laws of war).

194. See BRIERLY, *supra* note 141, at 59-60 (discussing custom as source of international law when evidenced by state practice and *opinio juris*).

tion.<sup>195</sup> An agreement involving the laws of war generally applies only during a war between two or more of the contracting parties.<sup>196</sup> Additionally, states often provide that if a non-contracting party joins a war between two or more contracting parties, the treaty ceases to apply.<sup>197</sup>

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195. See Legality Opinion, *supra* note 4, ¶ 57, at 824 (discussing state practice of declaring weapons of mass destruction illegal by specific agreements).

196. See St. Petersburg Declaration, *supra* note 187, at 299, 1 A.J.I.L. Supp. at 96 (limiting contracting parties' obligations to war between contracting parties); Declaration to Prohibit for the Term of Five Years the Launching of Projectiles and Explosives From Balloons, and Other Methods of a Similar Nature, July 29, 1899, 32 Stat. 1839, 1839, 187 Consol. T.S. 456, 456, 1 A.J.I.L. Supp. 153, 154 [hereinafter 1899 Hague Declaration I] (providing that treaty's obligations apply only to war between two or more contracting parties); Declaration Respecting Asphyxiating Gases, July 29, 1899, 1907 Gr. Brit. T.S. No. 32 (Cmnd. 3751) at 10, 10, 187 Consol. T.S. 453, 453, 1 A.J.I.L. Supp. 157, 157-58 [hereinafter 1899 Hague Declaration II] (binding contracting parties only in war between two or more contracting parties); Declaration Respecting Expanding Bullets, July 29, 1899, 1907 Gr. Brit. T.S. No. 32 (Cmnd. 3751) at 5, 5, 187 Consol. T.S. 459, 459, 1 A.J.I.L. Supp. 155, 156 [hereinafter 1899 Hague Declaration III] (creating obligations for contracting parties only in war between two or more contracting parties). Generally, a convention or treaty binds only the parties to the treaty, and no longer binds them if they cease to be parties to the convention or treaty. SINGH & McWHINNEY, *supra* note 24, at 39. Conversely, the treaty or convention does not create obligations for those states not parties to the treaty or convention. 1 OPPENHEIM, *supra* note 11, at 28; see 1 SCHWARZENBERGER, *supra* note 142, at 458 (discussing state's decision whether to create obligations for itself by entering into treaty).

197. See St. Petersburg Declaration, *supra* note 187, at 299, 1 A.J.I.L. Supp. at 96 (stating that St. Petersburg Declaration would cease to bind contracting parties if non-contracting party joined armed conflict); 1899 Hague Declaration I, *supra* note 196, at 1839-40, 187 Consol. T.S. at 456, 1 A.J.I.L. Supp. at 154 (terminating contracting parties' obligations when non-contracting party enters war between them); 1899 Hague Declaration II, *supra* note 196, 1907 Gr. Brit. T.S. No. 32 at 11, 187 Consol. T.S. at 453, 1 A.J.I.L. Supp. at 158 (providing that declaration will no longer bind contracting parties if non-contracting party enters hostilities with one contracting party); 1899 Hague Declaration III, *supra* note 196, 1907 Gr. Brit. T.S. No. 32 at 5, 187 Consol. T.S. at 459, 1 A.J.I.L. Supp. at 156 (restricting scope of treaty's application if, in war between contracting parties, non-contracting party joins belligerents). When France, the United Kingdom, and the United States signed the Geneva Gas Protocol, they entered reservations outlining the scope of the protocol's coverage because the protocol did not include any restricting language. Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, 571, 94 L.N.T.S. 65, 67, 69 (entered into force on Feb. 8, 1928) (ratified by United States on Jan. 22, 1975) [hereinafter Geneva Gas Protocol] (setting forth reservations of France, United Kingdom, and United States). An example of the effect of this limiting language is the Iran-Iraq War. See REISMAN & ANTONIOU, *supra* note 193, at xix-xx (discussing Iran-Iraq War in light of Iraq's reservation to Geneva Gas Protocol). Iran never acceded to the Geneva Gas Protocol and Iraq entered a reservation providing that it would not be bound by the Geneva Gas Protocol in a conflict involving a non-contracting party. *Id.* Thus, the Geneva Gas Protocol may not have

## 2. The Period Preceding the 1868 St. Petersburg Declaration

The laws of war distinguish between *jus ad bellum*<sup>198</sup> and *jus in bello*<sup>199</sup> to monitor states' initial resort to war and their subsequent conduct during armed conflict.<sup>200</sup> *Jus ad bellum* relates to the lawfulness of a belligerent's resort to war.<sup>201</sup> *Jus in bello* refers to the rights and duties of belligerents during the course of war.<sup>202</sup>

As early as the fourth century B.C., states sought to regulate the means and methods of warfare to limit the destructive effects of war.<sup>203</sup> During the Middle Ages, religious authorities attempted to reduce the savagery of armed conflict.<sup>204</sup> Prior to the Thirty Years War in 1618,<sup>205</sup> informal rules governed armed con-

applied to the Iran-Iraq War when Iraq used chemical weapons. *Id.*; see HIRO, *supra* note 103, at 43 (describing Iraqi use of chemical weapons during Iran-Iraq War).

198. 2 SCHWARZENBERGER, *supra* note 186, at 37.

199. MCCOUBREY & WHITE, *supra* note 5, at 189.

200. *See id.* at 189, 196 (discussing differences between *jus ad bellum* and *jus in bello*). The debate about the legality of nuclear weapons use focuses on *jus in bello* rather than *jus ad bellum* because aggressors would theoretically employ nuclear weapons after they are already engaged in war. *See id.* at 248-51 (discussing legality of nuclear weapons by applying principles of *jus in bello*). Provisions of the U.N. Charter govern international disputes and supplement principles of *jus in bello* and *jus ad bellum*. *See* GEORG SCHWARZENBERGER, *INTERNATIONAL LAW AND ORDER* 47, 173 (1971) (stating that U.N. Charter establishes limitations on *jus ad bellum* and discussing U.N. Charter's regulation of use of force in self-defense). Article 2(4) prohibits the threat or use of force, and Article 51 limits the use of force in self-defense. U.N. CHARTER arts. 2(4), 51.

201. MCCOUBREY & WHITE, *supra* note 5, at 1.

202. *Id.* at 189.

203. MEYROWITZ, *supra* note 27, at 2; *see* 1 *THE LAW OF WAR: A DOCUMENTARY HISTORY* 3 (Leon Friedman ed., 1972) [hereinafter 1 FRIEDMAN] (quoting *Book of Manu*, ancient Hindu civilization text which provided restrictions on types of weapons and conduct towards sick, wounded, and those who surrender).

204. SINGH & McWHINNEY, *supra* note 24, at 14. During the twelfth century, General Councils of the Catholic Church issued decrees regulating conduct during hostilities. 1 FRIEDMAN, *supra* note 203, at 9. In 1139, the Second Lateran Council condemned the use of the cross-bow which was the primary medieval hand-operated missile weapon. *A DOCUMENTARY HISTORY OF ARMS CONTROL AND DISARMAMENT* 11 (Trevor N. Dupuy & Gay M. Hammerman eds., 1973) [hereinafter *DOCUMENTARY HISTORY*]; *see* ARTHUR NUSSBAUM, *A CONCISE HISTORY OF THE LAW OF NATIONS* 18 (rev. ed. 1962) (discussing prohibition against use of cross-bow). The decree prohibited, "under penalty of anathema that that deadly and God-detested art of slingers and archers be in the future exercised against Christians and Catholics." 1 FRIEDMAN, *supra* note 203, at 9. Despite the ban on the cross-bow, the use of the cross-bow continued until the development of explosives and firearms. MEYROWITZ, *supra* note 27, at 3.

205. *See* CICELY V. WEDGWOOD, *THE THIRTY YEARS WAR* 11-12 (1939) (describing events preceding outbreak of hostilities between Catholics and Protestants). The Thirty Years War, commonly called the last religious war in Europe, began on May 23, 1618,



flict without reference to international or concerted efforts.<sup>206</sup>

The formalization of the laws of war did not occur until Dutch jurist Hugo de Groot, known as Grotius,<sup>207</sup> memorialized the rules on the means and methods of warfare in *De Jure Belli ac Pacis*,<sup>208</sup> written during the Thirty Years War.<sup>209</sup> While Grotius acknowledged the inevitability of war, he argued that reasonable, state-imposed limits should govern a state's resort to war and conduct during war.<sup>210</sup> Grotius justified restrictions on the conduct during war by citing humanitarian concepts including limits on unnecessary suffering<sup>211</sup> and the limited right to kill an enemy.<sup>212</sup>

During the eighteenth century, the writings of philosopher Jean-Jacques Rousseau<sup>213</sup> advanced the laws of war.<sup>214</sup> By defin-

and the warring countries declared peace in November, 1648 with the Peace of Westphalia. *Id.* at 12, 501 n.2, 507.

206. ROBERTS & GUELFF, *supra* note 155, at 29 (stating that in 1868, St. Petersburg Declaration was first international agreement establishing limits on particular type of weapon).

207. SHAW, *supra* note 14, at 22; see HAMILTON VREELAND, JR., HUGO GROTIUS 164-77 (Fred B. Rothman & Co. 1986) (1917) (discussing publication of *De Jure Belli ac Pacis*). Born in 1583, Grotius studied at the University of Leiden at age eleven, and published his first book at age fourteen. *Id.* at 2, 11, 27. To many, Grotius is the "father of international law." Boutros Boutros-Ghali, *A Grotian Moment*, 18 FORDHAM INT'L L.J. 1609, 1609 (1995).

208. HUGO GROTIUS, DE JURE BELLI AC PACIS [THE LAW OF WAR AND PEACE] (1646), translated in 2 THE CLASSICS OF INTERNATIONAL LAW (Francis W. Kelsey trans., James B. Scott ed., 1964). When he completed *De Jure Belli ac Pacis* in June 1625, Grotius had divided his treatise into three books. VREELAND, *supra* note 207, at 164, 166. The first part addresses *jus ad bellum*, or the right to war, the second part discusses the causes of war, and the third part examines *jus in bello*, or conduct during war. *Id.* at 166-67.

209. 1 FRIEDMAN, *supra* note 203, at 14-15 (discussing effect of *De Jure Belli Ac Pacis* on warring parties during Thirty Years War).

210. See GROTIUS, *supra* note 208, § 25, at 18 (discussing parameters of belligerents' conduct during armed conflict). Grotius stated:

[I]east of all should that be admitted which some people imagine, that in war all laws are in abeyance. On the contrary war ought not to be undertaken except for the enforcement of rights; when once undertaken, it should be carried on only within the bounds of law and good faith.

*Id.*

211. See *id.* at 651-53 (contending that laws of nations prohibited belligerents from killing enemy by using poison or poisoning water or weapons).

212. See *id.* § 25, at 18 (stating that only goal of war is enforcing rights). According to one legal scholar, Grotius asserted that limits exist for violence during warfare. STONE, *supra* note 10, at 14. These limits arise from respect for human dignity, thus requiring belligerents to spare civilians and combatants wherever possible. *Id.*

213. Peter Gay, *Introduction* to BASIC POLITICAL WRITINGS OF JEAN-JACQUES ROUSSEAU ix (Donald A. Cress ed. & trans., 1987) (discussing Rousseau's background and fundamental theories). Rousseau, a prominent political theorist, was born on June 28,

ing war as a relationship between states,<sup>215</sup> Rousseau argued that citizens of belligerent states are incidental, rather than natural, enemies.<sup>216</sup> Rousseau acknowledged that a state's goal in war is the destruction of the enemy state<sup>217</sup> but asserted that states have a limited right to kill defenders of an enemy state.<sup>218</sup> According to Rousseau, states may consider the enemy's defenders as legitimate objects of attack when they bear arms.<sup>219</sup> Once defenders surrender, however, they are no longer the enemy's agents, and, therefore, cease to be legitimate objects of attack.<sup>220</sup>

### 3. The 1868 St. Petersburg Declaration

Despite the writings of influential jurists such as Grotius and Rousseau, states did not memorialize the laws of war in multilateral agreements until the mid-nineteenth century.<sup>221</sup> In 1863, the Russian military developed a bullet that exploded upon contact with hard surfaces.<sup>222</sup> Later modifications to the bullet caused it to explode upon contact with soft surfaces, such as human flesh.<sup>223</sup> Fearing that other nations would abuse the exploding bullet's power, the Russian Government proposed an international conference to ban the projectile.<sup>224</sup>

The conference resulted in the St. Petersburg Declara-

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1712. *Id.* at ix, xv. Rousseau wrote a political treatise entitled *Social Contract* in which he analyzed the relationship between government, authority, and individuals. *Id.* at xv.

214. MCCOUBREY & WHITE, *supra* note 5, at 215.

215. JEAN JACQUES ROUSSEAU, *SOCIAL CONTRACT* (1762), *reprinted in* BASIC POLITICAL WRITINGS OF JEAN-JACQUES ROUSSEAU 145 (Donald A. Cress ed. & trans., 1987) [hereinafter ROUSSEAU POLITICAL WRITINGS].

216. *Id.*

217. *Id.* at 146.

218. *Id.*

219. *Id.*

220. *Id.*

221. *See* 1 FRIEDMAN, *supra* note 203, at 149 (stating that before nineteenth century, states relied on treaties to solve specific problems arising in war, but not to address broad issues of rules of war).

222. DIETRICH SCHINDLER & JIRI TOMAN, *THE LAWS OF ARMED CONFLICTS* 101 (1988). The Imperial Russian Army developed the explosive projectile for use against armored ammunition transports. MCCOUBREY & WHITE, *supra* note 5, at 219.

223. *See* MCCOUBREY & WHITE, *supra* note 5, at 219 (discussing refined version of bullet which would explode and fragment upon contact with human flesh).

224. SCHINDLER & TOMAN, *supra* note 222, at 101. The Russian military forbade the bullet's use against any military personnel because the bullet had the potential to cause greater damage to troops. ROBERTS & GUELFF, *supra* note 155, at 29.

tion,<sup>225</sup> the first international agreement codifying a prohibition on the use of a specific weapon in armed conflict.<sup>226</sup> The St. Petersburg Declaration renounced the use of any projectile weighing less than 400 grams which either exploded or contained flammable material.<sup>227</sup> The contracting parties<sup>228</sup> also sought to establish a consensus on when the necessities of war should yield to humanitarian interests.<sup>229</sup>

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225. St. Petersburg Declaration, *supra* note 187, at 298-99, 1 A.J.I.L. Supp. at 95-96. The St. Petersburg Declaration states:

Considering that the progress of civilization should have the effect of alleviating as much as possible the calamities of war:

That the only legitimate object which states should endeavor to accomplish during war is to weaken the military force of the enemy;

That for this purpose, it is sufficient to disable the greatest possible number of men;

That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable;

That the employment of such arms would, therefore, be contrary to the laws of humanity;

The contracting parties engage, mutually, to renounce, in case of war among themselves, the employment, by their military or naval forces, of any projectile of less weight than four hundred grammes, which is explosive, or is charged with fulminating or inflammable substances.

....  
The contracting or acceding parties reserve to themselves the right to come to an understanding, hereafter, whenever a precise proposition shall be drawn up, in view of future improvements which may be effected in the armament of troops, in order to maintain the principles which they have established, and to reconcile the necessities of war with the laws of humanity.

*Id.* at 298-99, 1 A.J.I.L. Supp. at 95-96.

226. ROBERTS & GUELFF, *supra* note 155, at 29.

227. St. Petersburg Declaration, *supra* note 187, at 298, 1 A.J.I.L. Supp. at 96. Later declarations adopted at the first International Peace Conference held at The Hague in 1899 banned the use of similar weapons, including projectiles and explosives discharged from balloons, asphyxiating gases, and expanding bullets. *See* 1899 Hague Declaration I, *supra* note 196, at 1839, 187 Consol. T.S. at 456, 1 A.J.I.L. Supp. at 154 (prohibiting contracting states from launching explosive projectiles from balloons); 1899 Hague Declaration II, *supra* note 196, 1907 Gr. Brit. T.S. No. 32 at 10, 187 Consol. T.S. at 453, 1 A.J.I.L. Supp. at 157 (banning use of projectiles designed to diffuse asphyxiating or other deleterious gases); 1899 Hague Declaration III, *supra* note 196, 1907 Gr. Brit. T.S. No. 32 at 5, 187 Consol. T.S. at 459, 1 A.J.I.L. Supp. at 155-56 (forbidding use of expanding bullets).

228. St. Petersburg Declaration, *supra* note 187, at 297-98. Nineteen countries either signed or acceded to the St. Petersburg Declaration, including France, Great Britain, and Russia. *Id.* at 297-99; *see* SCHINDLER & TOMAN, *supra* note 222, at 103 (listing contracting parties).

229. St. Petersburg Declaration, *supra* note 187, at 298, 1 A.J.I.L. Supp. at 95; *see* MCCOUBREY & WHITE, *supra* note 5, at 219 (discussing Russia's perceived need to restrict appalling potential of newly developed military technology).

While expressly banning a means of war, the St. Petersburg Declaration also proclaimed that certain humanitarian principles apply to conduct during warfare.<sup>230</sup> For the contracting parties, the only legitimate military objective of war was the weakening of enemy forces.<sup>231</sup> By agreeing that a belligerent state could attack only the enemy's military forces, contracting parties acknowledged a distinction between combatants and noncombatants.<sup>232</sup> The contracting parties also recognized that states could disable the greatest possible number of soldiers to attain the objective of weakening the enemy's forces.<sup>233</sup> Nonetheless, humanitarian concerns raised in the St. Petersburg Declaration limited the wanton destruction of the enemy by providing that aggressors could not employ weapons that would uselessly aggravate the suffering of disabled men or render their deaths inevitable.<sup>234</sup> Accordingly, the St. Petersburg Declaration enunciated a humanitarian principle prohibiting states from using weapons which cause unnecessary suffering.<sup>235</sup>

#### 4. The 1899 and 1907 Hague Conferences

At the invitation of the Imperial Russian Government, two conferences were held at The Hague in 1899 and 1907 (respectively, the "1899 Hague Conference" and "1907 Hague Conference," jointly the "International Peace Conferences").<sup>236</sup> As the

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230. REISMAN & ANTONIOU, *supra* note 193, at 35.

231. St. Petersburg Declaration, *supra* note 187, at 298, 1 A.J.I.L. Supp. at 95. The St. Petersburg Declaration reflected the theories of Grotius and Rousseau by providing that the only purpose of war was the weakening of the enemy's forces. *Id.* at 298, 1 A.J.I.L. Supp. at 95. Rousseau stated, "[f]or war does not grant a right that is unnecessary to its purpose." ROUSSEAU POLITICAL WRITINGS, *supra* note 215, at 146. Rousseau argued that this principle derived from reason and nature, and not from Grotian theories. *Id.*

232. See 2 SCHWARZENBERGER, *supra* note 186, at 157 (describing distinction between combatants and noncombatants as immunizing certain people and objects from attack).

233. St. Petersburg Declaration, *supra* note 187, at 298, 1 A.J.I.L. Supp. at 95.

234. *Id.* at 298, 1 A.J.I.L. Supp. at 95.

235. See Meyrowitz, *supra* note 191, at 234-35 (discussing prohibition against unnecessary suffering).

236. See GOLDBLAT, *supra* note 155, at 1 (discussing two International Peace Conferences as contributing to codification of laws of war). The International Peace Conferences consisted of both the 1899 and 1907 Hague Conferences. *Id.* The 1899 Hague Conference provided for a subsequent conference, known as the 1907 Hague Conference. Final Act of the International Peace Conference, July 29, 1899, 26 Martens Nouveau Recueil (ser. 2) 258, 264, 1 A.J.I.L. Supp. 103, 106 [hereinafter 1899 Hague Final Act]. Similarly, the 1907 Hague Conference recommended yet another confer-

first multilateral approaches to the general problems of modern warfare, the International Peace Conferences represented the next phase in the codification of the laws of war.<sup>237</sup> The goals of the International Peace Conferences included pursuing collective arms control negotiations, ensuring a lasting peace, and preventing armed combat.<sup>238</sup> With these goals, the 1899 Hague Conference marked the beginning of concerted efforts to limit conduct during warfare, or *jus in bello*.<sup>239</sup>

Participants in the 1899 Hague Conference<sup>240</sup> formally accepted rules of war to govern armed conflict between contracting parties.<sup>241</sup> The members of the 1899 Hague Conference adopted three conventions<sup>242</sup> in which they sought to reconcile

ence to continue the efforts of the first two conferences. Final Act of the Second International Peace Conference, Oct. 18, 1907, 205 Consol. T.S. 216, 226, 2 A.J.I.L. Supp. 1, 28 [hereinafter 1907 Hague Final Act]. Due to the outbreak of World War I, however, the third Hague Peace Conference never convened. DOCUMENTARY HISTORY, *supra* note 204, at 66-67.

237. MCCOUBREY & WHITE, *supra* note 5, at 220.

238. See DOCUMENTARY HISTORY, *supra* note 204, at 50-52 (reprinting Russian Circular Note proposing 1899 Hague Conference's agenda). Twenty-six governments, including China, France, Great Britain, Russia, and the United States, sent representatives to the conferences. SCHINDLER & TOMAN, *supra* note 222, at 49.

239. MCCOUBREY & WHITE, *supra* note 5, at 221. By adopting principles relating to the conduct of belligerents during warfare, parties to the 1899 and 1907 Hague Conferences codified principles of *jus in bello*. *Id.*

240. ROBERTS & GUELFF, *supra* note 155, at 35. On August 24, 1898, Czar Nicholas II called for an international conference at which states could affirm their commitment to maintaining universal peace and reducing armaments. See DOCUMENTARY HISTORY, *supra* note 204, at 48-50 (reprinting official Russian message delivered to ambassadors to Imperial Russian Court). Czar Nicholas sent a second message on December 30, 1898 discussing the conference's specific agenda and stating the conference's aims of reducing armaments and preserving peace. See *id.* at 50-52 (reprinting Russian Circular Note proposing 1899 Hague Conference program). The Russian Imperial Government convened the conference because it perceived that the international community sought the preservation of peace, and it believed the arms race had progressed to an unprecedented degree. See *id.* at 49 (reprinting Czar Nicholas II's official call for international conference).

241. SCHINDLER & TOMAN, *supra* note 222, at 49. The participants of the 1899 Hague Conference did not reach an agreement on the conference's primary object which was to limit or reduce armaments. ROBERTS & GUELFF, *supra* note 155, at 35; see DOCUMENTARY HISTORY, *supra* note 204, at 14 (stating that 1899 Hague Conference, as disarmament conference, was "complete failure"); 2 OPPENHEIM, *supra* note 7, at 122 (discussing limitation of armaments as ostensible object of 1899 Hague Conference). They did establish, however, institutions and procedures to settle international disputes, such as the Permanent Court of Arbitration at The Hague, antecedent to the PCIJ and the current ICJ. UNITED STATES ARMS CONTROL AND DISARMAMENT AGENCY, ARMS CONTROL AND DISARMAMENT AGREEMENTS 3 (1982) [hereinafter ARMS CONTROL].

242. 1899 Hague Final Act, *supra* note 236, at 263, 1 A.J.I.L. Supp. at 104; Conven-

humanitarian concerns with interests of military necessity.<sup>243</sup> The three conventions relate to the peaceful settlement of disputes,<sup>244</sup> the laws and customs of land warfare,<sup>245</sup> and maritime warfare.<sup>246</sup> At the 1899 Hague Conference, delegates also passed declarations limiting the use of specific weapons, including dum-dum bullets,<sup>247</sup> asphyxiating gases,<sup>248</sup> and projectiles and explosives launched from balloons.<sup>249</sup>

Two years after the end of the Russo-Japanese War,<sup>250</sup> the Czar of Russia resumed the International Peace Conference at

tion for the Pacific Settlement of International Disputes, July 29, 1899, 32 Stat. 1779, 187 Consol. T.S. 410, 1 A.J.I.L. Supp. 107 [hereinafter 1899 Hague Convention I]; Convention with Respect to the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803, 187 Consol. T.S. 429, 1 A.J.I.L. Supp. 129 [hereinafter 1899 Hague Convention II]; Convention for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention, July 29, 1899, 32 Stat. 1827, 187 Consol. T.S. 443, 1 A.J.I.L. Supp. 159 [hereinafter 1899 Hague Convention III]. Conventions and declarations are also known as treaties, and they refer to the parties' willingness to create binding legal obligations for themselves. SHAW, *supra* note 14, at 79.

243. SYDNEY D. BAILEY, *PROHIBITIONS AND RESTRAINTS IN WAR* 63 (1972)

244. 1899 Hague Convention I, *supra* note 242, art. 1, at 1785, 187 Consol. T.S. at 414, 1 A.J.I.L. Supp. at 109.

245. *See* 1899 Hague Convention II, *supra* note 242, pmbl., at 1804, 187 Consol. T.S. at 430, 1 A.J.I.L. Supp. at 130-31 (discussing convention's purposes of revising and defining rules of land warfare).

246. *See* 1899 Hague Convention III, *supra* note 242, pmbl., at 1828, 187 Consol. T.S. at 444, 1 A.J.I.L. Supp. at 160 (stating convention's objectives of adapting principles of 1864 Geneva Convention to maritime warfare).

247. 1899 Hague Declaration III, *supra* note 196, 1907 Gr. Brit. T.S. No. 32 at 5, 187 Consol. T.S. at 459, 1 A.J.I.L. Supp. at 155-56. The 1899 Hague Declaration III provides, "[t]he Contracting Parties agree to abstain from the use of bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core, or is pierced with incisions." *Id.* 1907 Gr. Brit. T.S. No. 32 at 5, 187 Consol. T.S. at 459, 1 A.J.I.L. Supp. at 155-56.

248. 1899 Hague Declaration II, *supra* note 196, 1907 Gr. Brit. T.S. No. 32 at 10, 187 Consol. T.S. at 453, 1 A.J.I.L. Supp. at 157. The 1899 Hague Declaration II provides, "[t]he Contracting Powers agree to abstain from the use of projectiles the object of which is the diffusion of asphyxiating or deleterious gases." *Id.* 1907 Gr. Brit. T.S. No. 32 at 10, 187 Consol. T.S. at 453, 1 A.J.I.L. Supp. at 157.

249. 1899 Hague Declaration I, *supra* note 196, at 1839, 187 Consol. T.S. at 456, 1 A.J.I.L. Supp. at 154. The 1899 Hague Declaration I provides, "[t]he Contracting Powers agree to prohibit, for a term of five years, the launching of projectiles and explosives from balloons, or by other new methods of a similar nature." *Id.* at 1839, 187 Consol. T.S. at 456, 1 A.J.I.L. Supp. at 154.

250. *See* SCHINDLER & TOMAN, *supra* note 222, at 57 (discussing Russo-Japanese War). The Russo-Japanese War, fought between 1904 and 1905, began without a formal declaration of war. *Id.* At the 1907 Hague Conference, contracting parties adopted a convention to ensure all hostilities would commence with prior warning, either by a declaration providing reasons for commencing hostilities or by an ultimatum with a conditional declaration of war. Convention Relative to the Opening of Hostilities, Oct.

The Hague in 1907.<sup>251</sup> Delegates at the 1907 Hague Conference revised the three conventions<sup>252</sup> and one declaration<sup>253</sup> from the 1899 Hague Conference and adopted ten new conventions.<sup>254</sup> In these documents, the delegates addressed the development of humanitarian principles<sup>255</sup> but failed to make progress on disarmament negotiations.<sup>256</sup>

In addition to adopting conventions and declarations, the contracting parties to both the 1899 and 1907 Hague Conferences drafted regulations<sup>257</sup> (respectively, "1899 Hague Regula-

18, 1907, art. 1, 36 Stat. 2259, 2271, 205 Consol. T.S. 264, 270, 2 A.J.I.L. Supp. 85, 86 [hereinafter 1907 Hague Convention III].

251. ROBERTS & GUELF, *supra* note 155, at 43. Representatives from 44 countries, including the five now-known nuclear powers, attended the 1907 Hague Conference. See 1907 Hague Final Act, *supra* note 236, at 217-24, 2 A.J.I.L. Supp. at 1-23 (listing delegates to 1907 Hague Conference).

252. See 1899 Hague Convention I, *supra* note 242, art. 1, at 1785, 187 Consol. T.S. at 414, 1 A.J.I.L. Supp. at 109 (providing for peaceful settlements of international disputes); 1899 Hague Convention II, *supra* note 242, pmbl., at 1804, 187 Consol. T.S. at 430, 1 A.J.I.L. Supp. at 130-31 (relating to laws and customs of war on land); 1899 Hague Convention III, *supra* note 242, pmbl., at 1828, 187 Consol. T.S. at 444, 1 A.J.I.L. Supp. at 160 (concerning adaptation to maritime warfare of principles of Geneva Convention of August 22, 1864).

253. See Declaration Prohibiting Discharge of Projectiles and Explosives From Balloons, Oct. 18, 1907, 36 Stat. 2439, 205 Consol. T.S. 403 [hereinafter 1907 Hague Declaration XIV] (prohibiting aerial bombardments).

254. 1907 Hague Final Act, *supra* note 236, at 225, 2 A.J.I.L. Supp. at 24-25 (listing 13 conventions and one declaration prepared by Conference for submission to plenipotentiaries); see, e.g., 1907 Hague Convention III, *supra* note 250, art. 1, at 2271, 205 Consol. T.S. at 270, 2 A.J.I.L. Supp. at 86 (setting forth principles of *ius ad bellum* by providing that hostilities should commence with prior warning); Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, Oct. 18, 1907, arts. 2-5, 17-18, 36 Stat. 2310, 2322-23, 2325-26, 205 Consol. T.S. 299, 300-03, 2 A.J.I.L. Supp. 117, 118-19, 122-23 (establishing duties for belligerents, neutral states, and citizens of neutral states to respect neutral territory during war); Convention Concerning Bombardment by Naval Forces in Time of War, Oct. 18, 1907, arts. 1-2, 36 Stat. 2351, 2363-64, 205 Consol. T.S. 345, 352, 2 A.J.I.L. Supp. 146, 147-48 (providing that contracting parties agree not to bombard undefended ports and towns, but allowing naval forces to bombard military targets in undefended towns); Convention for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention, Oct. 18, 1907, art. 1, 36 Stat. 2371, 2383, 205 Consol. T.S. 359, 361, 2 A.J.I.L. Supp. 153, 154 (providing protections for military hospital ships carrying wounded, sick, and shipwrecked).

255. See 1907 Hague Final Act, *supra* note 236, at 216, 2 A.J.I.L. Supp. at 1 (providing that sponsors of 1907 Hague Conference sought to "further develop the humanitarian principles which were the basis of the work of the first conference of 1899.").

256. See ROBERTS & GUELF, *supra* note 155, at 43 (noting that delegates did not reach general agreement on arms control).

257. Convention with Respect to the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803 Annex at 1811-1825, 187 Consol. T.S. 429 Annex at 436-42, 1 A.J.I.L.

tions" and "1907 Hague Regulations") establishing principles of customary international law exclusively applicable to land warfare.<sup>258</sup> Article 22 of the 1907 Hague Regulations<sup>259</sup> sets forth the basic principle that belligerents have a limited right to injure the enemy.<sup>260</sup> According to Article 23(e),<sup>261</sup> aggressors may not cause unnecessary suffering by employing arms, projectiles, or materials calculated especially to cause such suffering.<sup>262</sup> Article 23(a) forbids the use of poison or poisonous weapons,<sup>263</sup> and

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Supp. 129 Annex at 134-53 [hereinafter 1899 Hague Regulations]; Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277 Annex at 2295-309, 205 Consol. T.S. 277 Annex at 289-97, 2 A.J.I.L. Supp. 90 Annex at 97-117 [hereinafter 1907 Hague Regulations]. The text of the 1899 and 1907 Hague Regulations differs slightly with respect to certain articles. See ROBERTS & GUELF, *supra* note 155, at 43-44 (noting few instances where 1907 Hague Regulations contain substantive changes from 1899 Hague Regulations); compare 1907 Hague Regulations, *supra*, art. 23, 2277 Annex at 2301-02, 205 Consol. T.S. 277 Annex at 293, 2 A.J.I.L. Supp. 90 Annex at 106-07 (containing additional subsection, Article 23(h), not included in the 1899 Hague Regulations) with 1899 Hague Regulations, *supra*, art. 23, 1803 Annex at 1817-18, 187 Consol. T.S. 429 Annex at 438-39, 1 A.J.I.L. Supp. 129 Annex at 142-43 (differing from 1907 Hague Regulations by not containing similar provision on maintaining rights of adversary's nationals).

258. See ROBERTS & GUELF, *supra* note 155, at 43-44 (stating that 1899 Hague Convention II comprehensively sets forth laws governing land warfare, and noting few changes made by 1907 Hague Convention IV to revise 1899 Hague Convention II); STONE, *supra* note 10, at 551 n.26 (stating that Hague Regulations have become part of customary law and bind states independently of treaty obligations). The contracting parties recognized that the Hague Regulations did not exhaustively express the laws of war. Martens Clause, *supra* note 157, at 2279-80, 205 Consol. T.S. at 279, 2 A.J.I.L. Supp. at 91-92. Rather, the Martens Clause states that customary international law shall supplement the Hague Regulations relating to the laws of war. *Id.* at 2280, 205 Consol. T.S. at 279, 2 A.J.I.L. Supp. at 92.

259. 1907 Hague Regulations, *supra* note 257, art. 22, 36 Stat. 2277 Annex at 2301, 205 Consol. T.S. 277 Annex at 293, 2 A.J.I.L. Supp. 90 Annex at 106.

260. *Id.* art. 22, 2277 Annex at 2301, 205 Consol. T.S. 277 Annex at 293, 2 A.J.I.L. Supp. 90 Annex at 106. Article 22 provides, "[t]he right of belligerents to adopt means of injuring the enemy is not unlimited." *Id.* art. 22, 2277 Annex at 2301, 205 Consol. T.S. 277 Annex at 293, 2 A.J.I.L. Supp. 90 Annex at 106.

261. *Id.* art. 23(e), 2277 Annex at 2301-02, 205 Consol. T.S. 277 Annex at 293, 2 A.J.I.L. Supp. 90 Annex at 106.

262. *Id.* art. 23(e), 2277 Annex at 2301-02, 205 Consol. T.S. 277 Annex at 293, 2 A.J.I.L. Supp. 90 Annex at 106. Article 23(e) provides that belligerents may not "employ arms, projectiles, or material calculated to cause unnecessary suffering." *Id.* art. 23(e), 2277 Annex at 2301-02, 205 Consol. T.S. 277 Annex at 293, 2 A.J.I.L. Supp. 90 Annex at 106.

263. *Id.* art. 23(a), 2277 Annex at 2301, 205 Consol. T.S. 277 Annex at 293, 2 A.J.I.L. Supp. 90 Annex at 106. Article 23(a) provides that belligerents may not "employ poison or poisoned weapons." *Id.* art. 23(a), 2277 Annex at 2301, 205 Consol. T.S. 277 Annex at 293, 2 A.J.I.L. Supp. 90 Annex at 106. The 1907 Hague Regulations do not define the meaning of "poison or poisoned weapons." Legality Opinion, *supra* note



Article 23(c) provides that, upon surrender of an enemy, a belligerent no longer retains a right to kill or wound the enemy.<sup>264</sup> Article 25 prohibits attacks against neutrals or undefended towns, villages, dwellings, or buildings.<sup>265</sup> Some legal scholars contend that these regulations have become customary international law, and, therefore, bind states not parties to the 1907 Hague Convention IV.<sup>266</sup>

### 5. The 1925 Geneva Gas Protocol

The International Conference on the Control of the International Trade in Arms, Munitions, and Implements of War<sup>267</sup> convened in Geneva in 1925.<sup>268</sup> Members of the international community<sup>269</sup> disapproved of the use of poison gas by German

4, ¶ 55, at 824. According to the ICJ, states have formulated their own interpretations, and state practice does not indicate that contracting parties consider nuclear weapons as poison or poisoned weapons. *Id.*

264. 1907 Hague Regulations, *supra* note 257, art. 23(c), 2277 Annex at 2301-02, 205 Consol. T.S. 277 Annex at 293, 2 A.J.I.L. Supp. 90 Annex at 106. Article 23(c) provides that belligerents may not "kill or wound an enemy who, having laid down his arms, or having no longer means of defence, has surrendered at discretion." *Id.* art. 23(c), 2277 Annex at 2301-02, 205 Consol. T.S. 277 Annex at 293, 2 A.J.I.L. Supp. 90 Annex at 106.

265. *Id.* art. 25, 2277 Annex at 2302, 205 Consol. T.S. 277 Annex at 293, 2 A.J.I.L. Supp. 90 Annex at 107. Article 25 provides, "[t]he attack or bombardment, by whatever means, of town, villages, dwellings, or buildings which are undefended is prohibited." *Id.* art. 25, 2277 Annex at 2302, 205 Consol. T.S. 277 Annex at 293, 2 A.J.I.L. Supp. 90 Annex at 107. The version of Article 25 from the 1899 Hague Regulations does not contain the language "by whatever means." 1899 Hague Regulations, *supra* note 257, art. 25, 1803 Annex at 1818, 187 Consol. T.S. 429 Annex at 439, 1 A.J.I.L. Supp. 129 Annex at 143.

266. STONE, *supra* note 10, at 551 n.26; *see* BEST, *supra* note 159, at 8 (stating that Hague Regulations represent customary law).

267. ROBERTS & GUELF, *supra* note 155, at 137. The conference convened to adopt a convention, which has not entered into force, providing for the supervision of the international trade in arms, munitions, and implements of war. SCHINDLER & TOMAN, *supra* note 222, at 115. During the conference, the U.S. Government suggested prohibiting the export of gases for use in war. ARMS CONTROL, *supra* note 241, at 9. The French representative proposed drafting a protocol to prohibit the use of poisonous gas. *Id.* Finally, at Poland's recommendation, the drafters included bacteriological weapons in the prohibition. *Id.*

268. *See* ARMS CONTROL, *supra* note 241, at 9 (discussing origins of Geneva Gas Protocol); 2 OPPENHEIM, *supra* note 7, at 342-43 (discussing Geneva Gas Protocol as attempt to abolish use of gas and chemical warfare and as continuation of prohibition originally appearing in the 1899 Hague Declaration II).

269. *See* BEST, *supra* note 159, at 53-54 (stating that Geneva Gas Protocol banned the "most objectionable" gas used during World War I). The Geneva Gas Protocol arose from the concern of inter-war disarmers about inhumane weapons or weapons which aggressors could develop furtively. DOCUMENTARY HISTORY, *supra* note 204, at 76.

and British forces during World War I.<sup>270</sup> At the conference, thirty-eight nations signed a protocol<sup>271</sup> (“Geneva Gas Protocol”) condemning the use of asphyxiating, poisonous, or other gases, and of all analogous liquids, materials, or devices as a means of war.<sup>272</sup> Although most countries generally observed the protocol during World War II,<sup>273</sup> contracting parties did not strictly adhere to it in other disputes.<sup>274</sup>

The Geneva Gas Protocol provoked controversy because the drafters did not specify the chemical, biological, or other poisonous gases subject to the protocol’s prohibitions.<sup>275</sup> Based on the language banning “other” gases, some states claimed that it was

270. See C.R.M.F. CRUTTWELL, *A HISTORY OF THE GREAT WAR: 1914-1918* 153-54, 165-66 (2d ed. 1936) (discussing reaction to poison gas use during World War I); STONE, *supra* note 10, at 554 (discussing use of poison gas during World War I). As the first users of poison gas during World War I, German forces released chlorine gas from stationary cylinders on April 22, 1915. *Id.* at 554 & n.44. The German forces did not violate the 1899 Hague Declaration II because the forces did not discharge the poison gas from the air. *Id.*; see 1899 Hague Declaration II, *supra* note 196, 1907 Gr. Brit. T.S. No. 32 at 10, 187 Consol. T.S. at 453, 1 A.J.I.L. Supp. at 157 (prohibiting use of projectiles designed to diffuse asphyxiating gases).

271. See Geneva Gas Protocol, *supra* note 197, at 576-82, 94 L.N.T.S. at 72-74 (listing signatories).

272. *Id.* at 575, 94 L.N.T.S. at 67. The Geneva Gas Protocol declares that the contracting parties accept the prohibition on the use in war of asphyxiating, poisonous, or other gases and “agree to extend this prohibition to the use of bacteriological methods of warfare and agree to be bound as between themselves . . .” *Id.* at 575, 94 L.N.T.S. at 67, 69. The substance of the Geneva Gas Protocol derived from general principles of customary international law prohibiting the use of poison and other similar materials that cause unnecessary suffering. ROBERTS & GUELF, *supra* note 155, at 137.

273. See BEST, *supra* note 159, at 306 (stating that absence of poison gas use in World War II resulted from fear of enemy’s retaliation in like-kind). Despite the German military’s agreement to observe the Geneva Gas Protocol during World War II, the German military violated the Geneva Gas Protocol by killing millions of noncombatants with poisonous gas. STONE, *supra* note 10, at 555-56.

274. See ARMS CONTROL, *supra* note 241, at 9 (describing use of poison gas in other armed conflicts). During the Ethiopian War of 1935-1941, Italy used mustard gas, a type of poison gas, against Ethiopian forces. ANTHONY MOCKLER, HAILE SELASSIE’S WAR, *THE ITALIAN-ETHIOPIAN CAMPAIGN, 1935-1941* 81 (1984). During the Iran-Iraq War of 1980-1988, Iraq used chemical weapons to regain control of the Fao Peninsula. HIRO, *supra* note 103, at 43. After the Iran-Iraq cease-fire, Iraq used poison gas against the Kurds. *Id.* at 194. During the 1991 Persian Gulf War, Iraq threatened to use chemical weapons, but never moved chemical munitions towards the front line. MICHAEL R. GORDON & GENERAL BERNARD E. TRAINOR, *THE GENERAL’S WAR* 353 (1995).

275. Shaw, *supra* note 7, at 14; see ROBERTS & GUELF, *supra* note 155, at 137 (stating that Geneva Gas Protocol’s ambiguities stem from language prohibiting “other” gases); ARMS CONTROL, *supra* note 241, at 10 (discussing international community’s reaction to Geneva Gas Protocol and stating, “[i]nterpretation of the protocol remained a thorny problem.”).

unclear whether the Geneva Gas Protocol prohibited tear gas, other non-lethal gases, or herbicides.<sup>276</sup> Thirteen contracting parties partially clarified the confusion of the protocol's coverage by declaring that the prohibitions extended to tear gas.<sup>277</sup> The United States maintained, however, that the Geneva Gas Protocol did not prohibit the use of nontoxic gases or chemical herbicides.<sup>278</sup> When the United States ratified the Geneva Gas Protocol in 1975,<sup>279</sup> the President included a statement affirming the U.S. understanding that the Geneva Gas Protocol did not apply to control agents and chemical herbicides.<sup>280</sup> The U.S. Government preferred to restrict the use of weapons of mass destruction through disarmament agreements with effective safeguards.<sup>281</sup> Accordingly, the U.S. Government stood behind its decision to use tear gas and chemical herbicides for defoliation purposes during the Vietnam War.<sup>282</sup>

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276. ROBERTS & GUELF, *supra* note 155, at 137.

277. *Id.* On December 2, 1930, the British Government announced that it considered the Geneva Gas Protocol to ban the use of tear gas. *Id.* France and 11 other signatories agreed with this interpretation. *Id.*

278. *See id.* at 137-38 (discussing U.S. reasons for dissenting from British view regarding application of Geneva Gas Protocol to tear gas). The U.S. Government argued that tear gas and other non-lethal gases could be used during peace-time for police purposes. *Id.* Accordingly, it claimed that the Geneva Gas Protocol could not condemn the use of these gases in war when they could be lawfully used in peace. *Id.*

279. Geneva Gas Protocol, *supra* note 197, at 571. President Gerald R. Ford ratified the Geneva Gas Protocol for the United States on January 22, 1975. *See* Geneva Gas Protocol, *supra* note 197, at 571 (reprinting Presidential proclamation on Geneva Gas Protocol). When the U.S. Government ratified the Geneva Gas Protocol, it entered a reservation claiming that it could use chemical or biological weapons in response to an attack involving the first-use of such weapons by an enemy state or by the enemy's allies. *Id.* The French and British Governments entered similar reservations upon their ratifications. Geneva Gas Protocol, *supra* note 197, 94 L.N.T.S. at 67-69 n.1.

280. ROBERTS & GUELF, *supra* note 155, at 138.

281. ARMS CONTROL, *supra* note 241, at 10. The United States vetoed a Security Council resolution proposed by the Soviet Union which urged universal ratification of the Geneva Gas Protocol. *Id.* The United States subsequently voted against a General Assembly resolution condemning the use of chemical and biological agents during armed conflict. *Id.* at 11. The U.S. representative to the United Nations stated that the United States objected to interpreting treaties through resolutions. *Id.*

282. *See* NEIL SHEEHAN, A BRIGHT SHINING LIE, JOHN PAUL VANN AND AMERICA IN VIETNAM 618-19 (1988) (describing U.S. use of chemical herbicides for defoliation purposes). The U.S. armed forces began using defoliants in the early 1960's but used them more frequently between 1965 and 1967. *Id.* at 618. The U.S. armed forces primarily used herbicides near waterways to remove places of concealment where the enemy could ambush river boats. COMMANDER R.L. SCHREADLEY, FROM THE RIVER TO THE SEA: THE UNITED STATES NAVY IN VIETNAM 195 (1992). Defoliation strategy was not as effective as U.S. armed forces anticipated. *See id.* at 280 (describing continual North

## 6. The Kellogg-Briand Pact

To abolish the resort to violence in international relations,<sup>283</sup> sixty-three nations signed the Pact of Paris<sup>284</sup> ("Kellogg-Briand Pact") in 1928.<sup>285</sup> In Article I, the contracting parties condemned recourse to war and agreed to renounce war as an instrument of national policy.<sup>286</sup> The contracting parties also agreed to seek only pacific means to settle disputes.<sup>287</sup>

Some legal scholars<sup>288</sup> described the Kellogg-Briand Pact as overly ambitious and unrealistic because of its universal pledge not to resort to war.<sup>289</sup> This criticism focuses on the drafters' failure to include measures which would ensure compliance with

Vietnamese attacks despite defoliation). As part of its defoliation strategy, U.S. armed forces used herbicides to drastically defoliate broad strips on either side of the Long Tau ship channel. *Id.* Despite these efforts, North Vietnamese forces continually subjected ships in transit to rocket, recoilless rifle, and mining attack. *Id.* Agent Orange was the most common defoliant, and it contained minimal amounts of dioxin, a highly poisonous substance. SHEEHAN, *supra*, at 619. In response to U.S. defoliation tactics, Cambodia lodged a formal complaint in which it alleged damage to crops and vegetation caused by chemical spraying. SCHREADLEY, *supra*, at 159.

283. GOLDBLAT, *supra* note 155, at 7; *see* 1 FRIEDMAN, *supra* note 203, at 154 (describing Kellogg-Briand Pact as attempt to classify waging war as crime).

284. General Treaty for Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 59 [hereinafter Kellogg-Briand Pact]; *see* BAILEY, *supra* note 243, at 41 (discussing signatories to Kellogg-Briand Pact). Fifteen states initially signed the agreement. 1 FRIEDMAN, *supra* note 203, at 154. In the preamble to the Kellogg-Briand Pact, the signatories invited all remaining states to adopt its principles. Kellogg-Briand Pact, *supra*, pmbl., at 2344, 94 L.N.T.S. at 61.

285. *See* Kellogg-Briand Pact, *supra* note 284, pmbl., at 2344, 94 L.N.T.S. at 59 (stating that only pacific means should govern relations among states). Initially, French Foreign Minister Aristide Briand and U.S. Secretary of State Frank B. Kellogg decided to sign a bilateral pact renouncing war and agreeing to seek peaceful settlement of disputes. DOCUMENTARY HISTORY, *supra* note 204, at 155. Then, Secretary of State Kellogg urged that all nations should have the opportunity to sign the treaty. *Id.* The Kellogg-Briand Pact led to the first world disarmament conference held in 1932 regarding universal reduction and limitation on all types of armaments. GOLDBLAT, *supra* note 155, at 7.

286. Kellogg-Briand Pact, *supra* note 284, art. I, at 2345-46, 94 L.N.T.S. at 63. Article I provides, "[t]he High Contracting Parties solemnly declare . . . that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another." *Id.* art. I, at 2345-46, 94 L.N.T.S. at 63.

287. *Id.* art. II, at 2346, 94 L.N.T.S. at 63. According to Article II, "[t]he High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means." *Id.* art. II, at 2346, 94 L.N.T.S. at 63.

288. BAILEY, *supra* note 243, at 41; *see* DOCUMENTARY HISTORY, *supra* note 204, at 155 (referring to Kellogg-Briand Pact as "drunkard's oath").

289. Kellogg-Briand Pact, *supra* note 284, art. I, at 2345-46, 94 L.N.T.S. at 63.

the Kellogg-Briand Pact's obligations.<sup>290</sup> As further evidence of the Kellogg-Briand Pact's shortcomings, legal scholars noted that it failed to prevent World War II.<sup>291</sup>

### 7. Articles 2(4) and 51 of the U.N. Charter

The U.N. Charter contributed to the development of the laws of war through its prohibition in Article 2(4) on the threat or use of force<sup>292</sup> and its allowance in Article 51 for the use of force in self-defense.<sup>293</sup> The right to self defense, however, is a qualified right.<sup>294</sup> According to Article 51, a state cannot invoke the right to self-defense unless the Security Council fails to take measures to maintain international peace and security.<sup>295</sup> Rules of customary international law further limit the right to self-defense through requirements of necessity and proportionality.<sup>296</sup> These requirements provide that the use of force must be a proportionate and necessary response to an armed attack.<sup>297</sup>

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290. ARMS CONTROL, *supra* note 241, at 4-5; see 2 OPPENHEIM, *supra* note 7, at 190 (discussing lack of sanctions for violations of Kellogg-Briand Pact).

291. DOCUMENTARY HISTORY, *supra* note 204, at 155; BAILEY, *supra* note 243, at 41. The Kellogg-Briand Pact arguably failed to prevent World War II because it gave states the power to determine whether a situation warranted resort to force in self-defense. B.V.A. Röling, *International Law, Nuclear Weapons, Arms Control and Disarmament*, in NUCLEAR WEAPONS AND LAW 180, 182 (Arthur S. Miller & Martin Feinrider eds., 1984); see Meyrowitz, *supra* note 191, at 242 (stating that signatories continued to recognize resort to war for purposes of self-defense); ARMS CONTROL, *supra* note 241, at 5 (discussing hollowness of Kellogg-Briand Pact after signatories attached qualifications and interpretations of treaty's obligations which reduced treaty's force).

292. U.N. CHARTER art. 2(4).

293. *Id.* art. 51.

294. See *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 94, ¶ 176 (June 27) (stating that customary international law principles of necessity and proportionality limit responses by use of force in self-defense).

295. U.N. CHARTER art. 51.

296. *Military and Paramilitary Activities*, 1986 I.C.J. ¶ 176, at 94; see SHAW, *supra* note 14, at 692 (describing principles of necessity and proportionality as part of customary international law). The necessity and proportionality requirements of self-defense derive from the *Caroline* incident in 1837 involving the British seizure and destruction of a vessel in a U.S. port. *Id.* at 691-92. In an exchange of letters in which the British attempted to justify its actions, the U.S. Secretary of State required the British to prove the existence of the "necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment of deliberation." See IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 42-43 (1963) (quoting letter from U.S. Secretary of State Daniel Webster to British Lord Ashburton). The United States also required a showing that the British "did nothing unreasonable or excessive; since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it." See *id.* at 43 (quoting letter from Webster to British ambassador in Washington).

297. *Military and Paramilitary Activities*, 1986 I.C.J. ¶ 176, at 94.

## 8. The 1949 Geneva Conventions

During World War II, no agreement existed to provide adequate humanitarian safeguards for war victims.<sup>298</sup> At a diplomatic conference held in Geneva in 1949 under the auspices of the International Committee of the Red Cross,<sup>299</sup> representatives<sup>300</sup> adopted four conventions for the protection of the wounded, sick, and civilians.<sup>301</sup> The first three conventions reaffirmed earlier humanitarian principles<sup>302</sup> providing protections for wounded, sick, or shipwrecked combatants,<sup>303</sup> for those peo-

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298. GOLDBLAT, *supra* note 155, at 84; *see* 1 FRIEDMAN, *supra* note 203, at 155 (discussing World War II's role in revealing need for more comprehensive rules on prisoners of war and civilian population). When states learned the extent of the war crimes committed during World War II, they decided to conclude the Genocide Convention in 1948. GOLDBLAT, *supra* note 155, at 84; *see* Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, art. I, 78 U.N.T.S. 278, 280, 1970 Gr. Brit. T.S. No. 58 (Cmd. 4421) at 4 [hereinafter Genocide Convention] (confirming that genocide is punishable crime under international law).

299. REISMAN & ANTONIOU, *supra* note 193, at xxix. Members of the diplomatic conference decided to meet as a result of the hostilities of World War II. Rostow, *supra* note 162, at 168. The International Committee of the Red Cross prepared draft proposals on the application of humanitarian law to armed conflicts. ROBERTS & GUELF, *supra* note 155, at 169. After further revisions at the Seventeenth International Conference of the Red Cross, these proposals took the form of draft conventions for submission to a diplomatic conference. *Id.*

300. *See* ROBERTS & GUELF, *supra* note 155, at 169-70 (discussing development of conventional protections for war victims and civilians). Representatives from 64 states attended the conference. *Id.* at 169.

301. *See* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, arts. 12, 19, 6 U.S.T. 3114, 3122, 3128, 75 U.N.T.S. 31, 38, 44 [hereinafter 1949 Geneva Convention I] (providing protections for wounded and sick in field and for medical personnel in field); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, arts. 12, 22, 6 U.S.T. 3217, 3226-28, 3234, 75 U.N.T.S. 85, 92-94, 100 [hereinafter 1949 Geneva Convention II] (discussing protections for wounded, sick, shipwrecked at sea, and military hospital ships); Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, arts. 12, 13, 6 U.S.T. 3316, 3328, 75 U.N.T.S. 135, 146 [hereinafter 1949 Geneva Convention III] (discussing protections for prisoners of war from moment of capture through internment until release or death); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 13, 6 U.S.T. 3516, 3526-28, 75 U.N.T.S. 287, 296, 297 [hereinafter 1949 Geneva Convention IV] (establishing protections for civilians on indiscriminate basis).

302. BEST, *supra* note 159, at 132. The 1949 Geneva Convention IV supplements the provisions of the 1907 Hague Regulations. SCHINDLER & TOMAN, *supra* note 222, at 495.

303. 1949 Geneva Convention I, *supra* note 301, arts. 12, 19, at 3122, 3128, 75 U.N.T.S. at 38, 44.

ple tending to wounded, sick, or shipwrecked combatants,<sup>304</sup> and for prisoners of war.<sup>305</sup> The fourth convention<sup>306</sup> ("1949 Geneva Convention IV") established protections for civilians, as well as combatants.<sup>307</sup> All four Geneva conventions apply to cases of declared war or other armed conflicts between contracting parties.<sup>308</sup>

### 9. Protocols I and II Additional to the 1949 Geneva Convention

In the post-World War II period, the evolution of modern warfare prompted the international community to revise the laws of war.<sup>309</sup> The international community had not advanced the laws of war relating to the means and methods of warfare since the 1907 Hague Conference and the 1925 Geneva Gas Protocol.<sup>310</sup> New forms of armed conflict had developed, including wars of national liberation, guerilla warfare, and other non-international disputes.<sup>311</sup> With these new forms of armed conflict, civilians gradually lost protections because the means and methods of warfare had outgrown the protections provided in the

304. 1949 Geneva Convention II, *supra* note 301, arts. 12, 22, at 3226-28, 3234, 75 U.N.T.S. at 92-94, 100.

305. 1949 Geneva Convention III, *supra* note 301, arts. 12, 13, at 3328, 75 U.N.T.S. at 146.

306. See 1949 Geneva Convention IV, *supra* note 301, art. 3, at 3518-20, 75 U.N.T.S. at 288-90 (providing floor of protections for persons not involved in hostilities when dispute is not of international character). Article IV defines a protected person as one "who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals." *Id.* art. IV, at 3520, 75 U.N.T.S. at 290.

307. See *id.* art. 3, at 3518-20, 75 U.N.T.S. at 288-90 (protecting people not involved in armed conflict as well as combatants who have laid down their arms or who are wounded or sick).

308. 1949 Geneva Convention I, *supra* note 301, art. 2, at 3116, 75 U.N.T.S. at 32; 1949 Geneva Convention II, *supra* note 301, art. 2, at 3220, 75 U.N.T.S. at 86; 1949 Geneva Convention III, *supra* note 301, art. 2, at 3318, 75 U.N.T.S. at 136; 1949 Geneva Convention IV, *supra* note 301, art. 2, at 3518, 75 U.N.T.S. at 288.

309. GOLDBLAT, *supra* note 155, at 84.

310. *Id.* In agreements and conventions adopted before 1950, the international community addressed the application of the laws of war to international, and not domestic, disputes. *Id.*

311. See REISMAN & ANTONIOU, *supra* note 193, at xxix (recognizing wars of national liberation as new feature of international politics); ROBERTS & GUELF, *supra* note 155, at 387 (stating that international community questioned application of laws of war to guerilla warfare); see OMAR CABEZAS, *FIRE FROM THE MOUNTAINS, THE MAKING OF A SANDINISTA* 162-76 (1986) (describing guerilla warfare in Nicaragua).

pre-1950's agreements and conventions.<sup>312</sup> The rise in the number of internal conflicts caused the international community to clarify the application of the laws of war to these conflicts.<sup>313</sup>

To expand protections for civilians, the International Committee of the Red Cross convened a conference in Geneva<sup>314</sup> at which participants supplemented the Geneva Conventions of 1949 with two protocols.<sup>315</sup> Protocol I ("1977 Geneva Protocol I") augments protections 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 population.<sup>316</sup> It also banned belligerents from considering civilian objects as objects of attack or reprisal.<sup>317</sup> Finally, 1977

312. See GOLDBLAT, *supra* note 155, at 84 (discussing growth of guerrilla warfare after World War II); see also BEST, *supra* note 159, at 343 (discussing reluctance of imperial countries during Cold War to recognize that Third World countries should fight wars of national liberation by same standards as international wars). In guerrilla warfare, the distinction between combatants and civilians is often unclear because the ruling government's military has difficulty determining whether a citizen is part of a guerrilla group. GOLDBLAT, *supra* note 155, at 84. Rules relating to the distinction between combatants and noncombatants, therefore, did not protect civilians. See ROBERTS & GUELF, *supra* note 155, at 387 (stating that guerrilla warfare challenged determination of combatant status).

313. ROBERTS & GUELF, *supra* note 155, at 387.

314. See BEST, *supra* note 159, at 345 (discussing events leading to conference and process by which conference adopted protocols additional to 1949 Geneva Conventions). The conference convened in 1974 and concluded in 1977. *Id.* at 344-45; see ROBERTS & GUELF, *supra* note 155, at 387 (describing participation of certain national liberation movements in conference's deliberations). In the first session, conference participants recognized that their most difficult task was identifying wars of national liberation against colonialism, foreign occupation, and racist regimes as international armed conflicts. BEST, *supra* note 159, at 345.

315. REISMAN & ANTONIOU, *supra* note 193, at xxix; see Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), *opened for signature* Dec. 12, 1977, arts. 48-79, 1125 U.N.T.S. 4, 25-40, 16 I.L.M. 1391, 1412-26 [hereinafter 1977 Geneva Protocol I] (protecting victims and civilians involved in international armed conflicts); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), *opened for signature* Dec. 12, 1977, art. 1, 1125 U.N.T.S. 609, 611, 16 I.L.M. 1442, 1443 [hereinafter 1977 Geneva Protocol II] (providing protections for victims of non-international conflicts, including those between armed forces of contracting parties and dissident armed forces, but not including incidents of civil unrest).

316. 1977 Geneva Protocol I, *supra* note 315, art. 51(2), at 26, 16 I.L.M. at 1413. Article 51(2) states, "[t]he civilian population . . . shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited." *Id.* art. 51(2), at 26, 16 I.L.M. at 1413.

317. *Id.* art. 52(1), at 27, 16 I.L.M. at 1414. According to Article 52, "[c]ivilian



Geneva Protocol I codifies a humanitarian principle prohibiting indiscriminate attacks,<sup>318</sup> including attacks which would strike military targets, civilians, or civilian objects without distinction.<sup>319</sup> Protocol II ("1977 Geneva Protocol II") applies to internal or civil armed conflicts, but does not cover incidents of civil unrest.<sup>320</sup> It also mandates the humane treatment of all people who are not involved in or who are no longer involved in hostilities.<sup>321</sup>

### *E. Efforts to Contain Nuclear Weapons*

After World War II, international organizations began to direct their attention to the control of nuclear energy and nuclear disarmament.<sup>322</sup> The first effort to contain nuclear weapons involved a plan for the regulation of nuclear energy and the elimination of nuclear weapons.<sup>323</sup> In the United Nations, General Assembly resolutions have consistently addressed issues related to nuclear weapons.<sup>324</sup> Additionally, the international community has concluded numerous treaties concerning nuclear weap-

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objects shall not be the object of attack or of reprisals." *Id.* art. 52(1), at 27, 16 I.L.M. at 1414. Civilian objects include "all objects which are not military objectives." *Id.* art. 52(1), at 27, 16 I.L.M. at 1414.

318. *Id.* art. 51(4), at 26, 16 I.L.M. at 1413.

319. *Id.* art. 51(4), at 26, 16 I.L.M. at 1413. Indiscriminate attacks include:

- (a) Those which are not directed at a specific military objective;
- (b) Those which employ a method or means of combat which cannot be directed at a specific military objective; or
- (c) Those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.

*Id.* art. 51(4), at 26, 16 I.L.M. at 1413.

320. 1977 Geneva Protocol II, *supra* note 315, art. 1, at 611, 16 I.L.M. at 1443.

321. *Id.* art. 4(1), at 612, 16 I.L.M. at 1444. Article 4(1) provides that all people who are not involved in hostilities or who are no longer involved in hostilities "are entitled to respect for their person, honour and convictions and religious practices. They shall in all circumstances be treated humanely, without any adverse distinction." *Id.* art. 4(1), at 612, 16 I.L.M. at 1444.

322. See Rostow, *supra* note 162, at 179-83 (discussing international efforts since 1945 to address anxiety about use and proliferation of nuclear weapons).

323. See Bernard M. Baruch, *Proposals for an International Atomic Development Authority*, 14 DEP'T ST. BULL., June 1946, at 1057 [hereinafter Baruch Plan] (setting forth U.S. plan for control of nuclear energy and nuclear disarmament).

324. See Legality Opinion, *supra* note 4, ¶¶ 68-73, at 826-27 (discussing effect of General Assembly resolutions addressing legality of nuclear weapons use).

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### 1. The Baruch Plan

In 1946, the U.S. representative to the U.N. Commission on Atomic Energy,<sup>326</sup> Bernard Baruch,<sup>327</sup> presented a U.S. State Department plan (the "Baruch Plan") to the United Nations on the regulation of atomic energy and elimination of atomic weapons.<sup>328</sup> Under the Baruch Plan, the United States proposed placing the world's atomic resources under the control of an international atomic development authority.<sup>329</sup> This authority would monitor all phases of the development and use of nuclear energy,<sup>330</sup> including maintaining information on raw materials<sup>331</sup> and exercising complete control over production plants.<sup>332</sup> The

325. *Id.* ¶¶ 58-59, at 824-25 (canvassing treaties relating to proliferation, use, and testing of nuclear weapons).

326. *See* STONE, *supra* note 10, at 344-48 (discussing efforts and proposals on legal regulation of atomic weapons). The General Assembly established a Commission on Atomic Energy to investigate and make recommendations on the control of atomic energy and on nuclear disarmament. G.A. Res. 1, 1st Sess., 17th mtg., U.N. Doc. A/RES/1, at 9 (1946).

327. *See* CRAIG & JUNGEMAN, *supra* note 2, at 22 (discussing U.S. President Truman's appointment of Bernard Baruch, a statesman, as chief negotiator with Soviet Union concerning proposal for control of nuclear energy and nuclear weapons).

328. *See* Baruch Plan, *supra* note 323, at 1057 (outlining U.S. proposal for control of nuclear energy); ARMS CONTROL, *supra* note 241, at 5 (describing goals of Baruch Plan relating to regulation of nuclear weapons).

329. Baruch Plan, *supra* note 323, at 1059. The Baruch Plan states:

[t]he United States proposes the creation of an International Atomic Development Authority, to which should be entrusted all phases of the development and use of atomic energy, starting with the raw material and including—

1. Managerial control or ownership of all atomic-energy activities potentially dangerous to world security.
2. Power to control, inspect, and license all other atomic activities.
3. The duty of fostering the beneficial uses of atomic energy.
4. Research and development responsibilities of an affirmative character intended to put the Authority in the forefront of atomic knowledge and thus to enable it to comprehend, and therefor to detect, misuse of atomic energy. To be effective, the Authority must itself be the world's leader in the field of atomic knowledge and development and thus supplement its legal authority with the great power inherent in possession of leadership in knowledge.

*Id.*

330. *See id.* at 1060-62 (setting forth proposed measures of Baruch Plan). The Baruch Plan proposed that the International Atomic Development Authority would control atomic energy through "various forms of ownership, dominion, licenses, operation, inspection, research, and management by competent personnel." *Id.* at 1060.

331. *Id.* at 1060-61.

332. *Id.* at 1061.

Baruch Plan required the removal of nuclear weapons from existing arsenals and the cessation of nuclear weapons production, but only after the implementation of the international authority.<sup>333</sup> Provisions for compliance and punishments were of utmost importance to the success of the Baruch Plan.<sup>334</sup>

Despite the endorsement by a large majority of U.N. members, the Soviet Union rejected the Baruch Plan.<sup>335</sup> The Soviet Union objected to a number of substantive provisions, including inspection, ownership, and enforcement mechanisms.<sup>336</sup> Accordingly, the Soviet Union proposed its own plan prohibiting the production and use of nuclear weapons.<sup>337</sup> It called for the elimination of existing arsenals within three months of the plan's entry into force and before the creation of an international agency which would supervise the plan's implementation.<sup>338</sup> Negotiations between the Soviet Union and United States regarding these two proposals became deadlocked, and each country rejected the other's plan.<sup>339</sup>

## 2. General Assembly Resolutions

The General Assembly has adopted numerous resolutions directly relating to the use of nuclear weapons,<sup>340</sup> suspension of

333. *Id.* at 1060.

334. *Id.* at 1061.

335. ARMS CONTROL, *supra* note 241, at 6.

336. *Id.* at 6; *see* GOLDBLAT, *supra* note 155, at 13-14 (discussing Soviet Union's response to Baruch Plan and formulation of Soviet Union's own plan for control of nuclear weapons).

337. GOLDBLAT, *supra* note 155, at 13-14.

338. UNITED NATIONS DEP'T FOR DISARMAMENT AFFAIRS, THE UNITED NATIONS AND DISARMAMENT: 1945-1985 2 (1985).

339. *See* John Woodliffe, *Nuclear Weapons and Non-Proliferation: The Legal Aspects*, in NUCLEAR WEAPONS AND INTERNATIONAL LAW 85 (Istvan Pogany ed., 1987) (stating that impasse in negotiations resulted in failure of first attempt to reach international nuclear disarmament).

340. *See* G.A. Res. 1653, *supra* note 163, at 4-5 (declaring that use of nuclear weapons would violate U.N. Charter and laws of humanity); *see, e.g.*, Non-Use of Nuclear Weapons and Prevention of Nuclear War, G.A. Res. 148D, U.N. GAOR, 39th Sess., Supp. No. 51, at 78, U.N. Doc. A/39/749 (1984) (stating that nuclear weapons states have primary responsibility for nuclear disarmament and for taking measures to prevent outbreak of nuclear war); G.A. Res. 183B, U.N. GAOR, 38th Sess., Supp. No. 47, at 73, U.N. Doc. A/38/628 (1983) (recalling that two nuclear weapons states solemnly declared before General Assembly not to be first to use nuclear weapons, and inviting other nuclear weapons states to make similar declarations); G.A. Res. 78J, U.N. GAOR, 37th Sess., Supp. No. 51, at 64, U.N. Doc. No. A/37/662 (1982) (stating that nuclear disarmament is most effective deterrent against nuclear war and nuclear weapons use);

nuclear weapons testing,<sup>341</sup> and total nuclear disarmament.<sup>342</sup> In Resolution 1653,<sup>343</sup> the General Assembly declared that the

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G.A. Res. 92I, U.N. GAOR, 36th Sess., Supp. No. 51, at 64-65, U.N. Doc. A/36/752 (1981) (declaring that nuclear weapons use would violate U.N. Charter and would constitute crime against humanity); G.A. Res. 152D, U.N. GAOR, 35th Sess., Supp. No. 48, at 69, U.N. Doc. A/35/665/Add.1 (1980) (categorizing nuclear weapons use as violation of U.N. Charter and as crime against humanity); G.A. Res. 83G, U.N. GAOR, 34th Sess., Supp. No. 46, at 56, U.N. Doc. A/34/752 (1979) (recalling General Assembly Resolution 71B which called for prohibition of nuclear weapons use); G.A. Res. 71B, U.N. GAOR, 33d Sess., Supp. No. 45, at 48, U.N. Doc. A/33/461 (1978) (declaring that nuclear weapons use would violate U.N. Charter and would be crime against humanity, and stating that, due to these violations, nuclear weapons use should be prohibited pending nuclear disarmament); G.A. Res. 191, U.N. GAOR, 3d Sess., at 16-17, U.N. Doc. A/810 (1948) (requesting that states employ atomic energy only for peaceful purposes).

341. See, e.g., G.A. Res. 2163, *supra* note 164, at 11-12 (calling upon all nuclear weapons states to cease nuclear weapons testing in all environments); G.A. Res. 1648, U.N. GAOR, 16th Sess., Supp. No. 17, at 3, U.N. Doc. A/4942/Add.1 (1961) (urging states to suspend nuclear weapons testing); G.A. Res. 1402A, U.N. GAOR, 14th Sess., Supp. No. 16, at 4, U.N. Doc. A/4290 (1959) (requesting that states cease nuclear weapons testing); G.A. Res. 1252, U.N. GAOR, 13th Sess., Supp. No. 18, at 3-4, U.N. Doc. A/4090 (1958) (urging states to suspend nuclear weapons testing).

342. See, e.g., G.A. Res. 70C, *supra* note 165, at 90-91 (calling upon nuclear weapons states to seek nuclear disarmament); G.A. Res. 70P, U.N. GAOR, 50th Sess., at 99, U.N. Doc. A/50/590 (1995) (urging nuclear weapons to stop improving, developing, stockpiling, and producing nuclear warheads and their delivery systems); G.A. Res. 75H, U.N. GAOR, 49th Sess., Supp. No. 49, at 70, U.N. Doc. A/49/699 (1994) (requesting nuclear weapons states to take measures towards disarmament with view to absolute elimination of all nuclear weapons). The General Assembly has also passed resolutions calling for a multilateral convention prohibiting the use of nuclear weapons. G.A. Res. 71E, U.N. GAOR, 50th Sess., at 104, U.N. Doc. A/50/591 (1995); G.A. Res. 76E, U.N. GAOR, 49th Sess., Supp. No. 49, at 77-78, U.N. Doc. A/49/700 (1994); G.A. Res. 76B, U.N. GAOR, 48th Sess., Supp. No. 49, at 84-85, U.N. Doc. A/48/677 (1993); G.A. Res. 53C, U.N. GAOR, 47th Sess., Supp. No. 49, at 70, U.N. Doc. A/47/692 (1992); G.A. Res. 37D, U.N. GAOR, 46th Sess., Supp. No. 49, at 78, U.N. Doc. A/46/674 (1991); G.A. Res. 59B, U.N. GAOR, 45th Sess., Supp. No. 49A, at 71-72, U.N. Doc. A/45/779 (1990); G.A. Res. 117C, U.N. GAOR, 44th Sess., Supp. No. 49, at 80, U.N. Doc. A/44/786 (1989); G.A. Res. 76E, U.N. GAOR, 43d Sess., Supp. No. 49, at 90-91, U.N. Doc. A/43/857 (1988); G.A. Res. 39C, U.N. GAOR, 42d Sess., Supp. No. 49, at 81-82, U.N. Doc. A/42/751 (1987); G.A. Res. 60F, U.N. GAOR, 41st Sess., Supp. No. 53, at 85, U.N. Doc. A/41/841 (1986); G.A. Res. 151F, U.N. GAOR, 40th Sess., Supp. No. 53, at 90-91, U.N. Doc. A/40/946 (1985); G.A. Res. 63H, U.N. GAOR, 39th Sess., Supp. No. 51, at 70-71, U.N. Doc. A/39/750 (1984); G.A. Res. 73G, U.N. GAOR, 38th Sess., Supp. No. 47, at 67, U.N. Doc. A/38/641 (1983); G.A. Res. 100C, U.N. GAOR, 37th Sess., Supp. No. 51, at 83-84, U.N. Doc. A/37/670 (1982).

343. G.A. Res. 1653, *supra* note 163, at 4-5. The General Assembly adopted Resolution 1653 by a vote of 55 to 20, with 26 abstentions. U.N. GAOR, 16th Sess., 1063d plen. mtg., at 808, U.N. Doc. A/PV.1063 (1961). Of the five declared nuclear powers, China, France, the United Kingdom, and the United States voted against the declaration. *Id.* The Soviet Union voted for the resolution. *Id.*; see BAILEY, *supra* note 243, at 149-51 (discussing attitudes of China, Soviet Union, United Kingdom, and United States with

use of nuclear weapons would violate the U.N. Charter and laws of humanity.<sup>344</sup> Resolution 1653 refers to the 1868 St. Petersburg Declaration,<sup>345</sup> the 1899 and 1907 Hague Conferences,<sup>346</sup> and the 1925 Geneva Gas Protocol<sup>347</sup> in order to illustrate that weapons of mass destruction causing unnecessary suffering contravene the laws of humanity and principles of international law.<sup>348</sup> Resolution 1653 states that the use of nuclear weapons would exceed the scope of war, cause indiscriminate suffering, and affect people not involved in the hostilities.<sup>349</sup>

### 3. Treaties

While no single treaty explicitly bans the use of nuclear weapons,<sup>350</sup> numerous treaties circumscribe aspects of the use or possession of nuclear weapons.<sup>351</sup> Some treaties limit the acqui-

respect to provisions of Resolution 1653); *see also* Legality Opinion, *supra* note 4, at 849 (Oda, J., dissenting) (discussing passage of Resolution 1653).

344. G.A. Res. 1653, *supra* note 163, at 5. Resolution 1653 declares, "[a]ny State using nuclear and thermo-nuclear weapons is to be considered as violating the Charter of the United Nations, as acting contrary to the laws of humanity and as committing a crime against mankind and civilization." *Id.*

345. *Id.* at 5; *see* St. Petersburg Declaration, *supra* note 187, at 298-99, 1 A.J.I.L. Supp. at 95-96 (banning use of exploding bullets).

346. G.A. Res. 1653, *supra* note 163, at 5; *see supra* notes 236-66 and accompanying text (discussing 1899 and 1907 Hague Conferences and conventions and declarations adopted at each conference).

347. G.A. Res. 1653, *supra* note 163, at 5; *see* Geneva Gas Protocol, *supra* note 197, at 575, 94 L.N.T.S. at 67-69 (prohibiting use of asphyxiating, poisonous, or other gases as means of war).

348. G.A. Res. 1653, *supra* note 163, at 4-5.

349. *Id.* at 5. In reaching the conclusion that the use of nuclear weapons would be illegal, the General Assembly applied general rules of customary international law to nuclear weapons. *Id.* at 4-5. In its Legality Opinion, the ICJ states:

That application by the General Assembly of general rules of customary law to the particular case of nuclear weapons indicates that, in its view, there was no specific rule of customary law which prohibited the use of nuclear weapons; if such a rule had existed, the General Assembly could simply have referred to it and would not have needed to undertake such an exercise of legal qualification.

Legality Opinion, *supra* note 4, ¶ 72, at 826.

350. Legality Opinion, *supra* note 4, ¶¶ 57-58, at 824 (finding that prohibition on nuclear weapons use does not appear in treaties relating to weapons of mass destruction, and noting that international community has not produced treaty banning nuclear weapons use); Weston, *supra* note 4, at 546 (stating that no treaty specifically prohibits manufacture, stockpiling, deployment, or actual use of nuclear weapons).

351. *See* Southeast Asia Treaty, *supra* note 1, art. 2, at 640 (creating nuclear weapons-free zone in Southeast Asia); African Treaty, *supra* note 1, art. 2, at 707 (establishing nuclear weapons-free zone in Africa); South Pacific Nuclear Free Zone Treaty, Aug. 6,

sition, manufacture, and possession of nuclear weapons.<sup>352</sup> According to some treaties, states may not deploy nuclear weapons in specific physical locations,<sup>353</sup> such as outer space<sup>354</sup> or the seabed.<sup>355</sup> Similarly, some treaties forbid nuclear weapons testing

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1985, art. 2, 24 I.L.M. 1442, 1444 [hereinafter Treaty of Rarotonga] (founding nuclear weapons-free zone in South Pacific); Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Subsoil Thereof, Feb. 11, 1971, art. I, 23 U.S.T. 701, 704, 10 I.L.M. 146, 146-47 (entered into force May 18, 1972) [hereinafter Sea-bed Treaty] (creating nuclear weapons-free zone in sea-bed, ocean floor, and subsoil thereof); NPT, *supra* note 34, arts. I, II, at 487, 729 U.N.T.S. at 171 (preventing nuclear weapons proliferation by nuclear weapons states and non-nuclear weapons states); Treaty of Tlatelolco, *supra* note 1, art. 4, at 332, 6 I.L.M. at 523 (establishing nuclear weapons-free zone in Latin America); Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Jan. 27, 1967, art. IV, 18 U.S.T. 2410, 2413, 610 U.N.T.S. 206, 208 (entered into force Oct. 10, 1967) [hereinafter Outer Space Treaty] (founding nuclear weapons-free zone in outer space); Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, Aug. 5, 1963, art. I, 14 U.S.T. 1313, 1316-17, 480 U.N.T.S. 45, 45-47 (entered into force Oct. 10, 1963) [hereinafter Partial Test Ban Treaty] (forbidding nuclear weapons testing in atmosphere, outer space, or underwater); Antarctic Treaty, Dec. 1, 1959, arts. V, VI, 12 U.S.T. 794, 796-97, 402 U.N.T.S. 72, 76 (entered into force June 23, 1961) (creating nuclear weapons-free zone in Antarctica).

352. See Southeast Asia Treaty, *supra* note 1, art. 3(1)(a), at 640 (prohibiting contracting parties from developing, manufacturing, acquiring, possessing, or controlling nuclear weapons within zone); African Treaty, art. 3(a), *supra* note 1, at 707 (prohibiting manufacture, stockpile, acquisition, or possession of nuclear explosive device); Treaty of Rarotonga, *supra* note 351, art. 3(a), at 1444-45 (prohibiting manufacture, acquisition, possession, or control of nuclear explosive devices); NPT, *supra* note 34, art. I, at 487, 729 U.N.T.S. at 171 (preventing further proliferation of nuclear weapons by nuclear weapons states); Treaty of Tlatelolco, *supra* note 1, art. 1(1), at 330, 6 I.L.M. at 523 (requiring contracting parties to prohibit and prevent manufacture, production, or acquisition of nuclear weapons within their territories).

353. Legality Opinion, *supra* note 4, ¶ 58(b), at 824; see Southeast Asia Treaty, *supra* note 1, art. 3(1)(b), (2)(b) at 640 (banning contracting parties from controlling or stationing nuclear weapons inside or outside zone and from allowing another state to control or station nuclear weapons within zone); African Treaty, *supra* note 1, art. 4(1), at 707 (preventing stationing of nuclear explosive device in territory of each contracting party); Treaty of Rarotonga, *supra* note 351, art. 5, at 1446 (prohibiting stationing of nuclear explosive devices within contracting parties' territories); Treaty of Tlatelolco, *supra* note 1, art. 1(1)(b), at 330, 6 I.L.M. at 523 (forbidding Latin American countries from receiving, storing, installing, deploying, or possessing nuclear weapons); Antarctic Treaty, *supra* note 351, art. V, at 796, 402 U.N.T.S. at 76 (prohibiting nuclear explosions and disposal of radioactive waste in Antarctica).

354. See Outer Space Treaty, *supra* note 351, art. IV, at 2413-14, 610 U.N.T.S. at 208 (prohibiting contracting parties from placing space vehicles into orbit carrying nuclear weapons, and forbidding establishment of military bases on celestial bodies).

355. See Sea-bed Treaty, *supra* note 351, art. I(1), at 704, 10 I.L.M. at 146-47 (forbidding contracting parties from implanting or placing nuclear weapons or weapons of mass destruction on sea-bed or ocean floor).

in specific physical locations.<sup>356</sup> Some treaties also address recourse to nuclear weapons during hostilities.<sup>357</sup> Despite these treaties, the international community remains divided over the legality of nuclear weapons use.<sup>358</sup>

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356. Legality Opinion, *supra* note 4, ¶ 58(c), at 824; see Southeast Asia Treaty, *supra* note 1, art. 3(1)(c), (2)(c), at 640 (forbidding contracting parties from testing nuclear weapons or from allowing another state to test nuclear weapons in their territory); African Treaty, *supra* note 1, art. 5(b), at 708 (prohibiting testing of nuclear explosive devices within contracting party's territory); Treaty of Rarotonga, *supra* note 351, art. 6, at 1446 (preventing testing of any nuclear exploding device within South Pacific nuclear weapons-free zone and agreeing not to assist in or encourage such testing by other states); Sea-bed Treaty, *supra* note 351, art. I(1), at 704, 10 I.L.M. at 146-47 (preventing nuclear weapons testing in sea-bed zone by prohibiting placement of structures, launching installations, or any facility designed for testing); Treaty of Tlatelolco, *supra* note 1, art. 1(a), at 330, 6 I.L.M. at 523 (prohibiting nuclear weapons testing by Latin American countries); Outer Space Treaty, *supra* note 351, art. IV, at 2413, 610 U.N.T.S. at 208 (preventing nuclear weapons tests from originating in outer space by banning placement into orbit of any object carrying nuclear weapons); Partial Test Ban Treaty, *supra* note 351, art. I(1)(a), at 1316, 480 U.N.T.S. at 45 (requiring parties to prohibit nuclear weapons testing within their jurisdictions, including atmosphere, outer space, or underwater); Antarctic Treaty, *supra* note 351, art. V, at 796, 402 U.N.T.S. at 76 (banning all forms of nuclear explosions on Antarctica). On September 24, 1996, 65 nations signed a comprehensive test ban treaty which bans all nuclear test explosions. Farhan Haq, *Disarmament: Clinton Leads CTBT Signing But Experts Doubt Results*, INTER PRESS SERVICE, Sept. 24, 1996, available in LEXIS, News Library, Curnws File [hereinafter *Clinton Leads CTBT Signing*]. Before the treaty can enter into force, 44 nations with significant nuclear facilities, including Israel, India, and Pakistan, must sign the treaty. *Id.*; see Terry Atlas, *Nuclear Test Ban Pact OKD*, CHI. TRIB., Sept. 25, 1996, at 1 (discussing India's and Pakistan's opposition to treaty).

357. See Treaty of Rarotonga, *supra* note 351, protocol 2, art. 2, at 1461 (providing that contracting parties agree not to use or threaten to use nuclear devices against parties to Treaty of Rarotonga or against certain territories within South Pacific nuclear weapons-free zone); Treaty of Tlatelolco, *supra* note 1, protocol 2, art. 3, at 364, 6 I.L.M. at 534 (providing that protocol's contracting parties undertake not to use or threaten to use nuclear weapons against parties to Treaty of Tlatelolco).

358. See Jennifer Scott, *World Court to Rule on Legality of Nuclear Weapons*, REUTERS, Oct. 26, 1995, available in LEXIS, News Library, Curnws File [hereinafter *World Court*] (discussing diverging views on whether ICJ advisory opinion would encourage or deter disarmament negotiations); Kinzer, *supra* note 96, at A6 (discussing debate on legality of nuclear weapons use). Before hearings began at the ICJ for the advisory opinion, a nuclear arms specialist stated, "the view that nuclear weapons are illegal is definitely not a widely shared norm [in international law] at present." Scott, *supra*. Based on written submissions to the ICJ, six states, including France, Russia, the United Kingdom, and the United States, asserted the legality of nuclear weapons use. Brahma Chellaney, *Next on the World Court's Docket: Are Nuclear Arms Legal?*, INT'L HERALD TRIB., Opinion, Oct. 28, 1995. Twenty-eight states argued that nuclear weapons use is illegal, and nine states declined to address the legality issue, instead focusing on jurisdictional issues. *Id.*

## a. The Nuclear Non-Proliferation Treaty

The contracting parties<sup>359</sup> to the NPT<sup>360</sup> believed the spread of nuclear weapons would increase the dangers of nuclear war.<sup>361</sup> To address these concerns, the contracting parties agreed to prohibit the direct or indirect transfer of nuclear weapons by the "haves,"<sup>362</sup> and to forbid the receipt or manufacture of nuclear weapons by the "have nots."<sup>363</sup> Article III establishes safeguards in the form of inspections and monitoring by

359. NPT, *supra* note 34, at 561-66, 729 U.N.T.S. at 198-263 (listing signatories to original treaty signed at Washington and Moscow).

360. *See id.* arts. I, II, at 487, 729 U.N.T.S. at 171 (preventing spread of nuclear weapons by nuclear weapons states and non-nuclear weapons states); *see also* ARMS CONTROL, *supra* note 241, at 82-87 (discussing negotiations leading to approval of final draft of NPT). After private negotiations, the Soviet Union and the United States submitted separate, but identical, proposals for a draft treaty on non-proliferation to the Eighteen-Nation Disarmament Committee ("ENDC"). *Id.* at 84-85. Members of the ENDC accepted proposed revisions addressing concerns of non-nuclear weapons states and subsequently submitted a draft treaty to the General Assembly where it underwent further revision. *Id.* at 85. Initially signed in 1968 and entered into force in 1970, the NPT was extended indefinitely in late 1995. Final Document on Extension of the Treaty on the Non-Proliferation of Nuclear Weapons, May 11, 1995, 34 I.L.M. 961, Annex, Decision 3, at 972-73 (1995) [hereinafter NPT Extension]. As of June, 1996, 181 nations signed the NPT. Drozdak, *supra* note 40, at A14. Of the countries declining to sign the NPT, Israel pledged that it would consider signing the treaty only two years after a comprehensive peace in the Middle East. *Israel's Nuke Position*, *supra* note 116.

361. NPT, *supra* note 34, pmb., at 484, 729 U.N.T.S. at 169.

362. *See id.* art. I, at 487, 729 U.N.T.S. at 171 (stating obligations of nuclear weapons states). Article I provides:

Each nuclear-weapon State . . . undertakes not to transfer to any recipient whatsoever nuclear weapons or other nuclear explosive devices or control over such weapons or explosive devices directly, or indirectly; and not in any way to assist, encourage, or induce any non-nuclear-weapon State to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices, or control over such weapons or explosive devices.

*Id.* art. I, at 487, 729 U.N.T.S. at 171. The NPT defines a nuclear weapons state as one which had manufactured and exploded nuclear weapons or devices before January 1, 1967. *Id.* art. IX(3), at 492-93, 729 U.N.T.S. at 174. As of the NPT's signing, only China, France, the Soviet Union, the United Kingdom, and the United States fit this definition. NUCLEAR NON-PROLIFERATION, *supra* note 69, at 7.

363. *See* NPT, *supra* note 34, art. II, at 487, 729 U.N.T.S. at 171 (discussing duties of non-nuclear weapons states). Article II states:

Each non-nuclear-weapon State . . . undertakes not to receive the transfer from any transferor whatsoever of nuclear weapons or other nuclear explosive devices or of control over such weapons or explosive devices directly, or indirectly; not to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices; and not to seek or receive any assistance in the manufacture of nuclear weapons or other nuclear explosive devices.

*Id.* art. II, at 487, 729 U.N.T.S. at 171.



the International Atomic Energy Agency<sup>364</sup> ("IAEA") in order to assure the peaceful use of nuclear weapons-related material.<sup>365</sup> While the NPT permits peaceful nuclear testing,<sup>366</sup> it requires that non-nuclear weapons states have access to the information obtained from the testing.<sup>367</sup> The NPT does not include punishments or sanctions for violators of the treaty's obligations.<sup>368</sup> Finally, the NPT exacts a commitment by all contracting parties to pursue good faith negotiations towards nuclear disarmament.<sup>369</sup>

Recently, 175 states participated in a conference to review and extend the NPT.<sup>370</sup> In statements relating to the 1995 extension, the five nuclear powers gave security assurances by agreeing not to use nuclear weapons against non-nuclear weapons states that are parties to the NPT.<sup>371</sup> Also, the Security

364. See *id.* art. III, at 487-89, 729 U.N.T.S. at 172 (outlining role of IAEA in monitoring peaceful uses of nuclear energy). The IAEA is responsible for inspecting nuclear installations held or operated by non-nuclear weapons states to ensure compliance with the NPT. CRAIG & JUNGERMAN, *supra* note 2, at 436. Non-nuclear weapons states, however, allow these inspections only on a voluntary basis. *Id.*

365. NPT, *supra* note 34, art. III, at 487-89, 729 U.N.T.S. at 172; see BAILEY, *supra* note 70, at 4 (stating that safeguards acted as mainstay of non-proliferation system). By implementing safeguards, the drafters sought to prevent states from using commercial and research programs for non-peaceful purposes. *Id.*

366. NPT, *supra* note 34, art. IV, at 489-90, 729 U.N.T.S. at 172-73.

367. *Id.* art. V, at 490, 729 U.N.T.S. at 173; see David Pitt, *Nuclear-Free Zones: An Idea Whose Time Has Come*, in NUCLEAR-FREE ZONES 1, 1 (David Pitt & Gordon Thompson eds., 1987) (stating that term "peaceful uses" has not been defined). According to Article V, "potential benefits from any peaceful applications of nuclear explosions will be made available to non-nuclear-weapon States . . . on a nondiscriminatory basis." NPT, *supra* note 34, art. V, at 490, 729 U.N.T.S. at 173.

368. BAILEY, *supra* note 70, at 11. The NPT has suffered from problems of noncompliance. See *id.* at 6 (discussing noncompliance of certain states, such as Iran, Iraq, North Korea, South Korea, and Taiwan, with treaty obligations by developing nuclear programs). The NPT has failed to prevent vertical proliferation relating to the further accumulation of nuclear weapons by nuclear weapons states. Pitt, *supra* note 367, at 2. It has also failed to deter horizontal proliferation as a number of non-nuclear weapons states have acquired or can readily acquire nuclear weapons. *Id.*

369. NPT, *supra* note 34, art. VI, at 490, 729 U.N.T.S. at 173. According to Article VI, all contracting parties undertake "to 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." *Id.* art. VI, at 490, 729 U.N.T.S. at 173.

370. See NPT Extension, *supra* note 360, Annex, Decision 3, at 974 (listing participants); Barbara Crossette, *Treaty Aimed at Halting Spread of Nuclear Weapons Extended*, N.Y. TIMES, May 12, 1995, at A1 (discussing NPT's extension).

371. See S.C. Res. 984, U.N. SCOR, 50th Sess., at 2, S/RES/984 (1995) (discussing statements made by nuclear weapons states regarding security assurances).

Council unanimously adopted Resolution 984,<sup>372</sup> stating that the nuclear weapons states, as permanent members of the Security Council, should immediately refer incidents involving nuclear weapons to the Security Council in order to ensure that victims receive prompt assistance from the Security Council.<sup>373</sup>

### b. Nuclear Weapons-Free Zones

Nuclear weapons-free zones arose to prevent the spread of nuclear weapons<sup>374</sup> and to contain the number of existing nuclear weapons states.<sup>375</sup> In treaties creating nuclear weapons-free zones, contracting parties declare their territories free from aspects of nuclear weapons, such as nuclear testing, stockpiling nuclear weapons-related material, or dumping radioactive waste.<sup>376</sup> Presently, nuclear weapons-free zones exist in Africa,<sup>377</sup> Antarctica,<sup>378</sup> Latin America,<sup>379</sup> outer space,<sup>380</sup> the sea-bed,<sup>381</sup>

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372. *See id.* at 2 (inviting U.N. member states to assist non-nuclear weapons state if that state is attacked with nuclear weapons).

373. *Id.*

374. Jozef Goldblat, *Nuclear-Weapon-Free Zones*, in *THE FUTURE OF THE NON-PROLIFERATION TREATY* 86, 86 (John Simpson & Darryl Howlett eds., 1995).

375. *Id.*

376. *See* G.A. Res. 3472B, U.N. GAOR, 30th Sess., Supp. No. 34, at 23-24, U.N. Doc. A/10441 (1975) (defining nuclear weapons-free zone); Pitt, *supra* note 367, at 1 (defining nuclear weapons-free zone as area free of nuclear weapons while countries within territory may still receive support of nuclear weapons states). According to General Assembly Resolution 3472B, a nuclear weapons-free zone refers to:

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

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

G.A. Res. 3472B, *supra*, at 24.

377. *See* African Treaty, *supra* note 1, art. 2, at 707 (establishing nuclear weapons-free zone in Africa); Boutros Boutros-Ghali, *A New Nuclear Treaty Is a Big Step for Africa*, *INT'L HERALD TRIB.*, Apr. 5, 1996, at Opinion (discussing importance of nuclear weapons-free zone for Africa because treaty will arguably increase cooperation in use of nuclear science and will prompt diversion of resources formerly spent on nuclear arms race to development efforts).

378. *See* Antarctic Treaty, *supra* note 351, arts. V, VI, at 796-97, 402 U.N.T.S. at 76 (declaring Antarctica free of nuclear explosions and radioactive waste).

379. *See* Treaty of Tlatelolco, *supra* note 1, art. 4, at 332, 6 I.L.M. at 523 (founding nuclear weapons-free zone in Latin America).

380. *See* Outer Space Treaty, *supra* note 351, art. IV, at 2413, 610 U.N.T.S. at 208

Southeast Asia,<sup>382</sup> and the South Pacific.<sup>383</sup>

## II. HAS A PROHIBITION ON NUCLEAR WEAPONS USE ASCENDED TO CUSTOMARY INTERNATIONAL LAW?

The application of the laws of war to nuclear weapons is controversial because the overwhelming destructive force of nuclear weapons<sup>384</sup> distinguishes them from the conventional weapons which gave rise to the laws of war.<sup>385</sup> The laws of war theoretically prohibit the use of nuclear weapons through limits on methods of warfare<sup>386</sup> and restrictions on types of weapons.<sup>387</sup> An absolute ban on the use of nuclear weapons, however, may not have ascended to a rule of customary international law.<sup>388</sup>

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(banning nuclear weapons and weapons of mass destruction from outer space and celestial bodies).

381. See Sea-bed Treaty, *supra* note 351, art. 1, at 704, 10 I.L.M. at 146-47 (prohibiting contracting parties from placing launching installations or other facilities specifically designed for storing, testing, or using nuclear weapons in sea-bed zone).

382. See Southeast Asia Treaty, *supra* note 1, art. 2, at 640 (establishing nuclear weapons-free zone in Southeast Asia).

383. See Treaty of Rarotonga, *supra* note 351, art. 2, at 1444 (creating nuclear weapons-free zone in South Pacific); *South Pacific Now Nuclear-Free Zone*, ATLANTA J. & CONST., Mar. 25, 1996 (describing negotiations surrounding formulation of treaty); Mackay, *supra* note 88, at 1862-63 (assessing contracting parties' reasons behind signing Treaty of Rarotonga).

384. See *supra* notes 35-48 and accompanying text (discussing destructive capabilities of nuclear weapons).

385. See MEYROWITZ, *supra* note 27, at 2 (discussing doubt among legal scholars over applicability of laws of war to nuclear weapons because laws of war arose before advent of nuclear weapons); SCHWARZENBERGER, *supra* note 200, at 185 (discussing legality of nuclear weapons). Despite the development of *jus in bello* after World War II, the "nuclear question remains notoriously unresolved." MCCOUBREY & WHITE, *supra* note 5, at 222.

386. See Shaw, *supra* note 7, at 2 (discussing application of general principles of laws of war concerning methods of warfare to nuclear weapons use); 2 OPPENHEIM, *supra* note 7, at 347-48 (proposing that assessment of legality of nuclear weapons use should incorporate reference to distinction between combatants and noncombatants, principles of humanity, and existing international documents that limit use of violence in war).

387. RICHARD FALK ET AL., NUCLEAR WEAPONS AND INTERNATIONAL LAW 22, 23 (1981) (discussing legality of nuclear weapons use in terms of prohibitions on weapons and tactics having cruel effects and causing unnecessary suffering).

388. ROBERTS & GUELF, *supra* note 155, at 18 (noting that states, including nuclear powers, have not agreed upon single set of rules governing nuclear weapons use). In its Legality Opinion, the ICJ unanimously held that no customary or conventional international law exists to authorize the use or the threat of use of nuclear weapons. Legality Opinion, *supra* note 4, ¶ 105(2)(A), at 831. Yet, the ICJ also concluded that it could not find a *per se* conventional or customary rule that specifically prohibited the threat or use of nuclear weapons. *Id.* ¶ 74, at 827.

A. *Customary International Law Prohibits the Use of  
Nuclear Weapons*

The laws of war consist of specific international conventions, treaties, and scholarly writings which condemn aspects of nuclear weapons use.<sup>389</sup> Humanitarian rules regulating participants in armed conflicts provide that military necessities cannot exceed the laws of war.<sup>390</sup> States must act in concert with principles such as the prohibition against unnecessary suffering,<sup>391</sup> the prohibition against indiscriminate attacks,<sup>392</sup> and the distinction between combatants and noncombatants.<sup>393</sup> Due to the health and destructive effects of nuclear weapons,<sup>394</sup> scholars have argued that the present technology has rendered nuclear weapons use inconsistent with these humanitarian principles of customary international law.<sup>395</sup>

1. Nuclear Weapons Violate the Prohibition Against  
Unnecessary Suffering

As a principle of humanity,<sup>396</sup> the prohibition against un-

389. See *supra* notes 192-97 and accompanying text (discussing sources of laws of war).

390. See Meyrowitz, *supra* note 191, at 234 (stating that St. Petersburg Declaration implies wartime sovereignty is not absolute because necessities of war cannot exceed laws of war).

391. See *supra* note 235 and accompanying text (explaining origins in St. Petersburg Declaration of prohibition against unnecessary suffering).

392. See *supra* notes 318-19 and accompanying text (describing prohibition against indiscriminate attacks).

393. See *supra* note 232 and accompanying text (explaining distinction between combatants and noncombatants); see also Röling, *supra* note 291, at 187 (listing principles relevant to determining legality of nuclear weapons, including prohibition against weapons causing unnecessary suffering and prohibition against indiscriminate attacks); MEYROWITZ, *supra* note 27, at 21-22 (discussing principles of laws of war applicable to nuclear weapons, including limited right to kill enemy, prohibition against unnecessary suffering, prohibition against asphyxiating or poisonous gases, and prohibition against indiscriminate attacks).

394. See *supra* notes 49-68 and accompanying text (examining health effects of nuclear explosions); see also *supra* notes 35-48 and accompanying text (describing destructive capabilities of nuclear weapons).

395. See Röling, *supra* note 291, at 190 (stating that nuclear weapons are "odious" and should *a priori* be considered illegal because states could employ less repulsive weapons).

396. See Grief, *supra* note 27, at 22-39 (discussing principles of international humanitarian law). International humanitarian law refers to the body of law consisting of the laws of war arising from conventions held at The Hague and at Geneva. See Legality Opinion, *supra* note 4, ¶ 75, at 827 (reviewing components of international humanitarian law). The Hague laws generally encompass restrictions on the means and methods

necessary suffering provides that during war states may not employ weapons or tactics that have cruel effects or cause unnecessary suffering to combatants.<sup>397</sup> The prohibition against unnecessary suffering first appeared in the preamble to the St. Petersburg Declaration.<sup>398</sup> The preamble states that contracting parties should not use weapons which would uselessly aggravate the sufferings of disabled men.<sup>399</sup> This principle was subsequently embodied in the Hague Regulations which sought to codify the laws of war.<sup>400</sup>

Scholars argue that nuclear weapons violate the prohibition against unnecessary suffering because the use of nuclear weapons involves more force than necessary to weaken the military forces of the enemy.<sup>401</sup> A determination of the amount of force necessary to overpower the enemy involves balancing military necessity against humanitarian concerns.<sup>402</sup> This balancing test considers whether there is an alternative method to weakening the enemy by causing the least amount of suffering.<sup>403</sup> In addition to casualties associated with the blast effects of nuclear weapons,<sup>404</sup> radiation from nuclear explosions causes health ef-

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of warfare used by belligerents against their enemy, and the Geneva laws generally address protections for victims of war, disabled combatants, and persons not involved in hostilities. *See id.* (examining aspects of international humanitarian law including laws developed at Hague and Geneva); *see also* MCCOUBREY & WHITE, *supra* note 5, at 257 (discussing difference between Hague law and Geneva law).

397. Meyrowitz, *supra* note 191, at 234-35; *see* St. Petersburg Declaration, *supra* note 187, at 298, 1 A.J.I.L. Supp. at 95 (declaring that contracting parties should not use weapons which would cause unnecessary suffering); 1907 Hague Regulations, *supra* note 257, art. 23(e), 2277 Annex at 2301-02, 205 Consol. T.S. 277 Annex at 293, 2 A.J.I.L. Supp. 90 Annex at 106 (prohibiting belligerents from employing arms, projectiles, or materials designed to cause unnecessary suffering); 1977 Geneva Protocol I, *supra* note 315, art. 35(2), at 21, 16 I.L.M. at 1409 (forbidding use of weapons, projectiles, and materials and methods of warfare intended to cause unnecessary suffering).

398. SINGH & McWHINNEY, *supra* note 24, at 116; *see supra* notes 221-35 and accompanying text (discussing St. Petersburg Declaration).

399. St. Petersburg Declaration, *supra* note 187, pmbl., at 298, 1 A.J.I.L. Supp. at 95.

400. Shaw, *supra* note 7, at 3; *see* 1907 Hague Regulations, *supra* note 257, art. 23(e), 2277 Annex at 2301-02, 205 Consol. T.S. 277 Annex at 293, 2 A.J.I.L. Supp. 90 Annex at 106 (forbidding use of arms, projectiles, or material intended to cause unnecessary suffering).

401. Grief, *supra* note 27, at 25; St. Petersburg Declaration, *supra* note 187, pmbl., at 298, 1 A.J.I.L. Supp. at 95.

402. Grief, *supra* note 27, at 25.

403. STONE, *supra* note 10, at 343; Grief, *supra* note 27, at 25.

404. *See supra* notes 35-48 and accompanying text (explaining destructive capabilities of nuclear weapons).

fects including long-term illnesses such as leukemia and thyroid cancer.<sup>405</sup> Accordingly, states using nuclear weapons would violate the prohibition against unnecessary suffering because conventional weapons would attain the goal of weakening the enemy without causing as much suffering as nuclear weapons.<sup>406</sup>

In the only case reviewing the atomic bombings of Hiroshima and Nagasaki,<sup>407</sup> the Tokyo District Court found that the U.S. use of atomic weapons during World War II violated customary international law by causing unnecessary suffering.<sup>408</sup> The Tokyo District Court relied on Articles 22 and 23(e) of the 1907 Hague Regulations to conclude that states cannot use means of warfare causing unnecessary suffering.<sup>409</sup> The court found that because the United States used nuclear weapons which caused unnecessary suffering, the United States violated international law.<sup>410</sup>

## 2. Nuclear Weapons Violate the Prohibition Against Indiscriminate Attacks

Article 48 of 1977 Geneva Protocol I<sup>411</sup> sets forth the basic rule that states must ensure protection and respect for the civil-

405. See STONE, *supra* note 10, at 343 (contending that radioactive substances cause suffering in excess of amount necessary to attain military objectives); SINGH & McWHINNEY, *supra* note 24, at 118 (stating that rationale of Article 23(e) of Hague Regulations prevents belligerent from torturing enemy after belligerent has disabled enemy, and arguing that radioactive fallout adds torture to disablement thereby causing unnecessary suffering); see also *supra* notes 49-68 and accompanying text (discussing health effects of nuclear explosions).

406. Grief, *supra* note 27, at 25.

407. See Harry H. Almond, Jr., *Deterrence and a Policy-Oriented Perspective on the Legality of Nuclear Weapons*, in NUCLEAR WEAPONS AND LAW 57, 59 (Arthur S. Miller & Martin Feinriders eds., 1984) (stating that *Shimoda* case is only judicial review of atomic bombs used during World War II); Richard Falk, *The Shimoda Case: A Legal Appraisal of the Atomic Attacks Upon Hiroshima and Nagasaki*, 59 A.J.I.L. 759 (1965) (providing comprehensive discussion of *Shimoda* case and international reaction to decision).

408. *Shimoda v. State* (Japanese Gov't), 8 JAPAN. ANN. INT'L L. 212, 242 (Tokyo Dist. Ct. 1964). Plaintiffs, Japanese citizens, sued the Japanese Government for injuries associated with the atomic bombings. *Id.* at 222-24. Plaintiffs claimed that the Japanese Government was responsible for its injuries because the Japanese Government waived the claims of its citizens against the United States for the bombings. *Id.* at 220. The Tokyo District Court dismissed plaintiffs' claims because it found that international law does not recognize individuals' claims until provided for in a treaty. *Id.* at 249-50.

409. *Id.* at 242.

410. *Id.* at 241-42.

411. See *supra* notes 316-19 and accompanying text (discussing 1977 Geneva Protocol I).

ian population by distinguishing between the civilian population and combatants and between civilian objects and military objectives.<sup>412</sup> According to Article 51, indiscriminate attacks involve targeting non-specific military objectives, using means or methods of warfare not directed at a specific military target, or using means or methods of warfare effecting the area outside the zone of warfare.<sup>413</sup> If a state knowingly engages in an indiscriminate attack affecting the civilian population or civilian objects, the state has committed a grave breach of 1977 Geneva Protocol I.<sup>414</sup> Any grave breach of 1977 Geneva Protocol I is a war crime.<sup>415</sup>

Scholars also contend that the use of nuclear weapons violates the prohibition against indiscriminate attacks<sup>416</sup> because the radiation from a nuclear explosion is uncontrollable, may damage non-military objects, and may also injure a large portion of the civilian population.<sup>417</sup> Although belligerents may incidentally affect civilians or civilian objects without violating the prohibition against indiscriminate attacks, they must not exceed humanitarian concerns when attempting to secure military advantage.<sup>418</sup> Following a nuclear attack, the wind carries radioactive

412. 1977 Geneva Protocol I, *supra* note 315, art. 48, at 25, 16 I.L.M. at 1412; *see* St. Petersburg Declaration, *supra* note 187, at 298, 1 A.J.I.L. Supp. at 95 (providing that sole legitimate object during war is weakening of enemy forces). A civilian is one who does not belong to the armed forces of the parties to the conflict, a militia or volunteer corp forming part of the armed forces, or an organized resistance movement. *See* 1977 Geneva Protocol I, *supra* note 315, art. 50, at 26, 16 I.L.M. at 1413 (defining civilians and civilian population). Civilian objects include all objects which are not military objectives. *Id.* art. 52(1), at 27, 16 I.L.M. at 1414. Military objectives "are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture, or neutralization . . . offers a definite military advantage." *Id.* art. 52(2), at 27, 16 I.L.M. at 1414.

413. 1977 Geneva Protocol I, *supra* note 315, art. 51(4), at 26, 16 I.L.M. at 1413; *see supra* notes 318-19 (defining indiscriminate attacks).

414. *Id.* art. 85(3)(b), at 42, 16 I.L.M. at 1428. To qualify as a grave breach, the state violating the 1977 Geneva Protocol I must act wilfully and its actions must cause death or serious injury to body or health. *Id.* art. 85(3), at 42, 16 I.L.M. at 1428.

415. *Id.* art. 85(5), at 42, 16 I.L.M. at 1428.

416. *See* MEYROWITZ, *supra* note 27, at 24 (stating that atomic bombings of Hiroshima and Nagasaki resulted in indiscriminate slaughter of Japanese citizens). *But see* 1977 Geneva Protocol I, *supra* note 315, at 432-34 (setting forth U.K. and U.S. reservations to Protocol I which expressly exempt nuclear weapons use from prohibition against indiscriminate attacks).

417. BAILEY, *supra* note 243, at 148. Arguably, "the nature of nuclear weapons makes it virtually inevitable that indiscriminate effects would accompany their use." Grief, *supra* note 27, at 28.

418. *See* 1977 Geneva Protocol I, *supra* note 315, art. 57(2)(a)(iii), at 29, 16 I.L.M. at 1416 (requiring that persons responsible for launching attack refrain from causing

fallout beyond the area of the explosion.<sup>419</sup> If the radioactive fallout affects civilians, the use of nuclear weapons has resulted in an indiscriminate attack.<sup>420</sup> Some legal scholars contend that nuclear weapons are per se indiscriminate and, therefore, military advantage can never outweigh humanitarian concerns.<sup>421</sup>

### 3. Nuclear Weapons Fail to Distinguish Between Combatants and Noncombatants

Nuclear weapons theoretically violate customary international law because the use of nuclear weapons affects combatants and noncombatants without distinction.<sup>422</sup> The theory distinguishing between combatants and noncombatants provides that a belligerent state may consider only another nation, and not the inhabitants of that nation, as the enemy.<sup>423</sup> Accordingly, this theory prohibits states from intentionally attacking civilians

incidental civilian deaths or damage to civilian objects if military necessity would not outweigh humanitarian concerns); *see also* Grief, *supra* note 27, at 29 (stating that military actions are subject to rule of proportionality when determining limits of legitimate conduct during armed conflict).

419. SINGH & McWHINNEY, *supra* note 24, at 106 n.4; *see* Rensberger, *supra* note 46, at A1 (describing diluted effect of radiation as winds carry radiation away from explosion's source).

420. *See* Meyrowitz, *supra* note 191, at 234 (contending that states cannot contain nuclear weapons to only military targets due to residual effects of radioactive fallout).

421. *See id.* at 234-35 (arguing that indiscriminate nature of effects of nuclear weapons upon civilians and combatants justifies prohibiting nuclear weapons under existing international law); Grief, *supra* note 27, at 28 (asserting that nuclear weapons are per se illegal because states cannot control effects of nuclear weapons and cannot direct nuclear weapons at particular military target); FALK ET AL., *supra* note 387, at 25-26 (positing that nuclear weapons are incompatible with provisions of international law limiting conduct of warfare because of indiscriminate destruction resulting from nuclear weapons use); BAILEY, *supra* note 243, at 148 (contending that states would have difficulty using nuclear weapons discriminately due to destructive power of nuclear weapons). Even if states can strategically use nuclear weapons, the risk of escalation into a total nuclear war increases, thereby risking a violation of the prohibition against indiscriminate attacks. *Id.*; *see* Grief, *supra* note 27, at 36 (discussing dangers of uncontrollable escalation of armed conflict with introduction of nuclear weapons).

422. *See* SINGH & McWHINNEY, *supra* note 24, at 151 (arguing that nuclear weapons use would terrorize civilian population thereby violating fundamental principle of laws of war); Grief, *supra* note 27, at 26-29 (asserting that international humanitarian law prohibits nuclear weapons because nuclear weapons use cannot distinguish between civilian objects and military objectives).

423. *See* 2 SCHWARZENBERGER, *supra* note 186, at 157 (stating that laws of war negatively define distinction between combatants and noncombatants by immunizing certain people and objects from attack); ROUSSEAU POLITICAL WRITINGS, *supra* note 215, at 145 (stating that inhabitants of state engaged in armed conflict become only incidental enemies of opposing state).



within fighting zones.<sup>424</sup> States developed a distinction between combatants and noncombatants<sup>425</sup> to regulate excesses in warfare<sup>426</sup> and to ensure protections for civilians within fighting zones.<sup>427</sup> The St. Petersburg Declaration set forth the distinction between combatants and noncombatants by declaring that weakening the enemy is the only legitimate objective of war.<sup>428</sup> Scholars maintain that the use of nuclear weapons fails to distinguish between combatants and noncombatants because civilians inside and outside fighting zones will suffer injuries due to the unpredictable and uncontrollable effects of nuclear weapons use.<sup>429</sup>

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424. See SCHWARZENBERGER, *supra* note 200, at 190-91 (stating that distinction between combatants and noncombatants originally intended to immunize civilian population from intentional attack within fighting zones). The distinction between combatants and noncombatants has never provided civilians with absolute immunity from attack. SINGH & McWHINNEY, *supra* note 24, at 70. According to Article 28 of the 1949 Geneva Convention IV, "[t]he presence of a protected person may not be used to render certain points or areas immune from military operations." 1949 Geneva Convention IV, *supra* note 301, art. 28, at 3538, 75 U.N.T.S. at 308.

425. See 1949 Geneva Convention I, *supra* note 301, art. 15, at 3124-26, 75 U.N.T.S. at 298 (providing that belligerent states may establish neutral zones for protection of wounded and sick combatants or noncombatants, and for civilians not taking part in hostilities and not conducting work of military nature); see Meyrowitz, *supra* note 191, at 238 (stating that combatant-noncombatant distinction is historical component of laws of war). In 1923, an international conference met at The Hague to reconsider existing rules of international law on warfare due to technological advances made since the 1907 Hague Conference. JOHN BASSETT MOORE, *INTERNATIONAL LAW AND SOME CURRENT ILLUSIONS AND OTHER ESSAYS* 182, 185 (Fred B. Rothman & Co. 1987) (1924). As the U.S. delegate, John Bassett Moore introduced a U.S. proposal and stated:

Among the elementary principles which the development of modern rules of warfare, running through several centuries, has been designed to establish and to confirm, the principle most fundamental in character, the observance of which the detailed regulations have largely been designed to assure, is the distinction between combatants and non-combatants, and the protection of non-combatants against injuries not incidental to military operations against combatants.

*Id.* at 200.

426. See Lester Nurick, *The Distinction Between Combatant and Noncombatant in the Law of War*, 39 A.J.I.L. 680, 681 (1945) (stating that due to influences of Grotius and Rousseau "excesses in warfare became repugnant to the conscience of mankind"). Until the Middle Ages, states that were engaged in armed conflicts treated all inhabitants of the opposing state as the enemy, including women and children. *Id.* In 1868, the St. Petersburg Declaration provided that belligerent states could consider only military forces as the enemy. St. Petersburg Declaration, *supra* note 187, at 298, 1 A.J.I.L. Supp. at 95.

427. See SCHWARZENBERGER, *supra* note 200, at 189 (stating that distinction between combatants and noncombatants applies within fighting zones).

428. St. Petersburg Declaration, *supra* note 187, at 298, 1 A.J.I.L. Supp. at 95; see *supra* notes 221-35 and accompanying text (discussing St. Petersburg Declaration).

429. See SINGH & McWHINNEY, *supra* note 24, at 75 (contending that any use of

#### 4. Nuclear Weapons Violate the Prohibitions Against the Use of Poison or Asphyxiating Gases

The use of nuclear weapons potentially violates the 1899 Hague Declaration II,<sup>430</sup> Article 23(a) of the Hague Regulations,<sup>431</sup> and the Geneva Gas Protocol,<sup>432</sup> based on similarities between nuclear weapons and asphyxiating or poisonous gases.<sup>433</sup> Due to the broad language and general acceptance of these treaties, some legal scholars have argued that these treaties apply to any weapon whose effects resemble the effects of poison or poison gas.<sup>434</sup> The radiation and radioactive fallout released from nuclear explosions contaminate people and living orga-

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nuclear weapons involves knowledge that such use will terrorize entire civilian population); *see also supra* note 421 (reviewing argument that nuclear weapons use causes uncontrollable effects).

430. *See* 1899 Hague Declaration II, *supra* note 196, 1907 Gr. Brit. T.S. No. 32 at 10, 187 Consol. T.S. at 453, 1 A.J.I.L. Supp. at 157 (prohibiting contracting parties from using projectiles that diffuse asphyxiating or deleterious gases).

431. 1907 Hague Regulations, *supra* note 257, art. 23(a), 2277 Annex at 2301, 205 Consol. T.S. 277 Annex at 293, 2 A.J.I.L. Supp. 90 Annex at 106. Despite the prohibition against the use of poison in Article 23(a), the 1907 Hague Regulations do not define the term poison. Legality Opinion, *supra* note 4, ¶ 55, at 824. In one definition, poison means:

A substance having an inherent deleterious property which renders it, when taken into the system, capable of destroying life. A substance which, on being applied to the human body, internally or externally, is capable of destroying the action of the vital functions, or of placing the solids and fluids in such a state as to prevent the continuance of life.

BLACK'S LAW DICTIONARY 1156 (6th ed. 1990). Additionally, the effects of poison include destruction of life or injury to health. *See* SINGH & McWHINNEY, *supra* note 24, at 121-26 (discussing prohibition against use of poison and asphyxiating gases).

432. *See* Geneva Gas Protocol, *supra* note 197, at 575, 94 L.N.T.S. at 67 (noting that international community has condemned use in war of asphyxiating and poisonous gases).

433. Shaw, *supra* note 7, at 13; FALK ET AL., *supra* note 387, at 26-27; *see* Grief, *supra* note 27, at 29 (discussing applicability of prohibitions of Geneva Gas Protocol to nuclear weapons use). Nuclear weapons resemble bacteriological weapons because both can cause mutations in the chemical structure of living organisms. FALK ET AL., *supra* note 387, at 29. Also, just as bacteriological weapons may affect wide geographical regions, radioactive fallout from nuclear explosions may disperse over vast geographic areas. SINGH & McWHINNEY, *supra* note 24, at 106 n.4. By failing to distinguish between civilians and combatants, or between civilian objects and military objects, both bacteriological and nuclear weapons theoretically violate the prohibition against indiscriminate attacks. *See* FALK ET AL., *supra* note 387, at 47 (contending that bacteriological and nuclear weapons are functionally equivalent because they both cause indiscriminate effects).

434. FALK ET AL., *supra* note 387, at 28; *see* SINGH & McWHINNEY, *supra* note 24, at 124-25 (arguing that nuclear weapons violate prohibition against poison due to similar effects of poison or poisoned weapons and effects of radiation contamination).

nisms.<sup>435</sup> The health effects resulting from this contamination resemble the health effects of poison or asphyxiating gases.<sup>436</sup> By considering the effects of nuclear weapons and radioactive fallout and the effects of poison or poisoned weapons as functional equivalents, some legal scholars have concluded that the prohibitions against the use of poison or poisoned weapons precludes the use of nuclear weapons.<sup>437</sup>

##### 5. The Cumulative Effect of Treaties and General Assembly Resolutions Limit Nuclear Weapons Use

Although no specific treaty bans the use of nuclear weapons,<sup>438</sup> the cumulative effect of treaties addressing the nuclear issue may establish a customary rule prohibiting the use of nuclear weapons.<sup>439</sup> One set of treaties provides for restrictions on nuclear weapons use or calls for the complete elimination of nuclear weapons.<sup>440</sup> Other conventions attempt to control and

435. Meyrowitz, *supra* note 191, at 235-36.

436. Shaw, *supra* note 7, at 14; see FALK ET AL., *supra* note 387, at 26 (arguing that exposure to radiation or radioactive fallout causes symptoms indistinguishable from symptoms induced by poison); STONE, *supra* note 10, at 343 (contending that radioactive substances are clearly poisonous). Specific elements of nuclear weapons, such as uranium, are highly toxic chemicals. FALK ET AL., *supra* note 387, at 26.

437. See Weston, *supra* note 4, at 561 (arguing that nuclear weapons use would violate Geneva Gas Protocol); Meyrowitz, *supra* note 191, at 235-36 (concluding that Article 23(a) of Hague Regulations prohibits nuclear weapons use because effects of nuclear weapons are analogous to effects of poison or poisoned weapons).

438. Legality Opinion, *supra* note 4, ¶¶ 57-58, at 824 (finding that ban on recourse to nuclear weapons does not appear in treaties relating to weapons of mass destruction, and noting that international community has not produced treaty prohibiting nuclear weapons use); Weston, *supra* note 4, at 546 (noting that no treaty specifically prohibits manufacturing, stockpiling, deploying, or actually using nuclear weapons).

439. See SINGH & McWHINNEY, *supra* note 24, at 251-55 (discussing incremental approach to nuclear disarmament).

440. See Southeast Asia Treaty, *supra* note 1, art. 3(1)(a), at 640 (preventing contracting parties from developing, manufacturing, acquiring, possessing, or controlling nuclear weapons); African Treaty, *supra* note 1, art. 3(a), at 707 (forbidding contracting parties from developing, manufacturing, stockpiling, acquiring, possessing, or controlling any nuclear explosive device); Treaty of Rarotonga, *supra* note 351, art. 2, at 1444 (creating nuclear weapons-free zone in South Pacific); Sea-bed Treaty, *supra* note 351, art. I, at 704, 10 I.L.M. at 146-47 (banning nuclear weapons from sea-bed, ocean floor, and subsoil thereof); Treaty of Tlatelolco, *supra* note 1, art. 4, at 332, 6 I.L.M. at 523 (establishing nuclear weapons-free zone in Latin America); Outer Space Treaty, *supra* note 351, art. IV, at 2413, 610 U.N.T.S. at 208 (banning placement into orbit of any object carrying nuclear weapons); Antarctic Treaty, *supra* note 351, art. V, at 796, 402 U.N.T.S. at 76 (prohibiting deployment of nuclear weapons in Antarctic region).

limit the existence of nuclear weapons.<sup>441</sup> Together, these treaties which limit aspects of nuclear weapons arguably represent the international community's dedication to achieving complete nuclear disarmament, and, therefore, constitute evidence of state practice opposing nuclear weapons use.<sup>442</sup>

In its Legality Opinion,<sup>443</sup> the ICJ stated that General Assembly resolutions have normative value as evidence of the creation of a new rule of customary international law or of the emergence of an *opinio juris*.<sup>444</sup> In its examination of the series of General Assembly resolutions relating to nuclear weapons,<sup>445</sup> the ICJ noted that certain states have argued that this series of General Assembly resolutions implies the existence of a rule of customary international law forbidding nuclear weapons use.<sup>446</sup>

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441. See Partial Test Ban Treaty, *supra* note 351, art. I, at 1316-17, 480 U.N.T.S. at 45-47 (banning nuclear weapons testing in atmosphere, outer space, and underwater); NPT, *supra* note 34, art. II, at 487, 729 U.N.T.S. at 171 (restricting possession and not use of nuclear weapons by states not already possessing these weapons in attempt to curtail spread of nuclear weapons states). Sixty-five nations recently signed a comprehensive test ban treaty to prohibit all nuclear test explosions. Haq, *supra* note 356. The treaty cannot enter into force until all 44 nations with significant nuclear facilities, including Israel, India, and Pakistan, sign the treaty. *Clinton Leads CTBT Signing*, *supra* note 356; see Atlas, *supra* note 356, at 1 (discussing India's and Pakistan's opposition to treaty).

442. See SINGH & McWHINNEY, *supra* note 24, at 252 (asserting that disarmament process has become self-perpetuating).

443. See Legality Opinion, *supra* note 4, ¶ 70, at 826 (discussing relative authoritative weight attached to General Assembly resolutions).

444. *Id.* ¶ 70, at 826; see *supra* notes 152-53 and accompanying text (discussing concept of *opinio juris*); see also SINGH & McWHINNEY, *supra* note 24, at 214-16 (arguing that traditional positivist view that General Assembly resolutions could never express rules of international law has evolved into acceptance of normative value of General Assembly resolutions). The ICJ, however, concluded that General Assembly resolutions do not establish a customary rule banning nuclear weapons use. Legality Opinion, *supra* note 4, ¶ 72, at 826.

445. Legality Opinion, *supra* note 4, ¶ 68, at 826. The ICJ specifically mentioned General Assembly Resolution 1653 and noted that the General Assembly has adopted resolutions which continually affirm the illegality of nuclear weapons. *Id.*; G.A. Res. 1653, *supra* note 163, at 5; G.A. Res. 148D, *supra* note 340, at 78; G.A. Res. 183B, *supra* note 340, at 73; G.A. Res. 78J, *supra* note 340, at 64; G.A. Res. 92I, *supra* note 340, at 64-65; G.A. Res. 152D, *supra* note 340, at 69; G.A. Res. 83G, *supra* note 340, at 56; G.A. Res. 71B, *supra* note 340, at 48.

446. Legality Opinion, *supra* note 4, ¶ 68, at 826. The ICJ further noted that states advocating the illegality of nuclear weapons use contend that the passage of General Assembly resolutions condemning the recourse to nuclear weapons involved the application of the laws of war to the use of nuclear weapons. *Id.* ¶ 69, at 826. By applying the laws of war to nuclear weapons, these states argue that the resolutions sought to confirm existing customary international law, and did not attempt to create new rules. *Id.*

These states rely on the purported existence of a consensus among U.N. members finding that nuclear weapons use contradicts fundamental humanitarian principles.<sup>447</sup> Accordingly, they argue that customary international law prohibits nuclear weapons use.<sup>448</sup>

### B. Customary International Law Does Not Prohibit the Use of Nuclear Weapons

The absence of a treaty specifically prohibiting nuclear weapons use in all circumstances, including self-defense, suggests that customary international law does not contain a per se prohibition against nuclear weapons use.<sup>449</sup> To support this conclusion, legal scholars rely on positivist notions of state sovereignty<sup>450</sup> and the practice of maintaining nuclear weapons for deterrent purposes.<sup>451</sup> Theoretically, states could use nuclear weapons without violating the laws of war by preserving the distinction between combatants and noncombatants.<sup>452</sup> Finally, the laws of war may not adequately address technological advances in warfare, and, thus, require revision in order to apply to nuclear weapons.<sup>453</sup>

#### 1. The International Community Has Not Expressly Accepted a Prohibition on the Use of Nuclear Weapons Through Treaty Law or Custom

The theory of state sovereignty provides that the international community may accept limits on new weapons only

447. MEYROWITZ, *supra* note 27, at 27.

448. *Id.*

449. See John Norton Moore, *Nuclear Weapons and the Law: Enhancing Strategic Stability*, 9 BROOK. J. INT'L L. 263, 264-65 (1983) (arguing that most nations, including five nuclear powers, have not accepted per se ban on nuclear weapons use).

450. See BRIERLY, *supra* note 141, at 51-54 (assessing doctrine of positivism). Positivism refers to the theory that international law consists only of rules to which states have expressly or implicitly consented. *Id.* at 51-52.

451. See Legality Opinion, *supra* note 4, ¶ 73, at 827 (recognizing nuclear weapons states' continued reliance on practice of deterrence).

452. See Rostow, *supra* note 162, at 165-66 (stating that, in absence of specific treaty banning nuclear weapons use, nuclear weapons use is arguably legal if consistent with U.N. Charter provisions on use of force).

453. See 2 SCHWARZENBERGER, *supra* note 186, at 158-59 (describing distinction between combatants and noncombatants as outdated); 2 OPPENHEIM, *supra* note 7, at 207-08 (discussing reasons for collapse of combatant-noncombatant distinction).

through express or implied consent.<sup>454</sup> The rationale supporting the theory of state sovereignty includes maintaining the integrity of, and respect for, sovereign states.<sup>455</sup> After the Peace of Westphalia in 1648 which concluded the Thirty Years War,<sup>456</sup> states considered one another sovereign and equal and assumed that no single state could judge another state's internal policies.<sup>457</sup> Thus, the theory of state sovereignty provides that a state may conduct itself in the international arena, subject to established limits, until and unless that state consents not to engage in otherwise permissible conduct.<sup>458</sup>

The international community has not expressed a ban on the use of nuclear weapons through conventional law.<sup>459</sup> The numerous treaties relating to nuclear weapons regulate particular aspects of nuclear weapons, such as nuclear weapons testing and the deployment of nuclear weapons in certain geographical areas.<sup>460</sup> The treaties do not, however, prohibit the use of nuclear weapons or declare that their use would violate international law.<sup>461</sup> According to the ICJ, these treaties do not estab-

454. See Legality Opinion, *supra* note 4, ¶ 57, at 824 (noting that states have typically declared weapons of mass destruction illegal by specific agreements). Arguably, new weapons do not violate international law solely because they are unique. See Nurick, *supra* note 426, at 683 (discussing limitations on new weapons used for artillery bombardment). Rather, any use of new weapons must comply with general principles of the laws of war. *Id.*

455. See U.N. CHARTER, art. 2(1) (stating that United Nations is based on principles of sovereign equality for member states).

456. See *supra* note 205 (describing Thirty Years War); see also KISSINGER, *supra* note 83, at 65. (stating that doctrine of *raison d'état* dominated European diplomacy following Thirty Years War). The doctrine of *raison d'état* provided that state interests justified the use of any means necessary to protect these interests. *Id.* at 58.

457. SHAW, *supra* note 14, at 539-41.

458. See *S. S. Lotus (Fr. v. Turkey)*, 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7) (providing that states are subject to rules of international law which they have adopted or which are usages generally accepted as expressing principles of binding law). According to two legal scholars, "consent must be regarded as patent in the ultimate acceptance of the practice as constituting a binding rule of law." SINGH & McWHINNEY, *supra* note 24, at 38.

459. See Rostow, *supra* note 162, at 165-66 (discussing argument that nuclear weapons use is legal if consistent with provisions of U.N. Charter in absence of specific treaty banning nuclear weapons use).

460. See *supra* note 356 and accompanying text (discussing treaties circumscribing nuclear weapons testing); *supra* notes 353-55 and accompanying text (reviewing treaties prohibiting nuclear weapons deployment).

461. Legality Opinion, *supra* note 4, ¶¶ 57-58, at 824 (finding that treaties relating to weapons of mass destruction do not include ban on recourse to nuclear weapons, and noting that international community has not convened to explicitly prohibit nu-

lish a new rule of customary international law prohibiting the use of nuclear weapons.<sup>462</sup>

Some legal scholars contend that the international community has not consistently considered nuclear weapons illegal, thus precluding custom from establishing a ban on nuclear weapons use.<sup>463</sup> In addition to treaties, states may assert their sovereignty through custom as evidenced by state practice.<sup>464</sup> Accordingly, custom may establish a restriction on states' ability to use nuclear weapons.<sup>465</sup> The practices and policies of the five nuclear weapons states<sup>466</sup> comprise evidence of state practice relating to the legality of nuclear weapons.<sup>467</sup> By incorporating nuclear weapons into policies of deterrence since 1945,<sup>468</sup> state practice indicates that the international community has not yet accepted a ban on nuclear weapons use.<sup>469</sup> For example, since

clear weapons use); Weston, *supra* note 4, at 546 (noting that no treaty specifically forbids manufacturing, stockpiling, deploying, or actually using nuclear weapons).

462. Legality Opinion, *supra* note 4, ¶ 61, at 825. According to one legal scholar, "[e]xisting treaties for the control of nuclear weapons and the ongoing negotiation of others constitute evidence that the international community does not believe that existing law, apart from customary and U.N. Charter rules regulating the right of self-defense, prohibits the existence or use of nuclear weapons." Rostow, *supra* note 162, at 182.

463. See Moore, *supra* note 449, at 264-65 (contending that nuclear weapons states have not accepted per se ban on nuclear weapons use); Rostow, *supra* note 162, at 179-82 (asserting that many members of international community did not consider nuclear weapons illegal at beginning of nuclear age).

464. See ICJ Statute, *supra* note 11, art. 38(1)(b), at 1060, 3 Bevens at 1187 (providing that custom constitutes source of international law); BROWNIE, *supra* note 15, at 5-9 (discussing elements of custom necessary to become international law); see also *supra* notes 141, 149-54 and accompanying text (examining how custom as evidenced by state practice develops into international law).

465. Rostow, *supra* note 162, at 182 (discussing lack of consensus on whether international law prohibits nuclear weapons use, apart from general limits on use of force in self-defense).

466. See Shaw, *supra* note 7, at 2 (discussing actual possession of nuclear weapons by China, France, Russia, United Kingdom, and United States); see also *supra* notes 73-105 and accompanying text (examining policies and practices of nuclear weapons states with respect to nuclear weapons).

467. See BRIERLY, *supra* note 141, at 60 (discussing state practice as evidence of custom). U.S. policy provides that nuclear weapons do not violate international law in the absence of a specific agreement declaring nuclear weapons use illegal. ARMY FIELD MANUAL, *supra* note 102, ¶ 34(b), at 18; see MEYROWITZ, *supra* note 27, at 29 (stating that U.S. Government contends use and possession of nuclear weapons are legal).

468. See Weston, *supra* note 4, at 575 (stating that United States and Soviet Union adopted deterrence policies for nuclear weapons after beginning of arms race).

469. See Rostow, *supra* note 162, at 176-78 (discussing role of nuclear weapons in international order during post-World War II period).

World War II, the five nuclear powers have threatened to use nuclear weapons on several occasions.<sup>470</sup> Thus, although these states have abstained from using nuclear weapons, nuclear weapons remain part of their military strategy.<sup>471</sup>

## 2. Policies of Deterrence Have Prevented an Armed Conflict Involving Nuclear Weapons

The doctrine of deterrence provides that a state under attack may retaliate with nuclear weapons if its attacker used non-conventional weapons, such as chemical, biological, or nuclear weapons, and the attack threatened the victim state's vital interests.<sup>472</sup> The reasoning of this doctrine is that the threat of nuclear retaliation will deter a potential aggressor.<sup>473</sup> By adopting policies of deterrence with respect to nuclear weapons,<sup>474</sup> the nuclear weapons states have indicated that they do not accept a per se prohibition on the use of nuclear weapons.<sup>475</sup> The

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470. See *id.* at 176-77 (discussing instances where nuclear weapons states threatened to respond with nuclear attack); see *supra* note 104 and accompanying text (describing threatened uses of nuclear weapons). One example of the threatened use of nuclear weapons was the Persian Gulf War when the U.S. Government implied a threat to use nuclear weapons in response to an Iraqi attack employing chemical or biological weapons. See Arkin, *supra* note 104, at 5.

471. See, e.g., Scott, *supra* note 102 (discussing U.S. policy of deterrence); Bellamy, *supra* note 13, at 1 (stating that United Kingdom maintains policy of deterrence towards nuclear weapons).

472. BAILEY, *supra* note 70, at 52; see KISSINGER, *supra* note 89, at 608-10 (discussing policy of deterrence during nuclear age); Alan Zimm, *Deterrence: Then & Now*, U.S. NAVAL INST. PROC., Aug. 1996, at 50, 50-58 (suggesting revisions in current definition of deterrence to accommodate changes in forms of conflict from Cold War to regional aggressions involving conventional weapons).

473. BAILEY, *supra* note 70, at 53.

474. See *supra* note 82 and accompanying text (noting Chinese policy of allowing nuclear weapons use only for retaliatory nuclear strike); *supra* note 85 and accompanying text (describing French deterrence policy); *supra* note 96 and accompanying text (discussing U.K. deterrence policy); *supra* note 105 and accompanying text (reviewing U.S. deterrence policy).

475. See Moore, *supra* note 449, at 264-65 (stating that five nuclear powers have not accepted per se ban on nuclear weapons use). In its Legality Opinion, the ICJ noted the argument of some states that circumstances, and not deterrence, prevented the use of nuclear weapons after World War II. Legality Opinion, *supra* note 4, ¶ 66, at 826. The ICJ, however, declined to rule on the practice of deterrence as state policy. *Id.* ¶ 67, at 826. Nonetheless, the ICJ acknowledged the ongoing adherence to the practice of deterrence as it stated, "[t]he 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 juris* on the one hand, and the still strong adherence to the practice of deterrence on the other." *Id.* ¶ 73, at 827.



United Kingdom and the United States have maintained that the threat of nuclear weapons use has deterred another global war.<sup>476</sup> According to the doctrine of deterrence, the development of increasingly destructive weapons has served the cause of peace.<sup>477</sup>

### 3. Nuclear Weapons Do Not Violate the Distinction Between Combatants and Noncombatants

By using nuclear weapons strategically, scholars argue that states will preserve the distinction between combatants and non-combatants.<sup>478</sup> The distinction between combatants and non-combatants renders certain people immune from attack during armed conflict.<sup>479</sup> Theoretically, the strategic use of nuclear weapons will not result necessarily in the destruction of an entire civilian population because states could target particular military objects.<sup>480</sup> Further, military objects may be located in remote

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476. See Legality Opinion, *supra* note 4, ¶ 73, at 827 (noting continued adherence to practice of deterrence by nuclear weapons states); Scott, *supra* note 102 (discussing U.K. policies on nuclear weapons). The United Kingdom has stated that possession of nuclear weapons as a deterrent is consistent with principles of self-defense. *Id.* The United Kingdom and the United States voted against General Assembly Resolution 1653, which declared that nuclear weapons use would contravene international law and the laws of humanity, because their policies of deterrence depended on their ability to respond to aggression at any necessary level. BAILEY, *supra* note 243, at 149.

477. MEYROWITZ, *supra* note 27, at xii. U.S. policies and practices during the Persian Gulf War illustrated the concept of deterrence. See Legality Opinion, *supra* note 4, at 842 (Schwebel, J., dissenting) (contending that U.S. threat of nuclear weapons effectively deterred Iraq from attacking with weapons of mass destruction). According to U.N. Ambassador Rolf Ekeus, Iraqi officials claimed they decided not to employ weapons of mass destruction after receiving the U.S. threat of January 9, 1991 which implied that "any [Iraqi] use of unconventional warfare would provoke a devastating [U.S.] response." Smith, *supra* note 122, at A1.

478. See 2 OPPENHEIM, *supra* note 7, at 350 (contending that nuclear weapons use does not invariably destroy distinction between combatants and noncombatants, and arguing that states can limit nuclear weapons to military objectives); R.F. Bacon, *Seizing the Strategic Baton*, U.S. NAVAL INST. PROC., May 1992, at 73, 73 (discussing strategic nuclear weapons policy as incorporating use of nuclear missiles designed for accuracy); see also *supra* note 232 and accompanying text (describing distinction between combatants and noncombatants). States have designed miniaturized nuclear warheads, weighing approximately 440 to 750 pounds, which are relatively smaller than the 10,000 pound nuclear weapon dropped on Nagasaki. Eric H. Arnett, *Nuclear Torpedoes for New Nuclear Powers*, U.S. NAVAL INST. PROC., June 1989, at 98, 98. These miniaturized nuclear warheads theoretically permit a state to launch a nuclear torpedo from a submarine in order to reach a target from a distance of several miles. *Id.*

479. 2 SCHWARZENBERGER, *supra* note 186, at 110.

480. *Id.*; see Everest E. Riccioni, *Strategic Bombing: Always a Myth*, U.S. NAVAL INST.

areas, lacking significant civilian populations, thus reducing the likelihood of affecting combatants.<sup>481</sup>

#### 4. The Distinction Between Combatants and Noncombatants Has Eroded and the Laws of War Should Be Revised

Although states may not consider noncombatants legitimate objects of attack,<sup>482</sup> noncombatants within the zone of military operations expose themselves and their property to the hazards of warfare.<sup>483</sup> The doctrine of military necessity<sup>484</sup> justifies the incidental deaths of civilians within the zone of military operations while a state attempts to weaken the enemy's forces.<sup>485</sup> If the international community expands the definition of military objectives to include larger tracts of territory, some scholars assert that states may avoid violating the distinction between combatants and noncombatants.<sup>486</sup> Adopting a broad definition of military objectives would, thus, strip noncombatants within the zone of operations of protections provided by the laws of war.<sup>487</sup>

PROC., Nov. 1996, at 49, 53 (proposing new visions for strategic bombing theory to ensure successful military operations based on realistic military capabilities).

481. See SCHWARZENBERGER, *supra* note 200, at 191 (discussing potential for states to attack "enemy hinterland" due to development of long-range missiles).

482. See St. Petersburg Declaration, *supra* note 187, at 298, 1 A.J.I.L. Supp. at 95 (stating that only legitimate object of war is weakening enemy's forces).

483. 2 SCHWARZENBERGER, *supra* note 186, at 115.

484. See Nurick, *supra* note 426, at 683 (discussing doctrine of military necessity). The doctrine of military necessity provides that states may rely on all indispensable measures not prohibited by the laws and customs of war in order to weaken the enemy. *Id.*; see MCCOUBREY & WHITE, *supra* note 5, at 342 (discussing concept of military necessity). Military necessity, however, will not justify the wanton devastation of a district. See Weston, *supra* note 4, at 555-56 (contending that humanitarian rules limit claims of military necessity with respect to direct attacks upon civilian populations and terror-bombing civilian regions to weaken morale).

485. See Weston, *supra* note 4, at 555 (stating that law condones incidental civilian damage depending on vitality of military target).

486. Nurick, *supra* note 426, at 680. According to one legal scholar, the mass destruction of cities during World War II indicated that the distinction between combatants and noncombatants "has been so whittled down by the demands of military necessity that it has become more apparent than real." *Id.*; see BAILEY, *supra* note 243, at 38 (discussing terror-bombing against civilians during World War II).

487. See 2 OPPENHEIM, *supra* note 7, at 207 (arguing that development of air warfare has resulted in belligerents considering targets outside theater of war, including munitions factories and industry centers, as legitimate objects of attack). According to one legal scholar, "[t]echnological developments of unparalleled destructive potentiality have brought about a situation in which almost any place in territories controlled by belligerent states can be transformed into an operational area." 2 SCHWARZENBERGER, *supra* note 186, at 158-59.

Legal scholars argue that advancements in military technology enlarged the zone of operations and contributed to a collapse of the distinction between combatants and noncombatants.<sup>488</sup> The development of long-range missiles allowed states to strike specific military targets beyond the initial zone of military operations.<sup>489</sup> If this strategic practice enables states to claim that the region containing the particular military targets falls within the zone of military operations, scholars argue that states can theoretically justify any civilian death as incidental.<sup>490</sup>

The two protocols additional to the 1949 Geneva Conventions potentially contributed to the blurring of the distinction between combatants and noncombatants.<sup>491</sup> To address new forms of warfare, such as guerilla warfare and wars of national liberation, the two protocols expanded the scope of the 1949 Geneva Conventions' protections.<sup>492</sup> Article 43 of 1977 Geneva Protocol I defines combatants as including armed forces of a government or authority not recognized by their adversary.<sup>493</sup> Article 44 further classifies combatants as those operating in the military arena without wearing military uniforms and without openly carrying weapons, so long as they carry weapons immediately before an armed attack.<sup>494</sup> While attempting to expand protections for non-traditional combatants, scholars maintain that this definition results in a dilution of the distinction between combatants and noncombatants.<sup>495</sup>

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488. See Nurick, *supra* note 426, at 680 (arguing that technological innovations have hastened trend in war to treat combatants and noncombatants alike); 2 SCHWARZENBERGER, *supra* note 186, at 158-59 (contending that traditional distinction between combatants and noncombatants is outdated); 2 OPPENHEIM, *supra* note 7, at 207-08 (discussing reasons for collapse of combatant-noncombatant distinction).

489. Nurick, *supra* note 426, at 689 (stating that aerial bombardment made it possible to "bring the war into the back yards of many millions of civilians").

490. 2 SCHWARZENBERGER, *supra* note 186, at 158-59.

491. See *supra* notes 309-21 and accompanying text (examining 1977 Geneva Protocols I and II); REISMAN & ANTONIOU, *supra* note 193, at xxix (reviewing criticism of two protocols); see also *supra* notes 298-308 and accompanying text (discussing 1949 Geneva Conventions).

492. See 1977 Geneva Protocol I, *supra* note 315, art. 1(4), at 7, 16 I.L.M. at 1397 (including armed conflicts against colonial domination, alien occupation, and racist regimes in scope of protocol's application).

493. *Id.* art. 43(1), at 23, 16 I.L.M. at 1410.

494. *Id.* art. 44(3), at 23, 16 I.L.M. at 1410-11.

495. See REISMAN & ANTONIOU, *supra* note 193, at xxix (discussing criticism of protocols due to definition of combatants).

III. *THE USE OF NUCLEAR WEAPONS IN ALL  
CIRCUMSTANCES IS NOT ILLEGAL UNDER  
CUSTOMARY INTERNATIONAL LAW*

Customary international law does not presently contain a rule prohibiting the use of nuclear weapons in all circumstances.<sup>496</sup> Accordingly, the use of nuclear weapons in self-defense would not constitute a per se violation of humanitarian principles within the laws of war.<sup>497</sup> Moreover, a rule declaring that the use of nuclear weapons is illegal would not adequately prevent a future use of nuclear weapons because states often violate the laws of war as a means of overcoming their enemies.<sup>498</sup> Instead, to safeguard against the risk of nuclear weapons use, the international community should adopt preventative measures to deter the use of nuclear weapons and should strengthen the non-proliferation regime.

A. *A Rule Prohibiting Nuclear Weapons Use in All Circumstances  
Has Not Ascended to Customary International Law*

Whereas the laws of war limit the means and methods of warfare, they do not prohibit the use of nuclear weapons in all circumstances.<sup>499</sup> The international community has not expressly or implicitly consented to a prohibition on nuclear weapons use through a treaty or custom as evidenced by state practice.<sup>500</sup> While General Assembly resolutions and treaties relating to nuclear weapons may express principles of customary international law, they have not established a rule forbidding nuclear weapons use.<sup>501</sup> Finally, general principles of the laws of war, such as the prohibition on the use of poison or asphyxiating

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496. See *supra* notes 454-71 and accompanying text (reviewing arguments as to why nuclear weapons use has not ascended to customary international law).

497. See *supra* notes 478-81 and accompanying text (describing contention that nuclear weapons use is not per se violation of distinction between combatants and non-combatants).

498. See *supra* notes 482-95 and accompanying text (setting forth assertion that distinction between combatants and noncombatants has eroded due to justification of military necessity).

499. See *supra* notes 192-97 and accompanying text (explaining sources of laws of war).

500. See *supra* notes 138-60 and accompanying text (reviewing meaning and sources of customary international law); see also *supra* notes 459-62 and accompanying text (discussing lack of express prohibition of nuclear weapons use); *supra* notes 463-71 and accompanying text (describing lack of customary ban on nuclear weapons use).

501. See *supra* note 172 (explaining non-binding effect of General Assembly resolu-

gases, do not ban nuclear weapons use.<sup>502</sup>

### 1. The Laws of War Lack an Express Prohibition on the Use of Nuclear Weapons

The international community generally declares weapons of mass destruction illegal by specific agreements.<sup>503</sup> No treaty exists to declare the use of nuclear weapons illegal.<sup>504</sup> The ICJ held that no rule of conventional or customary international law affirmatively permits the use of nuclear weapons.<sup>505</sup> The laws of war, however, do not generally set forth permitted conduct. The international community instead drafts conventions on the laws of war negatively in order to declare prohibited means and methods of armed conflict.

### 2. State Practice Has Not Consistently Evidenced the International Community's Intent to Outlaw Nuclear Weapons Use

The international community has not indicated through custom as evidenced by state practice<sup>506</sup> that a rule prohibiting nuclear weapons use has become part of customary international law. Within the international community, states have disagreed as to whether the use of nuclear weapons is illegal under customary international law.<sup>507</sup> Due to this division, no *opinio juris*<sup>508</sup> has emerged whereby states feel obligated to accept the illegality of nuclear weapons use. One example of the international community's inconsistent treatment of nuclear weapons use is the incorporation by nuclear weapons states<sup>509</sup> of the doctrine of de-

tions); *see also supra* note 173 and accompanying text (describing normative value of General Assembly resolutions).

502. *See supra* notes 267-82 and accompanying text (examining Geneva Gas Protocol which condemned use of asphyxiating, poisonous, or other gases, and of all analogous liquids, materials, or devices as means of war).

503. Legality Opinion, *supra* note 4, ¶ 57, at 824.

504. *See supra* note 4 and accompanying text (addressing lack of treaty designed explicitly to forbid nuclear weapons use).

505. Legality Opinion, *supra* note 4, ¶ 105(2)(A), at 831.

506. *See supra* notes 141, 149-54 and accompanying text (discussing custom as source of customary international law).

507. *See supra* note 358 (describing split among members of international community regarding legality of nuclear weapons use).

508. *See supra* notes 152-53 (explaining doctrine of *opinio juris*).

509. *See supra* notes 73-105 and accompanying text (examining nuclear policies and practices of states considered nuclear "haves").

terrence into their foreign policies since 1945.<sup>510</sup> States asserting the doctrine and practice of deterrence have consistently reserved the right to threaten or use nuclear weapons in self-defense against an attack directed at vital security interests.<sup>511</sup> With respect to a protocol to the Treaty of Tlatelolco,<sup>512</sup> the United States and the United Kingdom entered declarations providing for nuclear weapons use in self-defense after a contracting state, assisted by a non-nuclear weapons state, initiated an act of aggression towards them.<sup>513</sup> Other examples of state practice include state policies declining to accept a per se ban on nuclear weapons use,<sup>514</sup> the threatened use of nuclear weapons within the last fifty years,<sup>515</sup> the non-nuclear weapons states' support for protections offered by nuclear weapons states,<sup>516</sup> and covert attempts by non-nuclear weapons states to develop military nuclear weapons programs.<sup>517</sup> These examples illustrate that the international community has partially accepted nuclear weapons, and indicate, at the very least, that the international community has not reached a consensus on the legality of nuclear weapons use.

The international community, including non-nuclear weapons states, has implicitly acknowledged the legality of nuclear weapons through provisions for security assurances. In Security Council Resolution 255, the Soviet Union, the United Kingdom, and the United States agreed to provide security assurances to

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510. See *supra* notes 472-77 and accompanying text (discussing doctrine of deterrence).

511. See *supra* note 475 and accompanying text (addressing ongoing adherence by nuclear weapons states to practice of deterrence).

512. Treaty of Tlatelolco, *supra* note 1, protocol 2, art. 3, at 418-20; see also *supra* notes 352-53, 356-57, 379 and accompanying text (discussing Treaty of Tlatelolco).

513. See Treaty of Tlatelolco, *supra* note 1, protocol 2, art. 3, at 418-20 (providing that states signing Protocol II undertake not to threaten or use nuclear weapons against contracting parties to Treaty of Tlatelolco).

514. See *supra* note 475 and accompanying text (examining five nuclear powers' non-recognition of per se ban on nuclear weapons use).

515. See *supra* notes 104, 470 and accompanying text (noting instances of threatened use of nuclear weapons since World War II).

516. See *supra* notes 371-72 and accompanying text (describing security assurances given by nuclear weapons states to non-nuclear weapons states and reviewing nuclear weapons states' assistance offered through Security Council to non-nuclear weapons states in event of nuclear attack).

517. See *supra* notes 106-37 and accompanying text (examining past and present efforts of states considered nuclear "have-nots" to acquire nuclear weapons or develop military nuclear weapons programs).

non-nuclear weapons states.<sup>518</sup> These states pledged to act on behalf of non-nuclear weapons states through the Security Council if the non-nuclear weapons states faced an act of aggression involving nuclear weapons.<sup>519</sup> Accordingly, the international community recognizes the legality of the use and possession of nuclear weapons because in order to provide these security assurances, nuclear weapons states must have the capability to use nuclear weapons.

### 3. General Assembly Resolutions and Treaties Do Not Constitute Evidence of State Practice Establishing A Customary Rule of International Law Banning Nuclear Weapons Use

General Assembly resolutions have no binding effect<sup>520</sup> and cannot alone establish a rule of customary international law to prohibit the use of nuclear weapons. In the aggregate, General Assembly resolutions may express trends in international law,<sup>521</sup> but with respect to nuclear weapons they do not constitute evidence that a custom has become part of international law prohibiting nuclear weapons use. In its Legality Opinion, the ICJ noted that General Assembly resolutions indicated an international objective to progress towards complete nuclear disarmament.<sup>522</sup> Yet, many of these resolutions passed with significant opposition from both nuclear and non-nuclear states.<sup>523</sup> The consistent dissent, especially by nuclear weapons states, in the vote on nuclear weapons-related resolutions undermines the persuasive authority of such resolutions, especially when members of the dissent comprise a majority of the world's economic and military power.

Treaties addressing the acquisition, manufacture, posses-

518. S.C. Res. 255, U.N. SCOR, 23d Sess., at 13, U.N. Doc. S/INF/23/Rev.1 (1968).

519. *Id.*

520. *See supra* note 172 and accompanying text (discussing non-binding effect of General Assembly resolutions).

521. *See supra* note 173 and accompanying text (noting normative value of General Assembly resolutions).

522. Legality Opinion, *supra* note 4, ¶ 73, at 827.

523. *See supra* note 343 (noting passage of Resolution 1653 by 55 states in favor, 20 against, and 26 abstaining); *see also* Legality Opinion, *supra* note 4, at 849-50 (Oda, J., dissenting) (summarizing voting records on General Assembly resolutions relating to use of nuclear weapons).

sion, deployment, and testing of nuclear weapons<sup>524</sup> do not constitute a prohibition on the use of nuclear weapons.<sup>525</sup> These treaties merely indicate a growing international concern with nuclear weapons. The ICJ construed these various treaties as foreshadowing a future general prohibition.<sup>526</sup> Therefore, the international community must convene to establish such a ban because these treaties do not express general principles of law forbidding nuclear weapons use.

#### 4. The Prohibitions Against Poison, Poisonous Gases, and Asphyxiating Gases Do Not Establish a Ban Against Nuclear Weapons Use

Some legal scholars have argued that a prohibition on nuclear weapons use has emerged by analogy to treaties banning the use of poison, poisonous gases, and asphyxiating gases.<sup>527</sup> The treaties forbidding the use of poison, poisonous gases, and asphyxiating gases,<sup>528</sup> however, do not apply to nuclear weapons use. As the ICJ noted in its Legality Opinion, the contracting parties to these treaties have not indicated that nuclear weapons fall within the treaties' prohibitions.<sup>529</sup> Treaties relating to poison, poisonous gases, and asphyxiating gases forbid the use of weapons primarily designed to diffuse these gases.<sup>530</sup> The primary object of nuclear weapons use is the destruction of a particular target or targets, rather than the diffusion of gases.

524. See *supra* notes 350-83 and accompanying text (canvassing treaties on nuclear weapons).

525. Legality Opinion, *supra* note 4, ¶ 62, at 825.

526. *Id.*

527. See *supra* notes 430-37 and accompanying text (setting forth argument that nuclear weapons violate prohibitions against poison, poison gases, and asphyxiating gases).

528. See *supra* notes 430-32 and accompanying text (discussing prohibitions on poison, poisonous gas, and asphyxiating gases found in 1899 Hague Declaration II, 1907 Hague Regulations, and Geneva Gas Protocol).

529. Legality Opinion, *supra* note 4, ¶ 55, at 824. Based on the lack of the contracting parties intent to treat the 1899 Hague Declaration II, Article 23(a) of the 1907 Hague Regulations, and the Geneva Gas Protocol as referring to nuclear weapons, the ICJ found that these three provisions do not specifically prohibit the use of nuclear weapons. *Id.* ¶ 56, at 824.

530. See, e.g., *supra* note 248 and accompanying text (discussing scope of 1899 Hague Declaration II's prohibition on use of poison or asphyxiating gases).



B. *The Use of Nuclear Weapons in Self-Defense Would Not Per Se Violate Humanitarian Principles Within the Laws of War*

The legality of nuclear weapons use in self-defense depends on a state's ability to balance military necessity with humanitarian interests.<sup>531</sup> While humanitarian principles limit the right to use force, no single rule dispositively declares a weapon's use illegal. Accordingly, no single humanitarian principle would outlaw nuclear weapons if a nation successfully presented reasons for military necessity which justified such a use of force.

1. Customary International Law Does Not Include a Per Se Prohibition on the Use of Nuclear Weapons in Self-defense

The U.N. Charter prohibits the use of force in Article 2(4), including the aggressive use of nuclear weapons,<sup>532</sup> but condones the use of force in self-defense or collective defense in Article 51.<sup>533</sup> Principles of necessity and proportionality limit the use of force in self-defense.<sup>534</sup> In the absence of an explicit prohibition on a particular weapon, states may use nuclear weapons in self-defense if the use satisfies the requirements of necessity and proportionality.<sup>535</sup> Developments in nuclear weapons technology, including strategic nuclear warheads deployed on long-range missiles, have increased the likelihood that states could comply with Article 51.<sup>536</sup>

531. See *supra* note 402-03 and accompanying text (examining balance between military necessity and humanitarian principles).

532. U.N. CHARTER art. 2(4).

533. *Id.* art. 51.

534. See SHAW, *supra* note 14, at 691-95 (discussing limits on right to use force in self-defense).

535. See Legality Opinion, *supra* note 4, ¶ 39, at 822 (finding that if international law per se bans specific weapons, states use of those weapons is not legal simply because states comply with U.N. Charter provisions); Rostow, *supra* note 162, at 182 (stating that in absence of specific treaty banning nuclear weapons use, states remain bound by U.N. Charter rules regulating self-defense). Arguably, the use of nuclear weapons would be permitted if military objects could be destroyed without serious loss of life or injury to health. 2 OPPENHEIM, *supra* note 7, at 348-49.

536. See *supra* notes 478, 480 and accompanying text (describing strategic use of nuclear weapons).

## 2. Prohibitions on Traditional Methods of Warfare and Conventional Weapons Do Not Necessarily Apply to the Nuclear Age

The international community developed international humanitarian law to address excesses of conventional weapons. These humanitarian rules did not account for technological advances in warfare and weaponry, such as the harnessing of the destructive capabilities of nuclear power.<sup>537</sup> Humanitarian principles within the laws of war consist of the prohibition against unnecessary suffering,<sup>538</sup> the prohibition against indiscriminate attacks,<sup>539</sup> and the distinction between combatants and noncombatants.<sup>540</sup> The international community did not modernize the laws of war until the adoption of the 1977 Geneva Protocols I and II.<sup>541</sup> Yet the reservations attached to these protocols by states,<sup>542</sup> including nuclear weapons states, belies the applicability of the protocols to nuclear weapons use.

One example of obsolete provisions in international humanitarian law is the distinction between combatants and noncombatants.<sup>543</sup> Although the international community appears reluctant to discard the distinction between combatants and noncombatants, the methods of warfare practiced during World War II led to the dilution, if not the collapse, of the distinction. During World War II, belligerent states illustrated the ease with which they could manipulate the distinction between combatants and noncombatants by broadening the zone of military operations, thereby justifying incidental deaths of civilians within

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537. *See supra* notes 488-89 and accompanying text (describing how new missile technology has expanded zone of military operations).

538. *See supra* notes 396-400 and accompanying text (describing prohibition against unnecessary suffering).

539. *See supra* notes 411-15 and accompanying text (explaining prohibition against indiscriminate attacks).

540. *See supra* notes 424-25 and accompanying text (setting forth distinction between combatants and noncombatants).

541. *See supra* notes 309-21 and accompanying text (discussing adoption and substance of 1977 Geneva Protocols I and II).

542. *See supra* note 416 (examining U.K. and U.S. reservations to 1977 Geneva Protocol I exempting nuclear weapons from prohibition against indiscriminate attacks).

543. *See supra* notes 482-95 and accompanying text (reviewing argument that distinction between combatants and noncombatants collapsed after World War II).

the zone.<sup>544</sup>

*C. The International Community Must Strengthen Measures to Prevent Future Uses of Nuclear Weapons Instead of Relying on Illegality Determinations*

By concluding that customary international law does not declare nuclear weapons use illegal, the issue of monitoring and restricting nuclear weapons becomes political instead of legal. A convention or treaty merely prohibiting nuclear weapons will not effectively safeguard against their use and will not contribute to international security. When Bernard Baruch presented his plan for nuclear disarmament, he recognized the emptiness of a simple renunciation of nuclear weapons.<sup>545</sup> As evidenced by the failure of the Kellogg-Briand Pact to renounce war as an instrument of national policy,<sup>546</sup> blanket prohibitions are futile unless supported by an enforcement system. Accordingly, the international community should adopt preventative measures to deter nuclear weapons use and should strengthen the non-proliferation regime. A treaty prohibiting the use of nuclear weapons is only one step towards ensuring that states will not resort to nuclear weapons in future armed conflicts. If the international community follows its directive under Article VI of the NPT,<sup>547</sup> to conclude a treaty on nuclear disarmament, the treaty must establish mechanisms for inspection and oversight for civil as well as military nuclear weapons programs. A system of sanctions will also reinforce the treaty's substance. To achieve a strictly regulated nuclear regime, leaders of the international community must prioritize these issues on their agendas.

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544. See *supra* notes 488-89 (describing expansion of zone of military operations due to new weapons technology).

545. See *supra* notes 326-39 and accompanying text (describing Baruch Plan). When presenting the Baruch Plan, Baruch stated:

I think the peoples we serve would not believe—and without faith nothing counts—that a treaty, merely outlawing possession or use of the atomic bomb, constitutes effective fulfilment of the instructions to this Commission. Previous failures have been recorded in trying the method of simple renunciation, unsupported by effective guaranties of security and armament limitation. No one would have faith in that approach alone.

Baruch Plan, *supra* note 323, at 1059.

546. See *supra* notes 283-91 and accompanying text (examining Kellogg-Briand Pact).

547. See *supra* note 369 and accompanying text (explaining Article VI of NPT).

*CONCLUSION*

Instead of relying on hindsight to judge a state's actions involving nuclear weapons use, the international community should adopt a system of strict regulation and oversight incorporating sanctions to prevent the future use of nuclear weapons. In its Legality Opinion,<sup>548</sup> the ICJ declined to adopt a bright-line rule condemning the use of nuclear weapons in all circumstances. Rather, the ICJ decided that a state could use nuclear weapons in self-defense if its very survival was at stake. To determine whether the use of nuclear weapons violates customary international law, the ICJ requires the international community to conduct a retrospective analysis on a case-by-case basis. Unless the international community acts prospectively to implement a transparent regulatory system, states will continue to circumvent the existing proliferation regime and will justify nuclear weapons use on grounds of deterrence and self-defense.

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548. *See supra* notes 12-23 and accompanying text (discussing Legality Opinion).