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Nuclear weapon is a weapon which derives its destructive force from nuclear reactions of fission or fusion. It is capable of delivering a blast unmatched by any other modern weapon and the nuclear fallout it leaves behind makes the land within the effect-radius uninhabitable for decades.

Throughout history, nuclear weapons have only been used twice, both during the ending days of WWII, when the cities of Hiroshima and Nagasaki were bombed by US forces in order to force Japan to unconditional surrender. The “alternative prompt and utter destruction” the Potsdam Declaration promised in case capitulation would not take place, came in the face of total annihilation of the two urban centers. The targets were picked mainly for their wartime importance, but also for reasons of making the Japanese “appreciate the significance of such weapon”.¹ Clearly the conducted attack was of offensive nature, as it was not dictated by motives of self-defense.² It was unnecessary as well as disproportionate to the threat Japan posed at that time³, and it obviously went against the common principles of international law⁴, since civilians were deliberately made an object of attack. US bombings were used to apply psychological pressure on the Japanese government and challenged good morals the way terrorism challenges them today.⁵

¹ Atomic Bomb: Decision – Target Committee, May 10-11, 1945. See 6.1.
<http://www.dannen.com/decision/targets.html>

² That is from the viewpoint of modern theory.

³ Author’s opinion; there is a major debate among historians on whether invasion of Japan would result in far bigger casualties than from the bombardment of Hiroshima and Nagasaki. One should mention that in 1962 Tokyo District Court passed judgment on the in

⁴ An element of some weight is the protest lodged with the US Government on 10 August 1945, through Switzerland, by the Japanese Imperial Government, which stated that the atomic bomb dropped on Hiroshima was contrary to international law since it ‘produced suffering not inferior to that caused by other weapons specifically prohibited by international law’. One may also mention the famous decision handed down in 1962 by the Tokyo District Court in *Shimoda* case. In that decision the Court confined itself to passing judgment upon the lawfulness of the specific case of the bombings of Hiroshima and Nagasaki and did not claim to make a general pronouncement concerning atomic or nuclear weapons. The Court concluded that bombing was unlawful for it was contrary both to the principle prohibiting indiscriminate attacks on undefended towns, and to the principle forbidding the use of weapons causing unnecessary suffering. See Cassese A., *International Law* 2nd edition, 2005, 413.

⁵ In the “We will keep killing innocent civilians until our demands are met” sense.

In 1961 the United Nations General Assembly passed resolution 1653 (XVI) declaring that the use of nuclear weapons was illegal. Fifty-five states (consisting mainly of communist and Third World countries) voted in favor of the resolution, twenty states (consisting mainly of Western countries) voted against, and twenty-six states (consisting mainly of Latin American countries) abstained. The divergence between the positions of the communist and Western countries is explained by the fact that the Soviet superiority in conventional (*id est* non-nuclear) forces in Europe was so great (before the withdrawal of the Red Army from Eastern Europe) that the Western countries would have been compelled to use nuclear weapons in order to defend themselves against an invasion of Western Europe by Soviet conventional forces; consequently, the Western countries argued that the use of nuclear weapons is not contrary to international law. The Soviet Union, on the other hand, was able to win Third World goodwill by subscribing to the view that the use of nuclear weapons is illegal, because it knew that it would not need to be the first state to use them; if Western countries had used them first, the Soviet Union would have been able to justify its own use of nuclear weapons by means of the doctrine of reprisals.⁶

Today nuclear weapons are subject to many treaties, but most of them try to limit the number of weapons⁷, rather than to do away with them altogether. These treaties could therefore be considered strategic disarmament treaties rather than treaties founded in the principles of humanitarian law. Nonetheless, the horror of a possible nuclear holocaust has most certainly contributed to the disarmament efforts. The most significant treaty limiting the extent of nuclear weapons is the Nuclear Non-Proliferation Treaty (NPT) of 1968. The parties to the treaty agreed to limit nuclear weapons to those already possessing them. In return for not acquiring nuclear weapons, the non-nuclear state parties were guaranteed help in establishing civilian nuclear power programs, and the nuclear states committed themselves to a gradual disarmament. This treaty has been successful as countries trying to obtain nuclear power status are widely condemned by the international society⁸, but it has not been able to contain nuclear weapons completely to the original five nuclear state parties to the treaty. The treaty had to be extended in 1995, and the nuclear state parties to the treaty have renewed their promises to work for an

⁶ Malanczuk, P. Akehurst's Modern Introduction to International Law (1997), 346.

⁷ Including restrictions in certain geographical areas (Antarctic Treaty of 1959, Test Ban Treaty of 1963, Outer Space Treaty of 1967)

⁸ Iran currently stands accused by the UN of attempting to create a nuclear bomb. Although its officials claim that Iran's research is conducted for peaceful purposes only, it is obvious that Iran would highly benefit from having nuclear weapons, since it would provide additional guarantees against possible invasion by USA and counter-balance Israel's nuclear potential in Middle-Eastern region (see below).

eventual complete elimination of nuclear weapons.⁹ Aside United States, Russia, United Kingdom, France and People's Republic of China now stand India, Pakistan and starting from 2006 North Korea. These are the countries which have openly confirmed ownership of nuclear weapons and which conducted relevant tests. Various countries (e.g. Israel) are believed to possess nuclear weapons, but that was never publicly admitted.

The issue of the legality of the use of nuclear weapons was brought before the International Court of Justice on the basis of two requests for an advisory opinion, one filed by the World Health Organization on 3 September 1993, the other filed by the UN General Assembly on 6 January 1996. On 8 July 1996, the Court delivered its advisory opinions on both requests. The WHO request was dismissed with the reasoning that under the 'principle of speciality', the WHO had no competence to deal with the legality of the use of nuclear weapons. With regard to the request filed by the General Assembly, different majorities emerged among the judges concerning different steps of the decision. The Court found that there is neither in customary nor conventional law 'any specific authorization of the threat or use of nuclear weapons', but also no 'comprehensive and universal prohibition'. The Court further replied that 'threat or use of force by means of nuclear weapons that is contrary to Article 2 (4) of the UN Charter and that fails to meet all the requirements of Article 51 is unlawful' and that it 'should also be compatible with the requirements of the international law applicable in armed conflict, particularly those of the principles of international humanitarian law, as well as with specific obligations under treaties and other undertakings which expressly deal with nuclear weapons'.¹⁰ ICJ went on at § 43 to refuse to decide the issue whether the effects of any use of nuclear weapons would be so serious that it could not constitute a necessary and proportionate measure.¹¹ In response to the arguments presented to ICJ, somewhat unhelpful response was to the effect that 'it suffices for the Court to note that the very nature of all nuclear weapons and the profound risks associated therewith are further considerations to be borne in mind by States believing they can exercise a nuclear response in self-defense in accordance with the requirements of proportionality'. Several other members of the Court did not share the hesitant views of the majority either regarding the use of nuclear weapons as lawful *per se* under both *ius ad bellum* and IHL or according primacy to the right of self-defense over IHL. Several members of the Court, on the other hand, found the use of

⁹ Forbidden weapons. See nuclear weapons. http://www.everything2.com/index.pl?node_id=1540485

¹⁰ Malanczuk, P. Akehurst's Modern Introduction to International Law (1997), 347-348.

¹¹ Gray, C. International Law and the Use of Force (2000), 106 ref. 82.

nuclear weapons unlawful under current¹² international law. They did not, however, derive this illegality from *ius ad bellum*.¹³

Surprisingly the court also held that ‘in view of the current state of international law, and of the elements of fact at its disposal, it could not conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defense, in which the very survival of a State would be at stake’.¹⁴ Two objections can be made against this ambiguous ruling. First, it does not clarify whether, in the instance of self-defense to which it alludes, the aforementioned requirements must be respected. It is unclear, if the Court intended to say that the law does not specify whether in the case of self-defense ‘in which the very survival of the State would be at stake’, that State could breach the principles of proportionality, the other two fundamental principles of humanitarian law and the principle of neutrality. Second, there is no info on whether the Court intended self-defense to encompass anticipatory or pre-emptive self-defense as well.¹⁵ Another major problem is the triangular logjam the ICJ statement creates: it can be assumed, that if one country will be overpowered by far larger conventional force of another country, it ‘may’ obtain a right to use nuclear assault on enemy territory, because *de facto* its existence is at stake. The aggressor-State will then get into situation, where its own existence is at stake and ‘may’ obtain the right to nuclear counter-attack.¹⁶

Because of the moral implications of the use of nuclear weapons there is a danger that one may confuse what appears to be desirable in international society *de lege ferenda*, with what is actually prohibited or outlawed, that is to say with what exists *de lege lata*. As General Assembly Resolution 1653 (XVI) reminds us, nuclear weapon cause indiscriminate suffering and destruction and as such their use is therefore ‘contrary to the rules of international law and to the laws of humanity’. Such weapons can not be directed only against the enemy but are aimed at mankind in general. Third parties not involved in a war would be subjected to all the consequences of using nuclear weapons.¹⁷ Certain rules of international law might be extended

¹² Although the decision and opinions are dated 1996, author believes that recent changes in humanitarian law did not shatter the official position of States on the described matter, therefore ‘current international law’ would cover today’s international law as well.

¹³ Gardam, J. Necessity, Proportionality and the Use of Force by the States (2004), 170.

¹⁴ At §§ 96-97, 105 (e).

¹⁵ Cassese A., International Law 2nd edition, 2005, 414 ref. 18.

¹⁶ Situations, where intentional provocations take place, are reviewed below.

¹⁷ Detter, I. The Law of War (2000). 242-243.

by analogy to deal with nuclear weapons. For instance, Article 23(a) of the Hague Regulations of 1907 declares that it is forbidden to employ poison or poisoned weapons', and the Geneva Gas Protocol of 1925 prohibits 'the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices'.¹⁸ Some believe, that although not technically a gas, radioactivity should 'as a poisonous weapon' be prohibited by inference or analogy on the basis of principles contained in the Geneva Gas Protocol.¹⁹ It is arguable that the fallout caused by nuclear weapons resembles poison, but the analogy is not close enough to be absolutely compelling; fallout is only a side effect of nuclear weapons, whereas poisoning is the main (if not the sole) effect of using poison gas.²⁰

Alternatively, nuclear weapons could be compared with the mass bombing raids of the Second World War; but there was no treaty prohibiting those raids, and it would be difficult to argue that they were contrary to customary law, in the light of the extensive use of them by both sides in the WWII.²¹ Today, however, the First Protocol of Geneva Convention of 1977²² sets a basic rule: *In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.*²³ One element relevant for the assessment of illegality of nuclear weapons is obviously their indiscriminate nature, a characteristic that is common to all weapons of mass destruction. Weapons of such range and intensity can not, and are not designed to, distinguish between military and civilian objectives. This is a major argument in the assessment of illegality of nuclear weapons. But, on the other hand, it undermines the validity of other arguments, especially that nuclear weapons are inevitably directed against large groups of population, thus are illegal under the Convention on the

¹⁸ Malanczuk, P. Akehurst's Modern Introduction to International Law (1997), 346-347.

¹⁹ Greenspan, M. The Modern Law of Land Warfare (1959), 373.

²⁰ Malanczuk, P. Akehurst's Modern Introduction to International Law (1997), 346-347.

²¹ Malanczuk, P. Akehurst's Modern Introduction to International Law (1997), 347.

²² Since the adoption of Protocol I to the Geneva Conventions, proportionality is both a conventional and customary principle of IHL. The treaty rule is located in the provisions of the Protocol that deal with indiscriminate attacks. These are defined so as to include: an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated. A disproportionate attack is only one of the proscribed categories of indiscriminate attacks in the Protocol. So, for example, a weapon that is inherently incapable of distinguishing between civilian and military targets is illegal *per se* as indiscriminate. No issue of proportionality arises in such cases. It is only when a weapon is capable of distinguishing between civilian and military objects that the question of proportionality become relevant. See Gardam, J. Necessity and Proportionality in *jus ad bellum* and *jus in bello*. International Law, the International Court of Justice and Nuclear Weapons (1999), 284.

²³ Protocol I Additional to the Geneva Convention of 1977, Art. 48.

Prevention and Punishment of the Crime of Genocide of 1948, since genocide entails singling out of groups, whereas the employment of nuclear weapons intrinsically does not distinguish between anyone or anything within, and outside the impact area.²⁴ Besides that, when signing the First Protocol in 1977 few countries (including USA, France and UK) specifically placed on record that the Protocol does not regulate nor prohibit the use of nuclear weapons.

There remains the underlying principle that acts of war should not cause unnecessary suffering, that is, suffering out of all proportion to the military advantage to be gained from those acts. Nuclear weapons cause enormous suffering, but they can also produce an enormous military advantage. It would therefore be unwise to conclude that the use of nuclear weapons is unlawful in all circumstances.²⁵

Here we come to the actual use of the right to defend self with nuclear weapons. In theory, a State might use nuclear arsenal in various different situations: (1) to launch an attack against another State, thus initiating a war proper; (2) to make a pre-emptive attack on another State, when the attacking State believes that the other State is about to launch a nuclear attack (e.g. the Caribbean Crisis of 1963); (3) to respond in kind to a nuclear attack (or to an attack involving the extensive use of prohibited weapons of mass destruction) by another State; (4) to inflict devastating losses on the enemy in the course of a conventional war²⁶; (5) to retaliate against the enemy's first use of nuclear weapons, or large-scale use of such prohibited weapons of mass destruction as chemical or bacteriological weapons, in the course of conventional war. Aggressive first strike, like any armed attack not in self-defense, by whatever weapon it may be carried out would be clearly contrary to Article 2 (4) of the UN Charter. The ICJ clearly recognized this notion in its Advisory Opinion.²⁷ In the case of a pre-emptive first strike by using nuclear weapons, it would seem that again this is contrary to Article 2 (4), because Article 51 of the UN Charter does not authorize such strikes, whatever the arms involved. It should be noted that in its aforementioned Advisory Opinion the ICJ failed to address this important issue. Be that as it may, one should however not be blind to a hard and insurmountable fact: the nuclear Powers, in particular the five permanent members of the Security Council, all claim that they are entitled to use nuclear weapons to prevent a serious and imminent nuclear attack (and perhaps even a massive attack

²⁴ Detter, I. *The Law of War* (2000). 243

²⁵ Malanczuk, P. *Akehurst's Modern Introduction to International Law* (1997), 347.

²⁶ The only practice of using nuclear weapons (during the bombings of Nagasaki and Hiroshima in 1945) were of this type.

²⁷ At § 105 (c).

with weapons of mass destruction). Thus, the nuclear policy advocated by those Powers is in strident contrast with what seems to be the better interpretation of international law.²⁸

As for the second use in self-defense as defined above, it can be held to be lawful (as asserted by some nuclear powers such as the UK²⁹), provided however it meets various requirements. First those of necessity and proportionality, as the ICJ stated in general terms in 1986 in *Nicaragua* case (§ 176) and repeated, with specific reference to the arms in issue, in the above mentioned Advisory Opinion on *Legality of the Threat or Use of Nuclear Weapons* (§ 41). Second, the requirement deriving from two fundamental principles of international humanitarian law: that on protection of civilians, with the consequent obligation of always distinguishing between civilian and military objectives, and the principle whereby it is prohibited to cause unnecessary suffering to combatants. Third, the principles of neutrality, whereby belligerents must respect the inviolability of neutral powers. The ICJ admitted all of these requirements in its aforementioned Advisory Opinion (§§ 42, 78-87, 88-89). However it is doubtful whether nuclear weapons can be used in such a manner as to meet all these requirements, but some nuclear Powers claim that the so-called tactical³⁰ nuclear weapons may be used in keeping with international law. Some authors have suggested possible illustrations of allegedly lawful uses of nuclear weapons: for instance, the nuclear bombing of troops and armor in an isolated desert ‘with a low-yield air burst in conditions of no wind’³¹ or the detonating of a ‘clean’ nuclear weapon ‘against an enemy fleet in the middle of the ocean’.³² As for the use of nuclear weapons in a conventional war, it would not be warranted by any norm or principle and indeed would exacerbate the conflict by bringing about an escalation in the use of weapons of mass destruction. Moreover it would be contrary to the aforementioned principles of humanitarian law as well as the principles on neutrality (unless ‘tactical nuclear weapons are used and only against military objectives, without any serious ‘collateral’ effects on civilians’). In contrast, a retaliatory use in a conventional war would be

²⁸ Cassese A., *International Law* 2nd edition, 2005, 413-414.

²⁹ According to the British *Manual of the Law of Armed Conflict*, the UK ‘would only consider using nuclear weapons in self-defense, including the defense of its NATO allies, and even then only in extreme circumstances’. See *Ibid*, 414 link 17.

³⁰ *Id est* those used on the battlefield; if civilian objects fall within the effect radius, nukes are called ‘strategic’ nuclear weapons.

³¹ Schmitt, M. *Naval War College Review* vol. 362 (1998). The international court of justice and the use of nuclear weapons, 108.

³² Dinstein, Y. *The Conduct of Hostilities under the Law of International Armed Conflict* (2004), 79.

lawful if it clearly met the requirements referred to above, as well as, of course, all the requirements proper to belligerent reprisals.³³

The situations mentioned above can be described as *active* nuclear defense, but there is certainly another side to self-defense, which could be named *passive*. The psychological factor of a State owning a nuclear bomb can play a significant role in *ius ad bellum* policy of its enemies and guarantee security and integrity for years to come. Nuclear Powers, which still support the so-called policy of deterrence, do indeed claim that they have the right to discourage military aggression by demonstrating that it will serve no purpose; they consequently claim to be entitled to resort to self-defense by using nuclear weapons (the enemy knows that, should it launch a first nuclear strike, its territory will be devastated by a nuclear response).³⁴ Here, a question may rise, whether it would be legal to *imitate* possession of nuclear arsenal in order to drag opponents into thinking that a country is a nuclear-State³⁵. Therefore, theoretically, similar effect of *passive* self-defense will be achieved by simulation. Such behavior would not breach Non-Proliferation Treaty, neither does the author see any violations of IHL principles here. This kind of bluff, however, is easily recognizable (e.g. through espionage) and countries risk drawing World's condemnation without achieving the awaited results.

Drastic statements by politicians sometimes distort the contents of international law. Thus, a Minister of State in the West German Foreign Ministry claimed in 1983 that not even first use of nuclear weapons is banned by international law. But there is overwhelming agreement that prohibitions exist in the international legal system against first use. Legality of use in self-defense, however, is more problematic. On the one hand, there is considerable support for the view that such use is 'different' from first use, which may entail devastating effects; augmenting those caused by first user, and perhaps, precisely in juxtaposition with the first attack, cause the feared climatic changes that would result in the advent of a 'nuclear winter'. The legality of counter-attack must then, considering duties to neutrals, other uninvolved countries, and perhaps to international society as a whole, depend on the scale and nature of nuclear force used. If we further consider the alleged illegality of the use of nuclear weapons, there is considerable

³³ Cassese A., International Law 2nd edition, 2005, 414.

³⁴ Ibid.

³⁵ There is no evidence of any country trying this so far, since all States, which openly admit they possess nuclear weapons, have conducted nuclear tests.

agreement that the use of such weapons against an aggressor who has not himself used them, i.e. first use of nuclear weapons, is illegal.³⁶

There is furthermore a growing body of opinion suggesting that the second use, i.e. use in self-defense against a nuclear attack, is also illegal. One reason for such a standpoint is that the use of nuclear weapons is never part of rational war aim. The General Assembly has also warned against the dangers of ‘catastrophe’ that may be caused by any such new doctrine of limited or partial use of nuclear warfare. There is ostensibly no rational war aim and the use of nuclear weapons would prevent obedience to further rules concerning the conduct of hostilities and undermine respect for neutrals. As was already mentioned, the General Assembly has emphasized that the use of nuclear weapons would amount to a violation of the Charter as against ‘laws of humanity and constituting a crime against mankind and civilization’.³⁷ This important Resolution, named the Declaration on the Prohibition of the Use of Nuclear and Thermonuclear Weapons, states that the use of such weapons is contrary to the ‘spirit, letter and aims’ of the United Nations and that their use would ‘exceed even the scope of war’. Later, the General Assembly referred to the use of nuclear weapons as being under a ‘permanent prohibition’ indicating that such weapons are forbidden in any circumstances, including self-defense.³⁸ In this Resolution the use of nuclear weapons was related to the use of force as outlawed by the Charter.³⁹

As for the *passive* nuclear self-defense, the illegality of the use of nuclear weapons may not, according to some,⁴⁰ make deterrence unlawful. Possession of such weapons may constitute a lawful deterrence although they are possessed only to be potentially used. But since their subsequent use is an inevitable and non-excluded contingency it could be argued that even *passive* possession is of questionable legality. Yet the trend in the 1980s was to view possession in terms of security and to allow the possession of a negotiated number of nuclear weapons for deterrence purposes.⁴¹

³⁶ Dettler, I. *The Law of War* (2000). 244.

³⁷ Res. 1653(XVI) 1961.

³⁸ Res. 2936(XXVII) 1972.

³⁹ Dettler, I. *The Law of War* (2000). 245.

⁴⁰ See Brownlie, I. *Some Legal Aspects of the Use of Nuclear Weapons*, 444. *The International and Comparative Law Quarterly*, Vol. 14 No 2 (1965). According to Brownlie it is at least ‘not clear if use only or also deterrence is illegal’.

⁴¹ Dettler, I. *The Law of War* (2000). 245-246.

Quite delicate is the question of provocative acts in the aspect of nuclear warfare. It is possible, in theory, that a certain nuclear-State (official or not) could seek to provoke its enemies to attack with conventional forces or weapons of mass destruction (or to make preparations for such actions), so that the provocateur-State would achieve a status, where 'its very own existence is at stake' so that it may carry out nuclear bombardment of its own, thus obviously manipulating and abusing ICJ statement. Although this is unlikely to happen, since such provocation would place the provocateur-State into very high risk of elimination, it can possibly be exercised by 'fanatical' governments, which would put the priority of crippling and destroying another State above its own well-being.⁴²

In conclusion it should be said that nuclear weapons are very powerful instruments of self-defense, a privilege only few countries can enjoy, however. Nuclear-States have never found themselves in life-threatening situations, where their will to withhold nuclear strikes would be challenged. This is another proof of existence of *passive* defense, which the atomic weapons provide, but it leaves to wonder what would actually happen if such situations would arise. Hopefully, time will never tell, but with current IHL, where only World Society's opinion and few weak restrictions actually back up the anti-nuclear views, the threat of nuclear bombings, especially if 'justified' by self-defense, remains quite real today.

⁴² But then again, they probably would not care for abiding the IHL either.