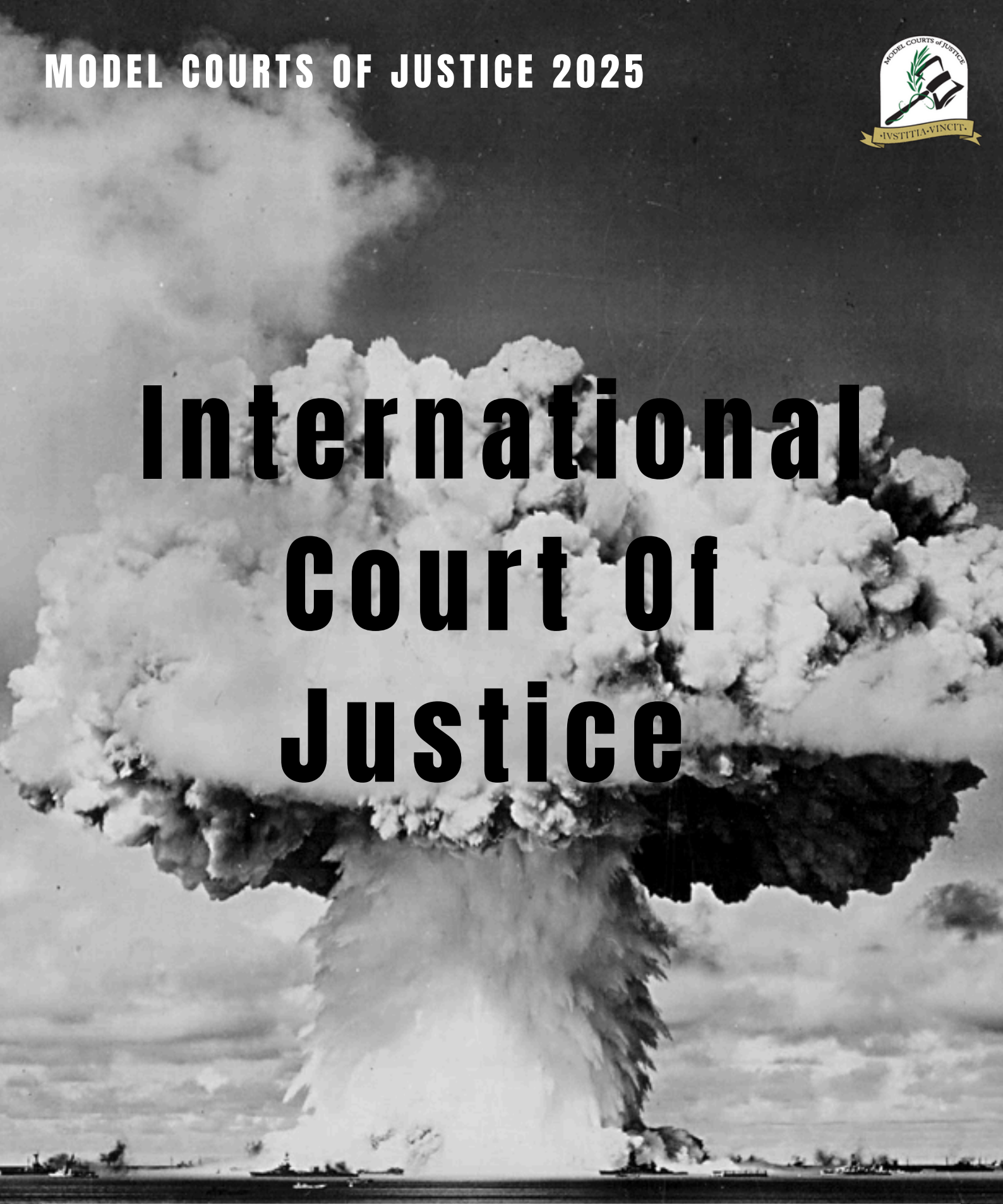
MODEL COURTS OF JUSTICE 2025



International Court Of Justice

Written by Eralp Aydınlıalp
Supervised by Aydan Seyidaliyeva

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LETTER FROM THE SECRETARY-GENERAL

Highly Esteemed Participants,

It is my pleasure to welcome you all to the 13th Edition of the Model Courts of Justice as the Secretary-General. My name is Aydan Seyidaliyeva and I am a junior law student at Ankara University, currently on her Exchange Program at Utrecht University Law School.

The participants of the Model Courts of Justice 2025 will be focusing on the fields of international humanitarian law, human rights law and most importantly the established customary and positive law of war with notions of the environmental law in the International Court of Justice. The case that will be simulated this year is *'Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons'*. In this regard, the participants, particularly those planning to participate in the Philip C. Jessup International Law Moot Court Competition will have the opportunity to practice their subjects and improve their written and oral skills.

I would first like to express my gratitude to Mr Eralp Aydınlıalp for excelling in the writing of the entire academic material for this court considering the type of proceeding and the specific nature of the case. Second, I appreciate the trainee of the International Court of Justice Miss Elif Sena Durkut for her progress and dedication for the Academic Team of the Model Courts of Justice 2025. Last, I would like to thank the Director-General of the Model Courts of Justice 2025 and the most valuable source of our motivation throughout the entire preparation process, Miss Elfin Selen Ermiş for enduring organizational excellence and professionalism with her wonderful organization team despite uncountable obstacles and the given conditions.

Before attending the sessions, I highly recommend that all the participants read the Study Guide and Rules of Procedure and prepare the printed versions of these documents with them to refer to during the Conference.

If you have any questions or hesitations about the Conference, please do not hesitate to contact me at secretarygeneral@modelcj.org

Sincerely,

Aydan Seyidaliyeva

Secretary-General of the Model Courts of Justice 2025

LETTER FROM THE UNDER-SECRETARY-GENERAL

Dear Participants,

I am Eralp Aydınlıalp, a senior student studying at Ankara University, Faculty of Law. My journey with Model Courts of Justice started in my sophomere year as a trainee of the European Court of Human Rights. This year I will be responsible as the Under-Secretary- General of the International Court of Justice.

This year, the Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons, one of the most important decisions on international humanitarian law, will be simulated. The ICJ will make its recommendation based on the question posed by the UN General Assembly in its resolution of 15 December 1996: 'Is the threat or use of nuclear weapons permitted under international law in all circumstances?"

My deepest gratitude goes out to our esteemed Secretary-General, Ms. Aydan Seyidaliyeva, and Director-General, Ms. Elfin Selen Ermiş, for their outstanding work and outstanding supervision throughout this academic year. Being a member of this amazing team has taught me the value of dedication and how to overcome obstacles. As a result, I would like to express my gratitude to the Under-Secretaries Generals of the 13th annual session of the Model Courts of Justice and the Academic Team for always being there for me. In addition, I have the utmost respect for the Organization Team. Through their efforts, they made the impossible possible.

In order to get an adequate grasp of the case and to be able experience Model Courts of Justice as intended, I highly recommend every participant to read the Study Guide, the Handbook, the Rules of Procedure and the other documents available on our website.

I welcome you all to the 13th edition of Model Court of Justice Conference and hope to meet you all.

If you have any questions, please do not hesitate to contact me,

Eralp Aydınlıalp,

Under-Secretary-General responsible for the International Court of Justice

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I. INTRODUCTION TO INTERNATIONAL COURT OF JUSTICE

1. History

The idea of the international community to establish an international court emerged in the atmosphere following the Hague Conferences of 1897 and 1907. The establishment of the Permanent Court of Arbitration, although neither permanent nor a court marked an important step forward in the consolidation of an international legal system. However, it was not until the end of the First World War that a concrete step was taken in this regard.[1]

After the first world war with the establisment of the Covenant of League of Nations, the ancestor of the International Court of Justice (ICJ), the Permanent Court of International Justice (PCIJ), was established and was governed by its own rules and procedures, predetermined and compulsory for parties who submitted to its jurisdiction. Article 14 of the Covenant of the League of Nations gave the Council of the League permission to draw up plans for the establishment of a Permanent Court of International Justice. This court had the authority to hear and adjudicate any international legal dispute submitted to it by the parties to the dispute and also provided advisory opinions concerning any dispute or legal question referred to it by the Council or Assembly. Between 1922 and 1940, the PCIJ heard 29 contentious cases between nation-states and issued 27 advisory opinions.[2]

The UN Charter, which is the result the San Francisco Conference, embodies the Statute of the ICJ, which was modelled after that of the PCIJ. In the fall of 1945, after it convened for the last time, the PCIJ transferred its jurisdiction to the ICJ. The first Members of the ICJ were elected at the first session of the UN General Assembly and Security Council on February 6, 1946. One month later, the ICJ had its first public sitting and heard its first case involving the United Kingdom and Albania.[3]

[1] Malcolm N. Shaw, International Law (Cambridge University Press 2008) 959
[2] c 50
[3] History, International Court of Justice (ICJ) *(International Court of Justice)* https://www.icjcij.org/en/history accessed October 22, 2024

2. Structure

The General Assembly and Security Council of the United Nations elect the 15 judges that compose the International Court of Justice to nine-year terms. These organs issue their votes independently but concurrently. An absolute majority of the votes in both bodies is required for a candidate to be elected. In some instances, this necessitates holding multiple voting rounds.[4]

Judges must be elected from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices or are jurisconsults of recognised competence in international law.[5]

Once elected, a Member of the Court is a delegate neither of the government of his own country nor of that of any other State. Unlike most other organs of international organizations, the Court is not composed of representatives of governments. Before undertaking their responsibilities, members of the Court, who are independent judges, must officially declare in public that they would exercise their power in an impartial and consistent manner.[6]

Image I: International Court of Justice

[4] International Court of Justice, 'Members of the Court (International Court of Justice)'<https://www.icjcij.org/en/members> accessed 22 October 2024.
[5] Ibid
[6] Ibid

3. Proceedings

The Court may consider two kinds of cases: requests for advisory opinions on legal issues presented to it by specialized agencies and United Nations organs and legal disputes between States that are filed to it by those states.[7] The Court receives referrals from States or by directive of the Security Council. The Court receives memorials and counter memorials from the parties and the parties submit other relevant documents to the court. During oral hearings, the Court hears the testimony of the witnesses of the parties, experts, counsels, and the factual and legal arguments made by each of their counsels. The President has ultimate authority in case of a tie, and the Court makes decisions and takes action by majority vote. International law and national legal conflicts must be taken into consideration by the court while resolving the issues before it.[8]

a. Admissibility

Admissibility as a concept relates to concrete claims and legal proceedings, so questions of admissibility are either formal or substantive. Process of admissibility usually refers to an application whether proper or not in terms of judicial adjudication. In other words, admissibility is more about the qualities of claims and cases. On the other hand, jurisdiction, which is a concept often confused with admissibility, is more concerned with the power of the Court. An objection to the admissibility of a claim consists in the contention that there exists a legal reason, even when there is jurisdiction, why the Court should decline to hear the case, or more usually, a specific claim therein.[9]

[7] International Court of Justice, 'How to Court Works' < https://www.icj-cij.org/how-the-court-works> accessed 24 October 2024
[8] Ibid
[9] Robert Kolb, '*The International Court Of Justice'* (Hart Publishing 2013) p.201

i. Arbitration

In arbitration, the jurisdiction of the Court arises after the dispute emerges, if the parties agree to bring the dispute to the Court. In this method, the dispuntant states may submit the dispute to the court through a special agreement or treaty.[10] This method is referred to in the ICJ Statute Article 36(1) as follows: *'The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.'*[11]

ii. International Agreements Concluded Before the Dispute

The phrase '*The jurisdiction of the Court comprises...in treaties and conventions in force'* in Article 36(1) of the Statute refers to the second way to submit a case to the Court.[12] This is only conceivable if the treaty or convention addressed the parties to the ICJ in the case of a dispute or accepted jurisdiction of the Court *ex tunc*[13]. In this manner, the parties agree to apply to the Court by recognizing its jurisdiction in the case of a breach or violation arising from dipsuted circumstances.[14]

iii. Unilateral Declaration

Article 36 paragraph 2 of the Statue states that: *"The states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning..."*[15] Paragraph 2 refers to the 'optional clause on compulsory jurisdiction', which addresses unilateral statements through which States may accept the Court's jurisdiction concerning all other States that have issued such declarations.[16]

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[10] Hanqin Xue, '*Jurisdiction Of The International Court Of Justice'* (10th edn, Brill Nijhoff 2015)
[11] Statute of the International Court of Justice, art, 36(1).
[12] Ibid
[13] *Ex tunc* is a legal term derived from Latin, and means "from the outset". It can be contrasted with *ex nunc*, which means "from now on".
[14] Hanqin Xue, '*Jurisdiction Of The International Court Of Justice'* (10th edn, Brill Nijhoff 2015)
[15] Statute of the International Court of Justice, art, 36(1)
[16] Alfred P. Rubin, 'The International Legal Effects of Unilateral Declarations' (1977) p.71

In contrast to paragraph 1, paragraph 2 only addresses compulsory jurisdiction. States that have made optional declarations are subject to the Court's jurisdiction and may file a unilateral legal action against other states in the same category, among other potential issues. By stating that they recognize this jurisdiction in any legal disputes, states that are parties to the Statute may unilaterally submit the application letter.[17]

iv. Forum Prorogatum

The doctrine of forum prorogatum affords an informal way for a state to express consent to the jurisdiction of the Court. The Court may decide that the other party has accepted the jurisdiction by a variety of actions in certain situations where a state filed an appeal to the court concerning a legal dispute. The statute of the International Court of Justice permits the intervention of third parties to an ongoing case if the Court decision affects the third party or that the party has legal interests in the matter. The statute of the International Court of Justice gave consent to the intervention of third parties to an ongoing case if the Court decision affects the third party or that the party has legal interests in the matter. It is mentioned in Article 62 of the Statute as *"should a state consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene."* This kind of intervention is also called arbitrary intervention. The decision of accepting the offer is up to the Court.[18]

The emergence of the Forum Prorogatum is not based on the Statute, but is a doctrine that has emerged from practice. Several commentators have argued that the Court has also applied forum prorogatum in advisory proceedings. In a 1996 speech before the Sixth Committee of the United Nations General Assembly, President Bedjaoui of the ICJ surveyed the cases in which forum prorogatum had been applied and then stated that the Court had occasion to confirm its case-law on this topic, and not only in contentious proceedings but also in advisory proceedings, such as in the case concerning South West Africa. Since South Africa had raised

[17] Ibid

[18] Ruda J M, "Intervention Before the International Court of Justice", Fifty Years of the International Court of Justice, Cambridge, 2. Edition, Melbourne, (1998), 487.

the question of the jurisdiction of the Court, the Court observed that South Africa had given its consent by participating in the proceedings and addressing the merits.[19]

b. Security Council

The Security Council is one of the main organs of the United Nations, which seeks to maintain international peace and security. [20] The duties of the Security Council, as set out in Article 24 of the Charter of the United Nations, are as follows: "*In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf"*[21]. The Security Council is the only UN body with authority to issue resolutions that are binding on member states. It has 15 members in total, including 5 permanent members which have the right of veto.[22]

Image II: Security Council

[19] Sienho Yee, 'Forum Prorogatum And The Advisory Proceedings Of The International Court' (2001) 95 American Journal of International Law p.381

[20] United Nations, 'Security Council <https://main.un.org/securitycouncil/en > accesed 25 October 2024

[21] Charter of United Nations, art, 24(1)

[22] Charter of United Nations, art, 27(1)

c. Contentious Cases

In contentious cases, the legal dispute between states is settled by the court according to international law. Only states can be parties to the dispute. However, according to Article 93 of the Statute, there is no requirement to be a member of the UN to bring a dispute to the court.[23] After the oral procedure and the hearing of the parties, experts and witnesses, the judges continue their deliberations in private, closed to the public. At the final stage,the judgement of the Court is announced and the parties are bound by this judgement and cannot appeal it. Judges may add their opinions to the decision only in special circumstances, such as when an issue is susceptible to interpretation or may be assessed in light of new information.[24]

The sources of law that the Court must apply are: international treaties and conventions in force; international custom; the general principles of law; judicial decisions; and the teachings of the most highly qualified publicists.[25] Moreover, if the parties agree, the Court can decide a case *ex aequo et bono*, without confining itself to existing rules of international law.[26]

d. Advisory Opinion

Public international organisations cannot be parties to contentious proceedings. However, according to Article 65 of the Statute, advisory opinions are applicable to 5 organs and 15 specialised agencies of the United Nations.[27] Although contentious proceedings and advisory opinions are fundamentally similar, there are some differences.

Advisory proceedings begin when the Secretary-General of the United Nations or the director or Secretary-General of the organization asking the opinion submits a written request for an advisory opinion to the Registrar. The Court can accelerate proceedings in urgent matters by

[23] Statute of the International Court of Justice, art, 93(2)
[24] How to Court Works (International Court of Jusitce) <https://www.icj-cij.org/how-the-court-works> accesed 25 October 2024
[25] Statute of the International Court of Justice, art, 38
[26] Ibid
[27] Statute of the International Court of Justice, art, 65

taking all necessary actions. The Court has the authority to hold both written and oral procedures to obtain all the information required regarding the question brought to it.[28]

Advisory opinions of the Court have significant legal importance and moral significance even though they are not legally binding. They frequently serve as a tool for peacekeeping and preventive diplomacy. In their unique way, advisory opinions also support the development and clarity of international law, promoting peaceful ties between states.[29]

e. Interim Measures

The International Court of Justice may take interim measures of protection to preserve the respective rights of the party-states pending final judgment on the merits when it deems necessary. This matter is explained in Article 41 of the Statute as follows: "*The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party."*[30]

The main purpose of the Court's power to indicate provisional measures is to prevent irreparable prejudice to the rights that are the subject of the dispute. In fact, however, the Court has also made use of its power under Article 41 for a different purpose, considering itself to be entitled to indicate measures aimed at preventing the aggravation or the extension of the dispute.[31]

According to the International Court of Justice, interim measures must meet three criteria: urgency, irreparable damage to rights of the one party, and initial demonstration of jurisdiction. Since these measures shall be required on significant issues like the right to life, it is crucial to come up with useful and practical solutions in circumstances involving these criteria. In these situations, it is crucial to maintain urgency.[32]

[28] Advisory Jurisdiction (International Court of Justice) https://www.icj-cij.org/en/advisory-jurisdiction accessed October 25, 2024
[29] Advisory Jurisdiction (International Court of Justice) https://www.icj-cij.org/en/advisory-jurisdiction accessed October 25, 2024
[30] Statute of the International Court of Justice, art, 41
[31] Paolo Palchetti, 'The Power of the International Court of Justice to Indicate Provisional Measures to Prevent the Aggravation of a Dispute' (2008) 21 Leiden Journal of International Law 623
[32] Ibid

f. Merits

A case is considered to have merits if the decision is based on the law as it is applicable to the particular facts and evidence that have been presented. This contrasts with situations where decisions are based on procedural considerations. It is crucial to distinguish between decisions based on the merits and those based on procedural grounds because the former are final and governed by *res judicata*[33]. The parties to a case are unable to bring up the same claims in a later case if the decision is subject to *res judicata*. A party who disagrees with the ruling must instead file a motion to reconsider, file a motion for a new trial, or appeal the decision.[34]

Merits have been one of the fundamental subjects of international law since the birth of international law and the establishment of the ICJ. Approach of the Court to this issue is within the framework of the fundamental principles of international law and the rights of states, but there are several controversial decisions of the Court on international sovereignty and participation.[35]

Many scholars and international lawyers argue that a party to the case may not be a fully sovereign state but rather a protected or mandated one. They argue that all states have international personalities regardless of their standing in the international community.[36]

One of the complicated issues of international law is whether the rights of states derive directly from international law or whether they arise from the recognition of states by each other. Although the universality and consistency of international law rules have been demonstrated, the supremacy of international law norms over domestic law remains a matter of debate. However, it is unacceptable to avoid the application of the rules of international law for the

[33] Res judicata or res iudicata, also known as claim preclusion, is the Latin term for judged matter, and refers to either of two concepts in common law civil procedure: a case in which there has been a final judgment and that is no longer subject to appeal; and the legal doctrine meant to bar (or preclude) relitigation of a claim between the same parties.

[34] Merits 'Cornell University Law Faculty' https://www.law.cornell.edu/wex/on_the_merits accesed 11 November, 2024

[35] Gerald Fitzmaurice, *'The Law and Procedure of the International Court of Justice, 1951-54: General Principles and Sources of Law'* (1953) 30 British Year Book Internationall Law 1

[36] Ibid

sake of domestic law. This prevents domestic law from being used by States as a pretext for violating rules that must be observed or treaties that must be signed and executed.[37]

4. Sources

Article 38 of the Statute of the ICJ provides for the sources of international law. Nevertheless, if the parties agree, the court may rule *ex aequo et bono* based on equity and impartiality without being constrained by formal legal requirements.[38]

Article 38 of the Statute of the ICJ provides:

"'1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

b. international custom, as evidence of a general practice accepted as law;

c. the general principles of law recognized by civilized nations;

d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."[39]

Article 38, which enumerates the sources of international law, does not provide for a hierarchy among these sources, unlike national law. Although it is controversial whether there is an inferiority or uperiority between these sources of international law, the use and essence of these differ from each other.[40]

Sources such as international treaties have more influence as they are based upon the consent of the states, whereas others such as general principles are derived from ethics, morals, and

[37] Ibid
[38] David Kennedy, 'The Sources of International Law' (1987) 2 Amarican University Journal International Law & Policy 1
[39] Statute of the International Court of Justice, art, 65
[40] Wolfrum, R., Sources of International Law. In: Max Planck Encyclopedia of Public International Law. (2011)

logic. Article 38 does not list all the sources of international law that may be used in the proceedings in the court. Apart from the Article 38, there are several sources such as unilateral actions and legally binding decisions from international organizations, the consequences of which are seen in numerous International Court of Justice decisions.[41]

II. INTRODUCTION TO INTERNATIONAL HUMANITARIAN LAW

International humanitarian law aims to protect both combatants and non-combatants in armed conflicts from humanitarian impacts and to restrict the methods of warfare. This field of law is also known as the law of war or the law of armed conflict. [42]

The corpus of regulations governing relations between states is known as international law, and it encompasses international humanitarian law. In armed conflicts, international humanitarian law is applicable. It does not regulate whether and when state can actually employ force; that is the responsibility of a significant but distinct area of international law defined by the UN Charter.[43]

International humanitarian law applies only to armed conflicts and not to internal aggressions. The law applies only once a conflict has begun, and then equally to all sides regardless of who started the armed conflict. International humanitarian law divides armed conflict into international and non-international armed conflict. International armed conflicts are those in which at least two States are involved are governed by the Geneva Convention and Additional Protocol I.[44]

Armed conflicts that are restricted to a the territory of a single state and include either regular armed forces against armed dissident groups or armed groups battling one another are known as non-international armed conflicts. A smaller set of rules, defined by Additional Protocol II and Article 3 common to the four Geneva Conventions, govern internal armed conflict situations.[45]

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[41] Ibid
[42] Aldo Zammit Borda, 'Introduction to International Humanitarian Law' (2008) 34 Commwelth LawBulletin 739
[43] Ibid
[44] Rene Provost, *International Human Rights and Humanitarian Law* (first published 2002, Cambridge University Press 2004)
[45] Ibid

International humanitarian law covers two main areas: the protection of non-combatants or persons no longer taking part in the war and military tactics, methods of conflict and the restriction of certain weapons. International humanitarian law protects civilians and medical personnel who are not at war, as well as the wounded, sick and prisoners of war who are no longer at war.[46]

The basic rules in this respect are that it is forbidden to kill wounded or sick personnel who are unable to fight or who have surrendered, and the party that reaches them is obliged to care for them. The physical health and integrity of life of persons classified in this category must be respected. They are legally protected from all threats under all circumstances without discrimination. This is an issue that connects international humanitarian law and human rights. Also international humanitarian law governs distinguishable symbols, which designate persons, places and things that are legally protected.[47]

International humanitarian law prohibits certain warfare methods, tactics and the use of weapons and ammunition that impose any form of unnecessary suffering as well as the use of weapons that cause long-term damage to the environment. These issues prohibited by humanitarian law have also led to the prohibition of anti-personnel mines, blinding lasers, chemical and biological weapons.[48]

1. History of International Humanitarian Law

Although origin of the contemporary International Humanitarian Law (IHL) traces back 19th century, its principles and practices are significantly older. After the second half of the eighteenth century, with the dominance of autonomous states and the increasing humanist understanding, international humanitarian law, previously called the '*law of war'*, began to balance military necessities and human rights.[49]

[46] Aldo Zammit Borda, 'Introduction to International Humanitarian Law' (2008) 34 Commwelth Law

[47] Aldo Zammit Borda, 'Introduction to International Humanitarian Law' (2008) 34 Commwelth Law Bulletin 739

[48] ICRC (2002) *What are the Origins of International Humanitarian Law?,* Advisory Service on International Humanitarian Law, Geneva. <www.icrc.org> accesed October 29, 2024

[49] Aldo Zammit Borda, 'Introduction to International Humanitarian Law' (2008) 34 Commwealth Law Bullettin 739

Lieber Code, one of the first examples of the law of war is a written document that occuered to govern the conduct of the United States forces in the American Civil War. However, the Battle of Solferino in 1859 was literally the milestone for international humanitarian law. Henry Dunant, a Swiss citizen, happened to be present in the battlefield. Horrified by the suffering of injured soldiers, he was inspired to found the Red Cross movement, which was to become *'a promoter and custodian of the humanitarian idea and the primary initiation for its transition into international humanitarian law'*.[50]

Image III: Logo of ICRC (International Comitee of the Red Cross)[51]

Furthermore, Dunant encouraged for the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field to be adopted in 1864. The Geneva tradition of humanitarian law commenced with this Convention. The 1949 Geneva Conventions, the 1977 Additional Protocols, and the 1907 Hague Convention are the next set of humanitarian instruments listed in traditional history.[52]

Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field concerns the legal status of medical personnel during armed conflict. According to the Convention, wounded enemy soldiers must be collected and treated in the same way as allied armed forces. These rules were extended and improved by the Geneva

[50] Cedric Cotter & Ellen Policinski, 'A History of Violence: The Development of International Humanitarian Law Reflected in the International Review of the Red Cross' (2020) 11 Journal of International Human Legal Studies 36

[51] https://www.icrc.org/en

[52] ICRC (2002) *What are the Origins of International Humanitarian Law?*, Advisory Service on International Humanitarian Law, Geneva. <www.icrc.org> accesed October 29, 2024

Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field of 1906.[53]

The 1864 Geneva Convention marks the beginning of the conventions that today are called Geneva Law. Unlike Hague law, Geneva law aims to protect victims of armed conflict. It does not intend to define the rights and duties of soldiers, but instead describes the obligations of military personnel towards the victims of armed conflicts, leaving the failure to fulfill these obligations to Hague law.[54]

The distinction between Geneva and Hague law has been substantially abolished by Additional Protocol I. The 1864 and 1906 Conventions have been superseded by the more detailed provisions of 1949 Geneva Convention I and Geneva Convention II. Certain principles are, yet, common to all these treaties. All of these not only prohibit attacks on the wounded and medical personnel but also strive to ensure their collection and protection.[55]

World War I, with its new munitions and unprecedented extension of combat actions, demonstrated the limits of the existing law. One of the most important developments in international humanitarian law during World War I was the evolution of air strikes and the associated long-distance firing. These attacks took place despite the Hague Regulations prohibiting attacks on defenceless towns and villages. World War I also revealed deficiencies in the legal protection of the wounded and prisoners of war.[56]

In 1923, the Hague Rules of Aerial Warfare were formulated, together with rules concerning the control of radio communications in times of war. World War I had highlighted the danger to the civilian population from aerial warfare. In the aftermath of that war numerous proposals were made to subject aerial warfare to new legal constraints. The obvious military advantages of aerial warfare prompted a new agreement at the Washington Conference on the Limitation of Armaments in 1921.[57]

The Hague Rules of Aerial Warfare were never legally adopted and also their principles were widely disregarded during World War II. Nevertheless, although never entered into force, the

[53] Dieter Fleck, The Handbook of International Humanitarian Law (4th edn, Oxford University Press 2021) p.24
[54] Ibid
[55] Ibid
[56] Ibid
[57] Dieter Fleck, The Handbook of International Humanitarian Law (4th edn, Oxford University Press 2021) p.24

Rules were commonly regarded at the time as an important statement of the legal principles, which should govern aerial warfare. The basic principles which they laid down, though not the list of targets, were embodied in a resolution of the Assembly of the League of Nations in 1938.[58]

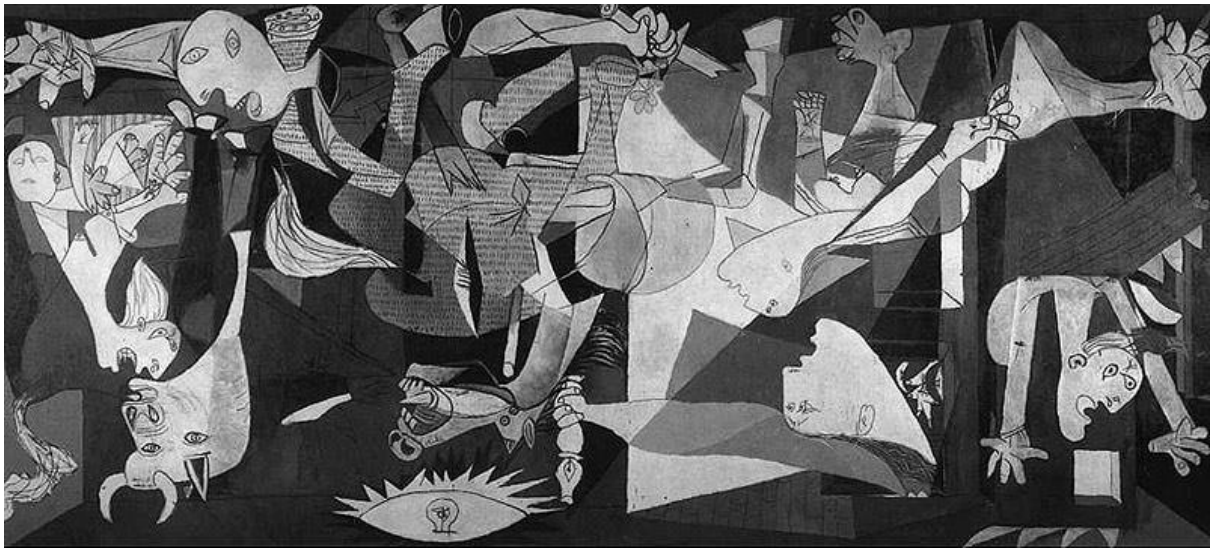

Image IV: Guernica[59]

After the World War II, International Cross Comitee of the Red Cross (ICRC) drew up in 1956 the Delhi Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War. These Draft Rules and the ICRC Commentary upon them show the influence of the Hague Rules of Aerial Warfare.[60]

2. Sources of International Humanitarian Law

The sources of international humanitarian law are mainly the Geneva Conventions of 1949 and the Geneva Conventions of 1977 as well as additional Protocols I and II. In addition, customary international law, UN legislations and resolutions, international court decisions and ICRC legislation are also sources of international humanitarian law.

[58] Ibid

[59] "Guernica, 1937 by Pablo Picasso" <https://www.pablopicasso.org/guernica.jsp> *Guernica* is a large 1937 oil painting by Spanish artist Pablo Picasso. It is one of his best-known works, regarded by many art critics as the most moving and powerful anti-war painting in history.

[60] Ibid

a. Treaty Law

i. The Hague Convention of 1907

Organised in 1899 in The Hague, Netherlands, the first Hague Peace Conference was a step towards a permanent international court for the settlement of international disputes. The then US president Teddy Roosevelt called for a second conference on behalf of Czar Nicholas II. Once more, the main issue was not a judicial body to be called upon only in certain situations, but rather the establishing of a permanent international court of arbitration to resolve disputes between governments that would otherwise result in war.[61]

This endeavour also ended in failure; how judges would be selected was an important issue and this problem could not be resolved and also arms limitations went unmentioned in the Czar's conference proposal. The conference met with greater success from the aspect of weapons and rules of war, a result unforeseen by the Czar.[62]

Ten new conventions and one statement were approved in 1907 after the three conventions decided upon at the 1899 meeting were altered. A set of guidelines for land warfare was annexed to Convention II by the 1899 Convention. The same listing was repeated in 1907 under the title "Convention IV Respecting the Laws and Customs of War on Land," and the laws and customs were released as they were in effect in 1907 in the annex of the same name. The 1949 Geneva Conventions were largely based on such laws and conventions, even though Annex IV, now often known as "Hague Regulation IV," had limited provisions for the protection of civilians.[63]

ii. The Four Geneva Conventions of 1949

The Geneva Conventions of August 12, 1949, are four new conventions with 429 articles governing law that were amended and modified by an international conference of diplomats in

[61] Solis GD, The Law of Armed Conflict: *International Humanitarian Law in War* (2nd edition Cambridge University Press 2016) 51
[62] Ibid
[63] Ibid

1949 to broaden upon the previous treaties for the protection of war victims. Any declared war or other armed conflict between nations is subject to the Geneva Conventions. They also apply when forces from another country seize a country, either entirely or in part, even in the absence of armed resistance.[64]

The first Geneva Convention of four with the establishment of the ICRC was ratified in 1864, for the Amelioration of the Condition of the Wounded in Armies in the Field. The second Geneva Convention of 1906 was for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, which was implemented through the Hague Conventions. World War I emphasised the need for the strengthening of protections accorded prisoners of war. Consequently, the third Geneva Convention of 1929 was relative to the Treatment of Prisoners of War.[65]

There are about a dozen common provisions in the 1949 Conventions. These articles were adopted by all four of the 1949 Conventions, as the title implies. In three instances, all four Conventions have these common Articles in precisely the same place. Therefore, Article 1 has the same meaning in all four 1949 Conventions. Other common articles are found in various spots throughout the Conventions and read roughly similarly, though not exactly.[66]

iii. The Two Additional Protocols of 1977 and the Third Additional Protocol of 2005

On 8 June 1977, the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts adopted two Protocols Additional to the 1949 Geneva Conventions.[67] This was the result of nearly ten years of intensive and delicate negotiations. Additional Protocol I protects the victims of international armed conflicts, while Additional Protocol II protects the victims of non-international armed

[64] Solis GD, The Law of Armed Conflict: *International Humanitarian Law in War* (2nd edition Cambridge University Press 2016) 51
[65] Loyd van Dijk, 'Human Rights in War: On the Entangled Foundations of the 1949 Geneva Conventions' (2018) 112 Americab Journal of International Law 553
[66] Raymund T. Yingling & Robert W. Ginnane, 'The Geneva Conventions of 1949' (1952) 46 American Journal of International Law 393
[67] Francois Bugnion, 'Adoption of the Additional Protocols of 8 June 1977: A Milestone in the Development of International Humanitarian Law' (2017) 99 Int'l Rev Red Cross 785

conflicts. These Protocols, which do not replace but supplement the 1949 Geneva Conventions, updated both the law protecting war victims and the law on the conduct of hostilities.[68]

All rules protecting wounded and sick members of the armed forces, shipwrecked people, prisoners of war and civilians in the hands of an enemy power were thoroughly overhauled following the Second World War to take into account the experiences of that terrible conflict. The process culminated with the adoption of the four Geneva Conventions of 12 August 1949, which remain in force today and still form the cornerstone of the protection of war victims. Following World War II, every rule protecting wounded and sick military personnel, shipwrecked people, prisoners of war, and civilians under the control of an enemy power were completely altered to take into account the lessons learned from that conflict. The four Geneva Conventions of August 12, 1949, signified the process's conclusion. [69]

The laws governing the conduct of hostilities, or rules limiting the methods and means of conflict, were largely not altered by the Diplomatic Conference of 1949. Four years after Hiroshima, the Hague Convention relating to the Laws and Customs of War on Land of 18 October 1907, which was ratified during the balloon and airship era, still constituted the majority of the rules governing the means and methods of warfare, especially those pertaining to air.[70]

A group of experts guided the International Committee of the Red Cross in making the ambitious project known as the Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War. The committee was conscious that the rules protecting civilians from the impacts of hostilities needed to be revised. Article 14 of the Draft Rules banned using weapons *"whose harmful effects resulting in particular from the dissemination of incendiary, chemical, bacteriological, radioactive or other agents could spread to an unforeseen degree or escape, either in space or in time, from the control of those who employ them, thus endangering the civilian population"*. The provision amounted to a ban on using nuclear weapons, which led to the failure of the project.[71]

[68] Ibid

[69] Ibid

[70] Ibid

[71] Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War, ICRC,Geneva, 1956.

There is no doubt that the main achievement of the 1974-1977 Diplomatic Conference was the restoration of the traditional principle of immunity of the civilian population against the effects of hostilities, which was dramatically violated during the Second World War and in many subsequent conflicts.[72] After long and difficult debates, the Diplomatic Conference adopted detailed provisions on the protection of civilians and on what may appear to be the other side of the same coin, the definition of combatants and military objectives. A few years ago, the ICRC carried out an in-depth study on customary IHL involving some 100 highly qualified experts from all over the world. The study showed that the provisions of Additional Protocol I relating to the conduct of hostilities and the protection of civilians reflected customary international law, either because those provisions codified pre-existing customary rules or because international customs had crystallized around the wording used in the relevant provisions of Additionl Protocol I. This implies that those provisions are binding upon all States, whether or not they are party to Protocol.[73]

Image V: 1977 Draft stage negotiations on Additional Protocol 1[74]

[72] Francois Bugnion, 'Adoption of the Additional Protocols of 8 June 1977: A Milestone in the Development of International Humanitarian Law' (2017) 99 Int'l Rev Red Cross 785

[73] Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War, ICRC,Geneva, 1956.

[74] https://blogs.icrc.org/cross-files/drafting-history-1977-additional-protocols/

b. Customary Law

The internationally recognized processes of creating law along with the forms of its subsequent existence constitute the characteristic element of international law as an institutional entity. Custom is one of the law-creating procedure that also serves as one of the forms of existence of international legal norms. In other words, it is one of the sources of international law in a legal sense.[75]

From a theoretical perspective, it may be argued that law in general and international law in particular cannot exist as a distinct normative phenomenon without the official recognition of certain law-creating processes that are relevant forms of expression. Custom is created by the practice of States and continues to exist and operate as a norm based on the practice. For this reason, the ascertainment of the existence and content of customary rules in most cases is closely connected with the analysis of the process of their origin. The generally recognized normative definition of the notion of custom is provided by Article 38 of the Statute of the International Court of Justice. According to Article 38, the Court applies *"international custom, as evidence of a general practice accepted as law"*.[76]

In the assessment of State practice, two separate issues need to be addressed, namely the selection of practice that contributes to the creation of customary international law and the assessment of whether this practice establishes a rule of customary international law.[77]

Both physical and verbal acts of States constitute practice that contributes to the creation of customary international law. Physical acts include, for example, battlefield behaviour, the use of certain weapons and the treatment provided to different categories of persons.[78] Verbal acts include military manuals, national legislation, national case law, instructions to armed and security forces, military communique during the war, diplomatic protests, opinions of official legal advisers, comments by governments on draft treaties, executive decisions and regulations, pleadings before international tribunals, statements in international organisations and at

[75] Gennady M. Danilenko, 'The Theory of International Customary Law' (1988) 31 German Yearbook of International Law 9
[76] Gennady M. Danilenko, 'The Theory of International Customary Law' (1988) 31 German Yearbook of International Law 9
[77] Jean-Marie Henckaerts and Louise Doswald-beck , Customary International Humanitarian Law (2nd edn, ICRC 2005)
[78] Ibid

international conferences and government positions taken with respect to resolutions of international organisations.[79]

The International Law Commission has similarly considered verbal acts of States as contributing towards the creation of customary international law. It did so, for example, in the context of the Draft Articles on State Responsibility where it considered the concept of a "state of necessity" to be customary.[80]

The International Criminal Tribunal for the Former Yugoslavia has stated that in appraising the formation of customary rules of international humanitarian law, *"reliance must primarily be placed on such elements as official pronouncements of States, military manuals and judicial decisions"*[81]

c. General Principles

Unlike human rights law, the law of war tolerates, the killing and wounding of innocent human beings not directly participating in an armed conflict, such as civilian victims of lawful collateral damage. It also permits certain deprivations of personal freedom without convictions in a court of law. It allows an occupying power to resort to internment and limits the appeal rights of detained persons. It permits far-reaching limitations of freedoms of expression and assembly. The law of armed conflict regulates aspects of a struggle for life and death between contestants who operate on the basis of formal equality.[82]

The field of international law that seeks to limit the damage and suffering brought on by armed conflict is known as international humanitarian law. It states that *"the right of belligerents to adopt means of injuring the enemy is not unlimited,"* under Article 22 of the Hague Regulations.

[79] Ibid
[80] Ibid
[81] ICTY, Tadic case , Case No. IT-94-AR72, Decision on the defence motion for interlocutory appeal on jurisdiction, 2 October 1995, § 99.
[82] M. Cherif Bassiouni, 'A Functional Approach to General Principles of International Law' (1990) 11 Michigan Journal International Law 768

In order succeed in this goal of reducing the impact of armed conflicts, a set of comprehensive and critical principles is essential.[83]

III. KEY CONCEPTS

1. Environmental Law

As in other areas of law, religious or ethical beliefs may motivate individuals and pressure governments for environmental protection. An additional basis for action at the international level is the desire to protect interstate disputes over depleted or scarce resources consequent to incidents of transfrontier pollution.[84]

Environmental ethicists construct environmental protection around concepts of equity and justice, as seen in three sets of relationships: among existing persons, between present and future generations, and between humans and other species. Concern for humanity with long-term human survival also underlies many legal and social norms and may be grounded in a genetic or biological imperative. Interest in the survival of the human species requires that "humanity" be seen to include not only present but also future generations. From these various origins, concern for the environment has emerged.[85]

The first international agreements dealt with shared living resources and appeared only in the 19th century with the conclusion of international fishing treaties and agreements to protect various plant species. The primary purpose of the agreements was to sustain the harvesting of economically valuable species. This required international action because many of the species were migratory or they were located in areas outside national boundaries, such as on the high seas.[86]

After World War II, the international community responded to specific environmental threats caused by technological change and expanded economic activities. The growing use of supertankers to transport oil by sea led to the first efforts to combat marine pollution during the

[83] Thedor Meron , Development and Principles of International Humanitarian Law (Martinus Nijhoff 1985).
[84] Elli Lauka, International Environmental Law-Fairness, Effectiveness, and World Order (1nd edn, Cambridge University Press 2006)
[85] Ibid
[86] Bruce A. Ackerman & Richard B. Stewart, 'Reforming Environmental Law' (1985) 37 Stanford Law Review 1333

1950s. The utilization of nuclear energy led to other international regulations. A 1963 treaty, for example, restricted some military uses of radioactive materials.[87]

The Stockholm Conference adopted texts of lasting importance during a closing plenary session, notably the Stockholm Declaration on the Human Environment, adopted on June 16, 1972, by acclamation, an “Action Plan” containing 109 recommendations and a long resolution proposing institutional and financial commitments by the United Nations. These were the first comprehensive statements of international concern with environmental protection.[88]

Since then, the number of international legal instruments that concern the environment has increased significantly, to the point where people are currently focused on creating new ways to organize the negotiation and execution of related agreements, in particular their financial, administrative, and surveillance provisions.[89]

Negotiations on a number of international environmental agreements were sparked by the "transboundary effects" of environmental contamination in individual nations throughout the 1980s. The 1986 Chernobyl nuclear power plant catastrophe in the Soviet Union had particularly serious repercussions. European nations that were in the downwind route of the pollution were compelled to enact policies limiting the amount of water, milk, meat, and vegetables that their citizens could consume. Radiation traces were discovered in both human breast milk and cow's milk in Austria.[90]

Two international agreements, the Convention on Early Notification of a Nuclear Accident and the Convention on Assistance in the Case of Nuclear Accident or Radiological Emergency, were hastily drafted in 1986 to ensure notification and support in the case of a nuclear catastrophe as an immediate outcome of the Chernobyl disaster. In the decade that followed, a 1994 Convention on Nuclear Safety created incentives for nations to embrace fundamental guidelines for the secure operation of nuclear power facilities located on land.[91]

[87] Ibid
[88] Edith Brown Weiss, 'International Environmental Law: Contemporary Issues and the Enmergence of a New World Order' (1993) 81 Georgetown Law Journal 675
[89] Ibıd
[90] Sam Emmerechts, 'Environmental Law and Nuclear Law: A Growing Symbiosis' (2008) 82 Nuclear Law Bulletin 91
[91] Ibid

The World Meteorological Organization and UNEP organized the Intergovernmental Panel on Climate Change in 1995 to analyze fluctuations in temperatures on Earth, and the panel arrived at a finding that *"the balance of evidence suggests a discernible human influence on global climate."* The study was criticized by other groups for relying on insufficient data, underestimating the environmental consequences of global warming, and utilizing inaccurate models of climate change, yet being promoted by environmentalists as conclusive evidence of the fact of global warming. The Kyoto Protocol, including legally enforceable emission reduction goals for high-income countries, was adopted by a summit of Framework Convention on Climate Change signatories in Kyoto, Japan, two years later. In order to reach their emissions targets, developed nations were allowed by the protocol to get involved in emissions trading. The sale of "emission reduction units," which are obtained when a developed country reduces its emissions below its commitment level, to developed countries who have fallen below their emission targets served as one of its market mechanisms.[92]

Over the years, and particularly after the 1997 Kyoto Protocol turned the United Nations Framework Convention on Climate Change (UNFCCC) distinction between Annex I and non-Annex I countries into a so called a 'Chinese wall' between countries with and countries without quantified obligations, the main challenge facing the climate change regime has been to bring major developing countries such as China, India, Brazil, South Africa, Indonesia, South Korea and Mexico under some form of emission reduction commitments comparable to those applicable to developed countries.[93]

Indeed, non-Annex I countries have no quantified emission reduction obligations under the Kyoto Protocol, which has made it politically difficult for developed countries, and in particular the United States, to enter the negotiations. As a result, by 2012, commitments under the Kyoto Protocol covered only 24 per cent of global annual emissions while the main emitters, including China and the United States, which account for about 40 percent of global annual emissions, had no quantified emission reduction commitments.[94]

One of the main goals of the Paris Agreement is to keep the increase in global average temperature to well below 2°C above pre-industrial levels. In other words, this is the amount

[92] Anastasia Telesetsky, 'The Kyoto Protocol' (1999) 26 Ecology Law Quartely 797
[93] Jorge E. Vinuales, 'The Paris Agreement on Climate Change' (2016) 59 German Yearbook of International Law 11
[94] Ibid

of climate change that is believed to be endurable, rather than catastrophic. Because of the dangers of even this amount of global temperature increase, efforts are often focused on actually limiting the temperature rise to 1.5°C.[95]

The Paris Agreement also covers many other related topics, each of which relates to causes, consequences, or concomitant issues related to climate change and the overall goal of limiting global temperature increase to under 2°C. Article 7 of the Paris Agreement includes the goals of enhancing adaptive capacity, strengthening resilience, and reducing vulnerability to climate change.[96] Article 8 includes the development and use of early warning systems, emergency preparedness, and risk management to help address the impacts of climate change weather events.[97] Article 9 addresses financial aspects of the Paris Agreement: the costs associated with both climate change effects and ameliorating those effects as per the Paris Agreement are already large, difficult to manage, and still growing.[98]

2. Human Rights Law

Political conflicts that drew on natural law and liberal notions of rights led to the United States Declaration of Independence, which was followed by the Bill of Rights and the French Declaration of the Rights of Man and of the Citizen. The French Declaration placed more emphasis on the rights to liberty, property, security, and resistance to oppression than the American Declaration did on the rights to life, liberty, and the pursuit of happiness. Both statements significantly impacted international human rights legislation, especially the Universal Decleration on Human Rights (UDHR). As more and more emphasis was placed on the concepts of rights and freedom to support demands for equality, liberty and self-determination, the American and French declarations gained symbolic significance and became important reference points.[99]

[95] Ibid
[96] Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104. Art. 7
[97] Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104. Art. 8
[98] Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104. Art. 9
[99] Ibid

After World War II, the United Nations (UN) officially established human rights as part of international law in 1945 with the adoption of the UN Charter, one of its founding documents. According to Article 1(3), the goals of UN included advancing and strengthening fundamental freedoms and human rights.[100]

The UN has held a significant part in standard setting since 1945, which includes drafting treaties and other agreements that lay out broadly recognized human rights. Naturally, the adoption of the Universal Declaration on Human Rights (UDHR) in 1948 is its most well - known act. A number of treaties protecting different human rights proceeded.[101]

In order to supervise and observe the enforcement of human rights, the UN has also established a number of internal organizations. Political organizations like the Human Rights Council and its predecessor, the Commission on Human Rights, emerged under the guidance of the UN Charter. Under the fundamental UN human rights treaties, there are treaty bodies that keep an eye on how their specific treaties are being interpreted and applied.[102]

The importance of the universal and unprejudiced application of human rights is recognised in the non-discrimination provisions of the UN Charter, the UDHR and all subsequent human rights treaties and declarations. In accordance with common views of human rights obligations, the capacity of a state to be held liable for violation of human rights depends not only on the actions of state but also on the location of the violations as well as the nationality of those harmed.[103]

A movement for the founding an internationally recognised jus commune[104] of human rights has received more attention during the 1990s. As a result of more frequent cross-references between international and domestic courts interpreting provisions which are found in different treaties or domestic constitutions but are similarly worded and share inspiration from the Universal Declaration on Human Rights, this common law emerged. This progress has been fostered by several reasons. The content and background of the legal norms themselves tend to

[100] Joseph S. And Macbeth A, *Research Handbook on International Human Rights La*w (1st edn, Edward Elgar 2010)
[101] Ibid
[102] De Schutter O, International Human Rights Law Cases, Metarials, Commentary. (1st edn, Cambridge University Press 2020)
[103] Ibid
[104] Jus commune or ius commune is Latin for "common law" in certain jurisdictions. It is often used by civil law jurists to refer to those aspects of the civil law system's invariant legal principles, sometimes called "the law of the land" in English law.

be the most crucial factors. A comparison of the liberal constitutions of the Western countries led to the creation of the Universal Declaration of Human Rights.[105]

All states have a responsibility to maintain internationally accepted human rights, regardless of whether they have ratified any relevant treaties that have multiplied at the regional and international levels since the 1950s. In this regard, it is possible to interpret the Universal Declaration of Human Rights as just elaborating on the meaning of the UN Charter's provisions that refer to human rights as an objective that the Organization and its Member States shall pursue. In particular, Article 55 of the Charter imposes on the United Nations the duty to promote universal respect for and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion; under Article 56, all Members of the United Nations undertake to take joint and separate action in co-operation with the Organisation for the realisation of the purposes set forth in Article 55.

Although it is acknowledged that the UN Charter requires all of the member states of Organisation to guarantee human rights, in practice, this obligation only applies to states and UN bodies and not to all other issues of international law. However, because they are either a component of customary international law or general legal norms, human rights have been acknowledged as binding on all subjects of international law as part of general international law, despite the fact they are codified in international treaties.[106]

Two arguments are traditionally put forward in order to justify the view that human rights occupy a hierarchically superior position among the norms of international law. First, Article 103 of the UN Charter provides that *"In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.".*[107] Since one of the purposes of the UN Charter is to ensure international cooperation in the promotion and protection of respect for human rights and fundamental freedoms for all without distinction and since Article 56 of the Charter expressly imposes an obligation both on the Organisation itself and on Member States to contribute to the fulfilment of this purpose, it

[105] Ibid

[106] Joseph S and McBeth A, Research Handbook on International Human Rights Law (1st edn, Oxford Univerity Press 2022)

[107] Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI art 103

follows that any international obligation that conflicts with the obligation to promote and protect human rights must be set aside.[108]

Secondly, norms of international law (customary law, treaties and treaties as expressed in Article 38(1) of the Statute of the ICJ) are not hierarchised. Regarding the law of treaties, the Vienna Convention on the Law of Treaties says that any treaty that breaches a general international law standard at the time of its conclusion is void and unenforceable. A peremptory norm of general international law is defined as a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.[109]

According to current judicial practice, *jus cogens* norms are those that guarantee the protection of two fundamental interests of the international community: the protection of certain fundamental human rights and the preservation of the fundamental prerogatives of the States, the community's primary subjects, whose essential prerogatives are upheld by the recognition of their equal sovereignty and the prohibition of the use of force under circumstances other than those permitted by the UN Charter.[110]

4. The Martens Clause

The Martens Clause, proposed by the distinguished jurist F. F. de Martens, the Russian delegate to the Hague Peace Conference, has ancient antecedents rooted in natural law and gentlemanly behaviour.[111]

As formulated in 1899, the Martens clause read; *"Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established*

[108] Ibid

[109] Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980) art 53

[110] De Schutter O, International Human Rights Law Cases, Metarials, Commentary. (1st edn, Cambridge University Press 2020)

[111] Theodor Meron, *'The Martens Clause, Principles of Humanity, and Dictates of Public Conscience'* (2000) 94 American Journal of International Law 78

between civilized nations, from the laws of humanity, and the requirements of the public conscience."[112]

The Nuremberg jurisprudence, the International Court of Justice, human rights organizations, and numerous humanitarian law treaties that govern the instruments and methods of warfare have all cited the Martens clause in the years since it was first drafted. The Martens Clause was restated in the 1949 Geneva Conventions for the Protection of Victims of War, the 1977 Additional Protocols to those Conventions, and the Preamble to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons, albeit in slightly different versions. Moreover, attempts have recently been made, including by parties before the International Court of Justice, to invoke the clause, in the absence of specific norms of customary and conventional law, to outlaw the use of nuclear weapons. Furthermore, there have been recent attempts at using the article to outlaw the use of nuclear weapons in the absence of specific provisions of conventional and customary law, notably by parties before the International Court of Justice.[113]

The clause was originally intended to maintain humanitarian principles to safeguard the people of occupied territory, particularly armed resisters. Since then, there has been an accepted notion that the Martens clause governs every aspect of international humanitarian law. In their denunciation provisions, the Geneva Conventions utilise a version of the Martens provision for a slightly different but parallel purpose. It makes it clear that, in the event of a denunciation of the Conventions, the parties are bound by the principles of the law of nations deriving from the established customs among civilised peoples, the laws of humanity and the dictates of public conscience.[114]

This article ensures that international customary law remains applicable for states that are no longer bound by the Geneva Conventions as treaty law. The status of the Geneva Conventions as customary law has been confirmed by the International Court of Justice and is hardly ever contested.[115]

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[112]Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (adopted 29 July 1899, entered into force 4 September 1900)
[113]Theodor Meron, *'The Martens Clause, Principles of Humanity, and Dictates of Public Conscience'* (2000) 94 American Journal of International Law 78
[114] Jeffrey Kahn, 'Protection and Empire: The Martens Clause, State Sovereignty, and Individual Rights' (2016) 56 Virginia Journal of International Law 1
[115] Theodor Meron, *'The Martens Clause, Principles of Humanity, and Dictates of Public Conscience'* (2000) 94 American Journal of International Law 78

Dictates of public conscience can be examined from at least two perspectives. First, they can be seen as public opinion that shapes the conduct of the parties to a conflict and promotes the development of international humanitarian law, including customary law. Second, dictates of public conscience can be seen as a reflection of *opinio juris*. Although popular opinion, the *vox populi* may be different from the opinion of governments, which constitutes *opinio juris*, the former influences and helps to form the latter. Both aspects of the dictates of public conscience have been recognized by diplomats and judges.[116]

5. The Principle of Distinction

The *Law of War*, including the concept of distinction, exists first and foremost for the benefit of the combatant, although the protected are an obvious beneficiary. It is *the Law of War* that permits the combatant to commit acts that would otherwise be prohibited. For example, under the concept of distinction, a soldier who limits his intentional attacks to the targetable is immune from prosecution for the results of those attacks.[117]

Distinction is the cornerstone of the Law of War. It is fundamental: combatants are lawful targets during times of war while civilians are protected. Like all legal concepts, however, distinction must be constantly refined and updated to remain relevant and practicable to the modern soldier. Towards that end, the International Committee of the Red Cross (ICRC) has published an impressive study on the rules governing the *Law of War*, beginning with a detailed discussion on distinction.[118]

In armed conflicts, the belligerent may use only the amount and type of force necessary to defeat the enemy. Acts of war are only authorised if they are directed against military objectives, do not cause unnecessary suffering and are not malicious. In international armed conflicts, international humanitarian law explicitly recognises and defines protected individuals as persons who are not or can no longer participate directly in hostilities. This category of protected persons involves wounded, sick, and shipwrecked prisoners of war, as well as civilians. There are no formal categories of protected individuals in non-international

[116] Ibid
[117] Mark David Maxwell & Richard V. Meyer, 'The Principle of Distinction: Probing the Limits of Its Customariness' (2007) 2007 Army Law 1
[118] Ibid

armed conflict. Nonetheless, the applicable international humanitarian law provides material protection to people who do not continue to engage in hostilities.[119]

International humanitarian law grants special protection to certain groups of persons, women, children, refugees, displaced persons, missing persons, medical and religious personnel, humanitarian relief personnel, journalists, pregnant mothers and personnel involved in peace keeping missions are who entitled to protection under the civilian category of international humanitarian law.[120]

International law regarding persons taking part in or affected by an international armed conflict makes a fundamental distinction between combatants, who have become legitimate military objectives and civilians, a distinction being a leading principle and an unchangeable bottom line in international humanitarian law applicable in international armed conflicts. This distinction concludes the international legal status of the two categories.[121]

First of all, the significance of the military objectives and civil objects should be clearly observed. The boundary between military objectives and civil objectives remains a critical problem. Referring to Article 52 of Additional Protocol I (AP I) of the Geneva Conventions (GC). Article 52 of AP I first demand military objectives to be objects which by their nature, location, purpose or use make an effective contribution to military actions.[122]

Military objectives generally include armed forces, military aircraft and warships, buildings and objects for combat service support and commercial objectives which make an effective contribution to military action. The ICRC (International Committee on Red Cross) and Diplomatic Conference employ an abstract definition in order to limit the scope of the term military objective. At the heart of the category of military objectives are the armed forces of the adversary, including all military auxiliary organisations and paramilitary units fighting side by side with regular armed forces as well the regular units of the army, navy, air force, all militia and other groups who fight for the enemy. This includes any part of the population in the non-occupied territory on the approach of the foe, spontaneously taking up arms to defend

[119] Mark David Maxwell & Richard V. Meyer, 'The Principle of Distinction: Probing the Limits of Its Customariness' (2007) 2007 Army Law 1
[120] Ibid
[121] Noelle Quenivet, 'The War on Terror and the Principle of Distinction in International Humanitarian Law' (2010) 3 ACDI 155
[122] Mark David Maxwell & Richard V. Meyer, 'The Principle of Distinction: Probing the Limits of Its Customariness' (2007) 2007 Army Law 1

the invading force and guerrilla forces in occupied territories. Lawful combatants include paramilitary and armed law enforcement agencies which are incorporated with equipment serving for combat purposes namely warships and military aircraft.[123]

The installations and objects for immediate combat service support of a military nature such as barracks, fortifications, staff buildings, military command and control centres, military airfields, part facilities of the Navy, Ministries of a military nature for instance national defence, installations for supply service are traditional military objectives. Buildings and objects for combat service support have an additional layer of mean in which arose problematic consequences in delimitation rather than in cases dealing with buildings of obvious military function.[124]

The most delicate distinction is between permissible military objectives and civilian objects concerning the commercial aspects which makes an effective contribution to the military action. The list of ICRC includes means of communication, broadcasting networks, television stations, telephone and telegraph installations and all these are of fundamental military importance industries with importance to conduct war.[125]

The civilian elements are protected against all forms of attack. They are prohibited from firing or shelling, even for the purpose of terrorising the civilian population, unless they are directly involved in hostilities. Attacking civilian objects in retaliation is also restricted. The principle of the non-combatant army is the logical meaning of the basic principle of limited war. This principle makes the distinction between military and civilian objects. Under “military necessity”, the civilian population or individual civilians are not permissible objects to be attacked. The terror attack too has to be considered as grave breaches in the war crimes. The Yugoslav or the Serbian Army has repeatedly made terror attacks on civilian population during war in Croatia in 1991, Soviet warfare in Afghanistan during the 1980s, Iraqi attacks with “Scud” missiles on Saudi Arabia and Israeli cities during the Kuwait war in 1991 are the recent examples for blatant illegitimate belligerent practices.[126]

[123] Mark David Maxwell & Richard V. Meyer, 'The Principle of Distinction: Probing the Limits of Its Customariness' (2007) 2007 Army Law 1
[124] Ibid
[125] Ibid
[126] Carey J, Dunlap WV and Pritchard RJ, International Humanitarian Law: Origins, Challenges adn Prospects (1st edn. BRILL, 2006)

All the Geneva Conventions and the two Additional Protocols refer to absolute protection for medical and religious personnel, hospital ships, and religious places like churches, temples and mosques as in articles 19 and 24 of Geneva Convention I, regarding military hospitals, military medical personnel and chaplain attached to the armed forces, this is extended by articles 12 and 15 of Additional Protocol I to civilian medical and religious personnel. Hospital ships already enjoy this privilege under the Hague Conventions of Hospital Ships of 1904.[127]

Another argumentative category protection of the objects indispensable for the survival of the civilian population has emerged. In international customary law, this is not recognized in the principle of proportionality and sets boundaries of attacks on such objects where the damage and destruction logically load to significant grave sufferings for the civilian as a whole or individually; some common examples are food stuff, agricultural areas for the production of food, live stocks, drinking water installations like water tanks, supplies and irrigation works.[128] It is restricted even to attack, remove, to destroy or to render useless objects indispensable for the survival of civilians, rendering useless acts like deliberate pollution through chemicals or water reservoirs or contamination of crops by defoliants.[129]

6. The Law of Self-Defence

The use of force by a state for self-defence has long been protected by customary international law. But even though it dates back to letters exchanged between the United States and United Kingdom governments regarding the Caroline incident in 1837, its significance in the 19th century was constrained by the fact that, at the time, international law acknowledged a broad right to use force.[130]

The importance of self-defence in contemporary international law derives from its position as the principal exception to the general prohibition of the use of force enshrined in Article 2(4) UN Charter. That provision requires all Members of the United Nations to '*refrain in their international relations from the threat or use of force against the territorial integrity or*

[127] Mark David Maxwell & Richard V. Meyer, 'The Principle of Distinction: Probing the Limits of Its Customariness' (2007) 2007 Army Law 1
[128] Ibıd
[129] *International Humanitarian Law: Answers to Your Questions* (International Comitee of the Red Cross 2014)
[130] *International Humanitarian Law: Answers to Your Questions* (International Comitee of the Red Cross 2014)

political independence of any State, or in any other manner inconsistent with the purposes of the United Nations'.[131]

Chapter VII of the UN Charter authorises the UN Security Council to impose sanctions, including military measures, if it determines that there is a threat to the peace, breach of the peace or act of aggression. However, these provisions are not intended to abrogate the right of States to use force in self-defence, at least until the UN Security Council exercises its collective security powers.[132]

Although Articles 2(4) and 51 of the UN Charter are couched in terms of the rights and obligations of members of the UN, it is now generally accepted that, in almost all respects, they reflect rules of customary international law which are equally applicable to all States, irrespective of whether they are Members of the UN.[133] An exception is the procedural provision in Article 51 UN Charter, which requires that States report to the Security Council measures taken in self-defence.[134]

It is generally considered that, for a resort to force to constitute a lawful exercise of the right of self-defence, it must meet the following conditions: it must be a response to an armed attack; the use of force, and the degree of force used, must be necessary and proportionate; and it must be reported to the Security Council and must cease when the Security Council has taken measures necessary to maintain international peace and security.[135]

7. Principle of Proportionality

The principle of proportionality protects individuals and civilian objects against harm resulting from an attack that is excessive in relation to the military advantage expected from the attack. Although a core principle of international humanitarian law (IHL), important phrases are not specified in relevant treaties and have not received significant judicial explanations. This has

[131] Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI art 2/4
[132] Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI art 51
[133] Bowett DW, *Self-Defence in International Law* (1st edn, Lawbook Exchange 2009)
[134] Ibid
[135] Bowett DW, *Self-Defence in International Law* (1st edn, Lawbook Exchange 2009)

made it difficult to explain and apply the proportionality criteria to both academics and military leaders.[136]

Military commanders are prohibited from planning or executing such indiscriminate attacks. The principle of proportionality is accepted as a norm of customary international law applicable in both international and non-international armed conflict. The test for proportionality has been codified in Additional Protocol I. The relevant provisions of Additional Protocol I prohibit attacks that: *"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."*[137]

The Rome Statute classifes disproportionate attacks as a war crime, if committed during an international armed conflict, and prohibits *"intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated*."[138] Altogether, the principle of proportionality is widely understood to constitute part of customary international law.[139]

8. The Principle of Necessity

The international legal regulation of armed conflict necessarily involves a limitation on the sovereign capacity of States to use force in defence of their interests. Historically, the principle of necessity has been of fundamental importance in striking a balance between the practical realities of the use of force and the desire for legal limitations. The idea of military necessity derives essentially from the right of a State to take measures to defend its vital interests, but in

[136] Ian Henderson & Kate Reece, 'Proportionality under International Humanitarian Law: TheReasonableMilitary Commander Standard and Reverberating Effects' (2018) 51 Vanderbilt Journal Transnational Law 835
[137] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts Arts. 51, 57, June 8, 1977
[138] Rome Statute of the International Criminal Court, Jul. 17, 1998, art. 8.2(b)(iv), 2187 U.N.T.S. 90 (1998).
[139] Cogen A and Zlotogorski D, *Proportionality in International Humanitarian Law: Consequences, Precautions, and Procedures* (1st edn, Oxford University Press 2021)

the case of measures of use of force, this right is now fully circumscribed in modern *jus ad bellum*.[140]

The Lieber Code contains the classic definition of the military necessity principle: *"military necessity, as understood by modem civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modem law and usages of war."*[141]

In international law, the right to resort to force is substantially limited and its notification is regulated by reference to the combination of Articles 2(4) and 51 of the United Nations Charter. he degree of force that may be permissible in certain circumstances is related to the requirements of defence, and to this extent, jus ad bellum may interact directly with *jus in bello*.[142]

Jus in bello is traditionally categorised into Hague rather than Geneva categories, dealing respectively with the means and methods of warfare and the protection of victims of armed conflict. It is certainly the case that questions of necessity may arise more sharply in The Hague than in Geneva, but the concept is in fact found in both sub-categories and is a subject that is extensively referred to, for example, in the 1977 Protocol I to the 1949 Geneva Conventions.[143]

It is generally acknowledged that military necessity operates as a balance against humanitarian considerations and that this balance represents the overall framework of international humanitarian law. It can also be observed between humanity and military necessity can also be seen in certain specific rules of international humanitarian law. For example, Article 54(2) of the First Additional Protocol prohibits attacks against objects indispensable for the survival of the civilian population. Additional Protocol I Article 54(5) then goes on to state: *"In recognition of the vital requirements of any Party to the conflict in the defence of its national territory against invasion, derogation from the prohibitions contained in paragraph 2 may be made by*

[140] H. McCoubrey, 'The Nature of the Modern Doctrine of Military Necessity' (1991) 30 Military of Law & Law of War Rev 215

[141] Instructions for the Government Armies of the US in the Field, prepared by Francis Lieber, promulgated as General Orders No 100 by President Lincoln, 24 April 1863, art 14, reprinted in Dietrich Schindler and Jiri Toman, The Laws of Armed Conflict: A Collection of Conventions, Resolutions and Other Documents (4th edn, Martinus Nijhoff 2004) 3. For its modem incarnation, see UK Ministry of Defence, The Manual of the Law of Armed Conflict (Oxford University Press 2004) 21-22.

[142] Weiden, P.L. (1939) *Necessity in international law*. London: Grotius Society.

[143] H. McCoubrey, 'The Nature of the Modern Doctrine of Military Necessity' (1991) 30 Military of Law & Law of War Review 215

a Party to the conflict within such territory under its own control where required by imperative military necessity."[144] [145]

The theory of military necessity may be effectively divided into two main categories: those relating the fundamental basis of the idea, and those involving the details of its substance and implementation. The second division calls for an assessment of the recognition of military necessity contained in both judicial or quasi-judicial rulings and treaty provisions.[146]

There are two main perspectives on the role of necessity in the law of armed conflict. On the one hand, the normative regulation by *jus in bello* can be seen as a sphere of control that gradually reduces the legitimate scope of the previously unlimited potential for State action in war, with the remaining space covered by the concept of military necessity.[147]

There are two main perspectives on the function of necessity in the law of armed conflict. On the one hand, the normative regulation of jus in bello can be seen as a sphere of control that gradually reduces the legitimate scope of the previously unlimited space for State action in war; the controlled space is covered by the concept of military necessity. On the other hand, military necessity can also be interpreted as the recognition of a legal defence in circumstances where a specific legal regulation is absent or incomplete.[148]

9. The Prohibition of the Use of Weapons that Cause Unnecessary Suffering or Superfluous Injury

The prohibition of methods and means of warfare that cause unnecessary suffering is enshrined in many treaties, including such ancient documents as the Saint Petersburg Declaration and the Hague Regulations. The prohibition of the use of chemical and biological weapons, as set out in the Geneva Protocol on Gases, is essentially inspired by this rule. In particular, the re-statement of this rule in Additional Protocol I, the Convention on Conventional Weapons and its Protocol II, as well as in the Ottawa Convention and the Statute of the International Criminal

[144] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts Arts. 54(5), 57, June 8, 1977
[145] Lawrence Hill-Cawthorne, 'The Role of Necessity in International Humanitarian and Human Rights Law' (2014) 47 Israel Law Review 225
[146] Ibid
[147] Weiden, P.L. (1939) Necessity in international law. London: Grotius Society.
[148] Ibid

Court in the event of the amendment of Protocol II there, demonstrate that this prohibition is valid.[149]

The prohibition of means of warfare that cause unnecessary suffering depends on the effect of a weapon on combatants. While there is general acceptance of the existence of this rule, there are differences of opinion as to how to determine whether a weapon causes suffering. States generally agree that suffering that is not for a military purpose constitutes a violation of the rule. According to many States, the rule is to strike a balance between military necessity on the one hand and the injuries that may be caused to a person and the expected suffering on the other. Thus, any injury or suffering that is disproportionate to the military advantage hoped for, and thus considered excessive, would constitute a breach of the rule. Some States argue that the availability of other means is also a factor to be taken into account in assessing whether a weapon causes excessive suffering.[150]

Closely linked to this issue is the problem of weapons that inevitably cause death. The preamble of the Saint-Petersburg Declaration states that the use of such weapons *"would be contrary to the laws of humanity"*, and it was this consideration that led to the prohibition of explosive bullets in the same declaration.[151] The prohibition of methods of warfare that cause undue suffering was first codified in Additional Protocol I. In adopting the Ottawa Convention and the Convention on Conventional Weapons, States relied on the prohibition of the use of weapons, ammunition or materials that cause unnecessary suffering. The Statute of the International Criminal Court includes among war crimes the use of methods of warfare that cause unnecessary suffering and extreme pain.[152]

[149] Emily Crawford, 'The Enduring Legacy of the St Petersburg Declaration: Distinction, Military Necessity, and the Prohibition of Causing Unnecessary Suffering and Superfluous Injury in IHL' (2018) 20 Journal of Historical International Law 544

[150] Ibid

[151] U.C. Jha, 'Prohibited Weapons in Armed Conflicts' (2004) 4 ISIL Yearbook International Human & Refugee Law 56

[152] Emily Crawford, 'The Enduring Legacy of the St Petersburg Declaration: Distinction, Military Necessity, and the Prohibition of Causing Unnecessary Suffering and Superfluous Injury in IHL' (2018) 20 Journal of Historical International Law 544

10. Prohibition on the Use of Weapons of Indiscriminate Impact

According to the practice of States, this rule constitutes a norm of customary international law applicable in both international and non-international armed conflicts. Weapons that strike indiscriminately are weapons that cannot be directed against a specific military target or whose effects cannot be limited as prescribed by international humanitarian law. The prohibition of these weapons is supported by the prohibition of indiscriminate attacks in general.[153]

Additional Protocol I, prohibits the use of weapons that indiscriminately strike civilian persons or civilian property and military targets. This prohibition is reiterated in the Statute of the International Criminal Court. Many military instructions and official statements refer to weapons that *'strike indiscriminately'*, weapons that *'strike indiscriminately between military targets and civilian populations'*, or weapons that 'cannot distinguish between military targets and civilians', without further elaboration.[154]

Apart from such a general approach, the two most frequently applied criteria are the ability of a weapon to be directed against a military target and the ability to limit its effects in accordance with the requirements of international humanitarian law. Both of these criteria are set out in Additional Protocol I: Article 51/4/b prohibits weapons that cannot be directed against a specific military target, while Article 51/4/c prohibits weapons whose effects cannot be limited in the manner prescribed by the Protocol.[155]

11. Prohibition of the Use of Poison or Poisonous Weapons

The prohibition of the use of poison or poisonous weapons is an old rule of customary international law, enshrined in the Lieber Code and the Hague Regulations. According to the Statute of the International Criminal Court, the use of poison and poisonous weapons constitutes a war crime in international armed conflict.[156]

[153] Jordan J. Paust, 'Controlling Prohibited Weapons and the Illegal Use of Permitted Weapons' (1983) 28 McGill Law Journal 608
[154] Ibid
[155] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts Arts. 51, June 8, 1977
[156] Nebojsa Raicevic, 'The History of Prohibition of the Use of Chemical Weapons in International Humanitarian Law' (2001) 1 Facta Universitatis, Series: Law & Politics 613

The Statute of the International Criminal Court, in its sections on non-international armed conflicts, does not include a provision on the use of poison or poisonous weapons as a war crime, and this issue was not explicitly discussed at the Rome diplomatic conference. Some of the implementing acts of the Statute of the International Criminal Court have therefore limited the application of the rule that the use of poison or poisonous weapons constitutes a war crime in international armed conflicts.[157]

The rule is applicable to non-international armed conflicts, or its application is found in some military directives. Many military directives explain the prohibition of the use of poison or poisonous weapons in armed conflict on the grounds that they are ‘inhumane’ or ‘indiscriminate-striking’ weapons, which may well apply to non-international armed conflicts.[158] The application is appropriate for the rule to apply to international as well as non-international armed conflicts, as States do not generally possess a body of military weapons that differs depending on whether the conflict is international or non-international.[159] There are no confirmed reports of the use of poison or poisonous weapons in international or non-international armed conflicts.[160]

IV. CASE BEFORE THE COURT: ADVISORY OPINION ON THE LEGALITY OF THE THREAT OR USE OF NUCLEAR WEAPONS

1. Overview

a. Nuclear Weapons

Nuclear weapons are the most dangerous weapons on Earth. One can demolish an entire city, potentially killing millions and endangering the natural ecosystem and future generations' lives due to the long-term detrimental impacts. The risks of such weapons are inherent in their very nature. Although nuclear weapons have only been used in combat twice, following the 1945 bombings of Hiroshima and Nagasaki, there are currently estimated to be 13,400 nuclear

[157] John Norton Moore, 'Ratification of the Geneva Protocol on Gas and Bacteriological Warfare: A Legal and Political Analysis' (1972) 58 Virginia Law Review 419
[158] Paul G. Cassell, 'Establishing Violations of International Law: Yellow Rain and the Treaties Regulating Chemical and Biological Warfare' (1983) 35 Stanford Law Review 259
[159] Ibid
[160] William V. O'Brien, 'Biological/Chemical Warfare and the International Law of War' (1962) 51 Georgetown Law Journal 1

weapons in the globe, with over 2,000 nuclear tests conducted to date. Disarmament is the best defence against such threats, but accomplishing it has proven extraordinarily difficult.[161]

A nuclear weapon is a device which employs nuclear fission, nuclear fusion, or a combination of the two processes to release energy in a catastrophic way. Atomic warheads are a usual term applied to refer to fission weapons. Fusion bombs are usually defined as nuclear weapons in which at least certain amounts of energy are generated by nuclear fusion; they are additionally known as thermonuclear bombs or, more often, hydrogen bombs.[162] In contrast to conventional weapons, nuclear weapons are classified as weapons of mass destruction, as well as biological and chemical weapons. The atomic bomb (A-bomb), the hydrogen or thermonuclear bomb (H-bomb), which uses the energy released by the fission of hydrogen isotopes at a very high temperature, and the neutron bomb (N-bomb), which causes less chemical damage than the other two bombs but has more dangerous radiation effects, are all generally referred to as nuclear weapons.[163]

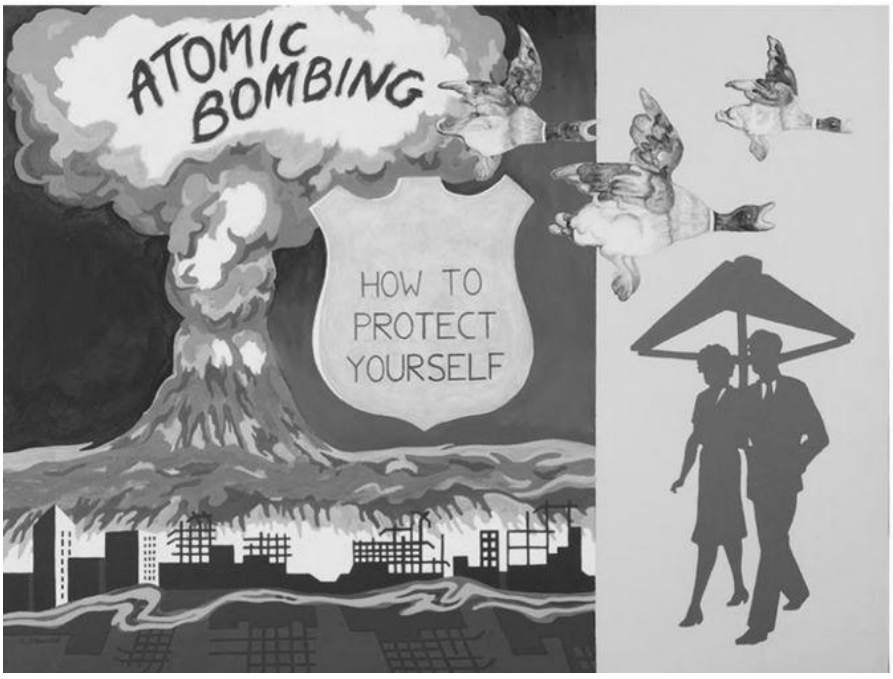

Image VI: Duck and Cover[164]

[161] Cirincione J, *Bomb Scare: The History and Future of Nuclear Wea*pons (1st edn, Colombia University Press 2008)
[162] Joseph M. Siracusa, Nuclear Weapons-A Very Short Intrıduction (3nd edn, Oxford University Press 2020) 32
[163]How Does Law Protect in Law, 'Nuclear Weapons' https://casebook.icrc.org/a_to_z/glossary/nuclear-weapons accesed 13 November 2024
[164] https://blog.nuclearsecrecy.com/2012/12/21/duck-and-cover-all-over-again/ "Duck and Cover" refers to a civil defense technique that was promoted in the United States during the Cold War, particularly in the 1950s. It was intended to protect people, especially children, in the event of a nuclear explosion.

It was constructed in Los Alamos, New Mexico, during World War II as part of the Manhattan Project. Brigadier General Leslie R. Groves and physicist J. Robert Oppenheimer approved Los Alamos as the main atomic bomb research centre on November 25, 1942, giving it the code name Project Y. On July 16, 1945, a plutonium bomb was successfully tested at a site 193 kilometres south of Albuquerque in New Mexico. Secretary of War Henry L. Stimson told President Truman about the potentially destructive new weapon produced in the top-secret Manhattan Project. On April 23, 1945, Stimson and the project director, General Leslie Groves, gave the new president a detailed briefing on the atomic bomb.[165]

The two basic designs for atomic bombs developed at Los Alamos are still used today, though with refinements that increase their explosive yield and shrink their size. Robert Oppenheimer, the scientific teams developed two methods for achieving the desired mass and explosive yield. The first is the gun assembly technique, which rapidly brings together two subcritical masses to form the critical mass necessary to sustain a full chain reaction. The second is the implosion technique, which rapidly compresses a single subcritical mass into the critical density.[166]

The choice to use the bomb on Japan is still debated today, and historians disagree on the bomb's role in ending the Pacific War. Officials at the time did not believe Japan was on the verge of unconditional surrender, and the planned land assault of the home islands would have led to massive losses for both sides. The months before the atomic bombings saw some of the most terrible fighting of the war in the Pacific, with thousands of US troops dying in island assaults.[167]

Truman advanced the first government non-proliferation plan in November 1946, when he participated in British Prime Minister Clement Attlee and Canadian Prime Minister Mackenzie King in proposing to the new United Nations that all atomic weapons be eliminated and nuclear technology for peaceful purposes be shared under strict international controls overseen by a United Nations Atomic Energy Commission. Truman was not alone in considering new policies that might be able to stop the spread of this terrible new weapon. In fact, the origins of

[165] Cirincione J, *Bomb Scare: The History and Future of Nuclear Wea*pons (1st edn, Colombia University Press 2008)
[166] Joseph M. Siracusa, Nuclear Weapons-A Very Short Intrıduction (3nd edn, Oxford University Press 2020) 32
[167] Ibid

this first U.S. plan can be found in the troubled conversations some atomic scientists held in the closing days of the war.[168]

President Truman ordered an increase in weapons production in 1948 following the Berlin Crisis and the Czechoslovakia coup. The United States possessed almost 200 atomic weapons by the end of 1949. Truman increased the stakes and accelerated a program to construct the "Super," or hydrogen bomb after the Soviets tested their first fission bomb in November. The advanced weapon that currently makes up the vast bulk of modern arsenals was first designed and tested as part of the Super project.[169]

America's leaders were enthusiastic about both nuclear power and nuclear weapons in the 1950s. Expert witnesses told Congress that nuclear energy was the miracle power of the immediate future. They predicted atomic-powered cars, airplanes, and homes.[170] On December 8, 1953, Eisenhower stepped to the podium of the United Nations to unveil his Atoms for Peace program. Eisenhower proposed the creation of the International Atomic Energy Agency (IAEA) to promote the peaceful use of atomic energy while the nuclear powers began to diminish the potential destructive power of the world's atomic stockpiles. By the time the IAEA opened for membership in 1956, the disarmament components of the original vision were gone, as was the idea of the IAEA as a uranium bank that would equitably receive and redistribute fissile material.[171]

The U.S. military was arming its soldiers with thousands of nuclear weapons, modifying them for use in nuclear depth charges, nuclear torpedoes, nuclear mines, nuclear artillery, and even a nuclear bazooka, while Atoms for Peace was advocating for the peaceful use of nuclear technology. Both the Soviet Union and the United States established massive nuclear weapon complexes, prepared plans for fighting and winning a nuclear war, and started deploying fleets of ballistic missile submarines and intercontinental ballistic missiles.[172] The United States' nuclear arsenal grew from a little under 400 bombs in 1950 to over 20,000 by 1960 as a result of the successful abandonment of international control attempts and the competition to develop

[168] Cirincione J, *Bomb Scare: The History and Future of Nuclear Wea*pons (1st edn, Colombia University Press 2008)
[169] Ibid
[170] *IAEA Yearbook*, 1992. *P. D. Nuclear Safety Review 1992* (IAEA 1992)
[171] *IAEA Yearbook*, 1992. *P. D. Nuclear Safety Review 1992* (IAEA 1992)
[172] Cunningham J, *Nuclear Weapons: Global Programmes, Challenges and Security Implications* (Nova Science Publishers, Inc 2017)

a numerical and subsequently qualitative nuclear advantage. In the same way, the Soviet arsenal increased from five warheads in 1950 to almost 1,600 in 1960.[173]

As the atomic scientists had warned in the Franck report, numerical superiority did not bring security. Tensions were high, and confrontations in Berlin and Cuba put the world on edge. The threat no longer came from just two states. The United Kingdom had joined the nuclear club in 1952, France in 1960, and China was not far off, they would test their first atomic weapon in 1964. In 1958, the U.S. intelligence community concluded that, if things proceeded as they had over the previous ten years, then as many as sixteen states could have nuclear weapons by 1968.[174]

Nearly every country in the world is currently a signatory of the Treaty on the Non-proliferation of the Nuclear Weapons, which has become a cornerstone of the international security system. 183 countries have vowed never to get nuclear weapons, and the five nuclear-armed powers recognized by the treaty (China, Russia, the United States, France, and the United Kingdom) have all agreed to diminish and eventually abolish their arsenals.[175] States with nuclear technology also commit to sell it to those without, provided that the recipients agree to use it exclusively for peaceful purposes. Under this system, which is overseen by the IAEA, international trade in nuclear power reactors, nuclear fuel, and nuclear technologies for agricultural or medical applications is regulated. The critical importance of the NPT is that it provided the international legal mechanism and established the global diplomatic norm that gave nations a clear path to a non-nuclear future.[176]

During the 1970s, the number of nuclear states also increased. India decided not to sign the 1968 NPT and went against the newly established international norm. In May 1974, India carried out a peaceful test of a nuclear device, becoming the sixth nation in the world to test. India's 1974 test also reinvigorated the probability of further proliferation by pushing Pakistan to pursue its own nuclear weapons.[177]

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[173] Ibid

[174] Cirincione J, *Bomb Scare: The History and Future of Nuclear Wea*pons (1st edn, Colombia University Press 2008)

[175] Burns H. Weston, 'Nuclear Weapons versus International Law: A Contextual Reassessment' (1983) 28 McGill Law Journal 542

[176] Ibid

[177] Sen Grupta B, *Nuclear Weapons?: Policy Options for India* (Sage Publications 1983)

In the 1990s, President Clinton implemented the Nunn-Lugar Cooperative Threat Reduction programs to secure and eliminate Russian nuclear weapons and materials; negotiated and signed the long-sought Comprehensive Nuclear Test-Ban Treaty (CTBT), which is still awaiting entry into force; helped denuclearize Belarus, Kazakhstan, and Ukraine following the dissolution of the Soviet Union; secured Senate ratification of George Bush's START II treaty and chemical weapons ban; and added the Agreed Framework with North Korea, which frozed that country's fledgling nuclear program.[178]

By 2006, the U.S. arsenal had been cut to approximately 9,900 total warheads; the Russians to about 16,000; with the two accounting for all but about one thousand of the estimated 26,900 warheads held by eight or nine nations. This is the lowest the global arsenals have been since 1962 and they are expected to continue shrinking over the rest of the decade.[179]

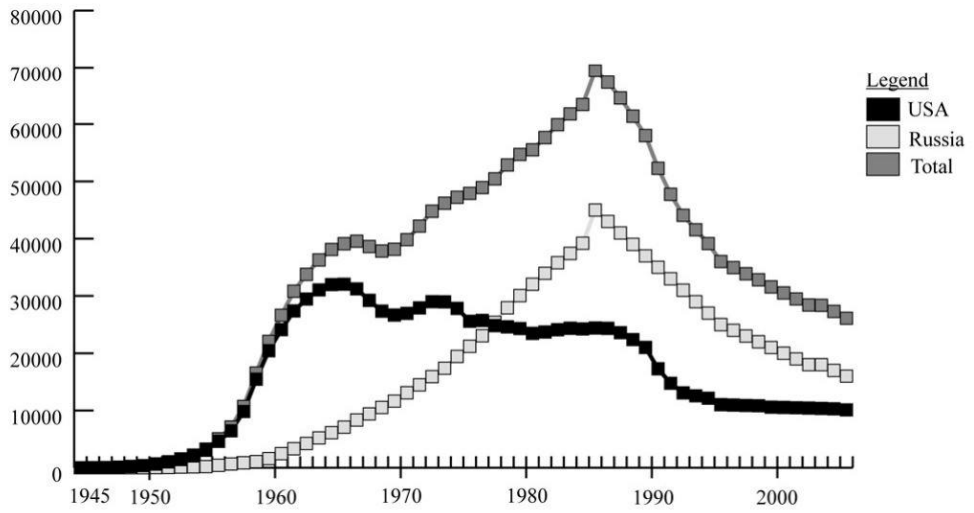

Image VII: Nuclear Stockpiles, 1945-2006[180]

Though nuclear proliferation is most often a strategic decision taken to balance the power of a nuclear rival, some states have felt so threatened by conventional rivals that they have chosen to pursue nuclear weapons.

In the 1960s, 23 states had nuclear weapons, were engaged in weapons-related research, or were actively discussing the pursuit of nuclear weapons; today, only 10 states have nuclear

[178] *Comprehensive Nuclear Test Ban Treaty* (United States Arms Control and Disarmament Agency 1998)
[179] Cirincione J, *Bomb Scare: The History and Future of Nuclear Wea*pons (1st edn, Colombia University Press 2008)
[180] NRDC, Archive of Nuclear Data, available at http://www.nrdc.org/nuclear/nudb/datainx.asp.

weapons or are thought to be seeking them; the number of nuclear weapons in the world has decreased from a peak of 65,000 in 1986 to about 27,000 today.[181] Since the signing of the Non-Proliferation Treaty, many more countries have abandoned nuclear weapon programs than have started them. Now North Korea, Iran, and Pakistan are the only three states in the world that began acquiring nuclear capabilities after the NPT entered into force and they have not ceased their efforts. Interestingly, no new nation has begun a nuclear weapon program since the end of the Cold War. The programs in North Korea and Iran both began in the 1980s.[182]

All things considered, the number of ballistic missiles and nuclear, biological, and chemical weapons has been progressively declining since the turn of the twenty-first century. Additionally, the number of governments having these weapons programs is declining.[183]

2. Facts of the Case

1. By a letter dated 19 December 1994, filed in the Registry on 6 January 1995, the Secretary-General of the United Nations officially communicated to the Registry a decision taken by the General Assembly, by its resolution 49/75 K adopted on 15 December 1994, to submit to the Court, for an advisory opinion, the following question: *"Is the threat or use of nuclear weapons in any circumstance permitted under international law ?"*

2. The resolution asked the Court to render its advisory opinion "urgently".
3. Written statements were filed by 28 States, and subsequently written observations on those statements were presented by two States.
4. In the course of the oral proceedings, which took place in October and November 1995, 22 States' oral statements are expected.

[181] *IAEA Yearbook*, 1992. *P. D. Nuclear Safety Review 1992* (IAEA 1992)
[182] Cirincione J, *Bomb Scare: The History and Future of Nuclear Wea*pons (1st edn, Colombia University Press 2008)
[183] Burns H. Weston, 'Nuclear Weapons versus International Law: A Contextual Reassessment' (1983) 28 McGill Law Journal 542

3. Claims of the Case

1. The Court must satisfy itself that the advisory opinion requested does indeed relate to a legal question within the meaning of its Statute and the United Nations Charter.

2. Nuclear deterrence is an instrument of policy which certain nuclear weapons States use in their relations with other States and which is said to prevent the outbreak of a massive armed conflict or war and to maintain peace and security among nations.

3. The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.

4. While the existing international law relating to the protection and safeguarding of the environment does not specifically prohibit the use of nuclear weapons, it indicates important environmental factors that are properly to be taken into account in the context of the implementation of the principles and rules of the law applicable in armed conflict.

5. The use of nuclear weapons would be a serious danger to future generations. Ionizing radiation has the potential to damage the future environment, food and marine ecosystem, and to cause genetic defects and illness in future generations.

6. The condition of proportionality must be evaluated in light of still further factors. Contended that the very nature of nuclear weapons, and the high probability of an escalation of nuclear exchanges, mean that there is an extremely strong risk of devastation. The risk factor is said to negate the possibility of the condition of proportionality being complied with.

7. The possession of nuclear weapons is itself an unlawful threat to use force. Possession of nuclear weapons may indeed justify an inference of preparedness to use them.

8. Emphasising the illegality of resorting to nuclear weapons, the use of nuclear weapons is already restricted by conventions containing various rules providing for the limitation or elimination of nuclear weapons in specific areas, or by conventions imposing certain control and limitation measures on the existence of nuclear weapons. Thus, nuclear weapons are legally limited by regional agreements.

9. The threat or use of force by means of nuclear weapons must satisfy all the requirements of Article 51 of the Charter of the United Nations, concerning natural law and self-defence.

10. The Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake.

11. Whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the International Covenant of Civil and Political Rights, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.

12. The Convention of 9 December 1948 on the Prevention and Punishment of the Crime of Genocide is a relevant rule of customary international law which the Court must apply.

13. It could be pointed out that the prohibition of genocide would apply in this case if the resort to nuclear weapons did indeed involve an element of intent against a group.

14. In the context of the Convention on the Prohibition of Military or Other Hostile Use of Environmental Modification Techniques; or, in the case of Additional Protocol 1, denied that they were bound by its provisions in general; or, in the context of the Convention on the Prohibition of Military or Other Hostile Use of Environmental Modification Techniques, denied that they related to the hostile use of nuclear weapons; or, in the case of Additional Protocol 1, denied that they were bound by its provisions in general; or it could be argued that positions on Article 35, paragraph 3, could be reserved.

15. Article 35, paragraph 3, and Article 55 of Additional Protocol No. 1 provide additional protection for the environment. Taken together, these provisions include a general obligation to protect the natural environment against widespread, long-term and serious environmental damage; the prohibition of methods and means of warfare intended or expected to cause such damage; and the prohibition of attacks on the natural environment in reprisal.

4. Established Agenda of the Court

The Court shall decide:

1. Could nuclear deterrence be a instrument that states can use to prevent armed conflicts?

2. Does the use of nuclear weapons have irreversible consequences for future generations?

3. Under what circumstances can the threat or use of nuclear weapons be considered under UN Charter Article 51?

4. How can the use and threat of nuclear weapons be assessed in light of the fundamental principles of international humanitarian law?

V. APPLICABLE LAW

1. Charter of the United Nations

Article 2 Paragraph 4

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

Article 51

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

Article 65

The Economic and Social Council may furnish information to the Security Council and shall assist the Security Council upon its request.

Article 96

The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.

Other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities.

2. The Treaty on the Non-Proliferation of Nuclear Weapons

Article VI

Each of the Parties to the Treaty undertakes 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.

3. Prevention and Punishment of the Crime of Genocide

Article 2

Any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) Killing members of the group;

(b) Causing serious bodily or mental harm to members of the group ;

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) Imposing measures intended to prevent births within the group;

(e) Forcibly transferring children of the group to another group.

4. 1949 Geneva Conventions and 1977 Additional Protocols I and II

Protocol I, Article 35

In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited.

It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.

It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.

Protocol I, Article 36

In the study, development, acquisition or adoption of a new weapon, means or method of warfare, a High Contracting Party is under an obligation to determine whether its employment would, in some or all circumstances, be prohibited by this Protocol or by any other rule of international law applicable to the High Contracting Party.

Protocol I, Article 55

1. Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.

2. Attacks against the natural environment by way of reprisals are prohibited.

5. International Covenant on Civil and Political Rights

Article 4

In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

Article 6, paragraph 1

Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

6. Rio Decleration on Environment and Development

Principle 24

Warfare is inherently destructive of sustainable development. States shall therefore respect international law providing protection for the environment in times of armed conflict and cooperate in its further development, as necessary.

7. Convention of 18 May 1977 on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques

Article 1

Each State Party to this Convention undertakes not to engage in military or any other hostile use of environmental modification techniques having widespread, longlasting or severe effects as the means of destruction, damage or injury to any other State Party.

Each State Party to this Convention undertakes not to assist, encourage or induce any State, group of States or international organization to engage in activities contrary to the provisions of paragraph 1 of this article.

VI. CASE LAW

1. Nuclear Tests (New Zealand v. France)

By a letter of 9 May 1973, received in the Registry of the Court the same day, the Arnbassador of New Zealand to the Netherlands transmitted to the Registrar an Application instituting proceedings against France, in respect of a dispute concerning the legality of atmospheric nuclear tests conducted by the French Governrnent in the South Pacific region. In order to found the jurisdiction of the Court, the Application relied on Article 36, paragraph 1, and Article 37 of the Statute of the Court and Article 17 of the General Act for the Pacific Settlernent of International Disputes done at Geneva on 26 Septernber 1928, and, in the alternative, on Article 36, paragraphs 2 and 5, of the Statute of the Court.

New Zealand asks the Court to adjudge and declare: That the conduct by the French Government of nuclear tests in the South Pacific region that give rise to radio-active fall-out constitutes a violation of New Zealand's rights under international law, and that these rights will be violated by any further such tests.

As the United Nations Scientific Committee on the Effects of Atomic Radiation has recorded in its successive reports to the General Assembly, the testing of nuclear devices in the atmosphere has entailed the release into the atmosphere and the consequent dissipation, in varying degrees throughout the world, of measurable quantities of radio-active matter. It is asserted by New Zealand that the French atmospheric tests have caused some fall-out of this kind to be deposited, inter alia, on New Zealand territory; France has maintained, in particular, that the radio-active matter produced by its tests has been so infinitesimal that it may be regarded as negligible and that any fall-out on New Zealand territory has never involved any danger to the health of the population of New Zealand. These disputed points are clearly matters going to the merits of the case, and the Court must therefore refrain, for the reasons given above, from expressing any view on them.

The scope of the present phase of the proceedings was defined by the Court's Order of 22 June 1973, by which the Parties were called upon to argue, in the first instance, questions of the jurisdiction of the Court and the admissibility of the Application. For this reason, as already

indicated, not only the Parties but also the Court itself must refrain from entering into the merits of the claim. However, while examining these questions of a preliminary character, the Court is entitled, and in some circumstances may be required, to go into other questions which may not *be strictly capable of classification as matters of jurisdiction or admissibility but are of such a nature as to require examination in priority to those matters. In this connection, it should be emphasized that the Court possesses an inherent jurisdiction enabling it to take such action as may be required, on the one hand to ensure that the exercise of its jurisdiction over the merits, if and when established, shall not be frustrated, and on the other, to provide for the orderly settlement of all matters in dispute, to ensure the observance of the "inherent limitations on the exercise of the judicial function" of the Court, and to "maintain its judicial character" (Northern Cameroons, Judgment, I.C.J. Reports 1963, at p. 29). Such inherent jurisdiction, on the basis of which the Court is fully empowered to make whatever findings may be necessary for the purposes just indicated, derives from the mere existence of the Court as a judicial organ established by the consent of States, and is conferred upon it in order that its basic judicial functions may be safeguarded. With these considerations in mind, the Court has therefore first to examine a question which it finds to be essentially preliminary, namely the existence of a dispute, for, whether or not the Court has jurisdiction in the present case, the resolution of that question could exert a decisive influence on the continuation of the proceedings. It will therefore be necessary to make a detailed analysis of the claim submitted to the Court by the Application of New Zealand. The present phase of the proceedings having been devoted solely to preliminary questions, the Applicant has not had the opportunity of fully expounding its contentions on the merits. However the Application, which is required by Article 40 of the Statute of the Court to indicate "the subject of the dispute", must be the point of reference for the consideration by the Court of the nature and existence of the dispute brought before it.*

VII. CONCLUSION

The effects of the United States dropping two atomic bombs on Hiroshima and Nagasaki in 1945 were witnessed by the states. For this reason, many states began to develop their nuclear arsenals. The World Court Project, which was a civil society campaign throughout the early 90s, aimed to secure an Advisory Opinion of the International Court of Justice to settle the legal status of nuclear weapons. Their efforts were successful when the United Nations General Assembly passed a resolution requesting the International Court of Justice to render an opinion on whether the threat or use of nuclear weapons in any circumstance is permitted under international law.[184]

In its advisory opinion, the Court examined the rules pertaining to the law of armed conflict and the law relating to the use of force under the UN Charter. However, before analyzing what the Court had to say about the regimes, it is pertinent to shed some light on how the Court reached such a conclusion.[185]

During the oral proceedings, many states will submit that nuclear weapons are expressly prohibited under international human rights law, namely Article 6 of ICCPR since it prohibits the arbitrary deprivation of life. However, in its advisory opinion, the Court may state that even if ICCPR talks about 'arbitrary deprivation of life,' what constitutes 'arbitrary' through ' a use of a certain weapon in warfare' is to be determined by *lex specialis,* which, in the present case, is the law of armed conflict. [186]

In addition, some states also may submit that since the use of nuclear weapons would also result in the loss of a large population, it would amount to genocide.[187] However, the Court, in its advisory opinion, stated that for genocide to occur, it would require *dolus specialis,* an intent to destroy a certain group on racial, ethnic, national, or religious grounds. Such a view is consistent with the jurisprudence of international tribunals, in particular, the International Criminal Tribunal for Rwanda, and the definition of genocide later adapted under the Rome Statute. Ultimately, it can be stated that the Court may remaine reluctant to accept that the

[184] Louise Doswald-Beck, 'International Humanitarian Law and the Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons' (1996) International Review of the Red Cross
[185] Ibid
[186] Christopher Vail, 'The Legality of Nuclear Weapons for Use and Deterrence' (2017) 48 Geo J Int'l L 839
[187] Louise Doswald-Beck, 'International Humanitarian Law and the Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons' (1996) International Review of the Red Cross

prohibition of nuclear weapons can be found in the corpus of human rights law and the law of genocide.[188]

During oral proceedings, many states may submit that nuclear weapons should be considered 'poisoned weapons'. In such a case, they would be prohibited under both the Second Hague Declaration of 29 July 1899 and the Hague Regulations Respecting the Laws and Customs of War on Land annexed to the Hague Convention IV, prohibiting poisoned weapons. In response, the Court noted that no consensus exists on what the terms 'poison' or 'poisoned weapons' mean. In such a case, only the weapons 'whose prime, or even exclusive, effect is to poison or asphyxiate' be considered poisoned weapons. Therefore, nuclear weapons cannot be deemed to be prohibited on this line of reasoning.[189]

The Court do not make an analysis on the scenarios in which a nuclear weapon can be used without violating the principles of distinction and unnecessary suffering. One such scenario was mentioned by the United States during the oral proceedings, stating that *"in some cases, such as the use of a low yield nuclear weapon against warships on the High Seas or troops in sparsely populated areas, it is possible to envisage a nuclear attack which caused comparatively few civilian casualties."*[190]

[188] Peter H. F. Bekker, 'Legality of the Use by a State of Nuclear Weapons in Armed Conflict' (1997) 91 Am J Int'l L 134

[189] Louise Doswald-Beck, 'International Humanitarian Law and the Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons' (1996) International Review of the Red Cross

[190] Ibid

VIII. BIBLIOGRAPHY

1. PRIMARY SOURCES

- Statute of the International Court of Justice
- Charter of United Nations
- The Hague Convention of 1907
- The Four Geneva Conventions of 1949
- Paris Agreement to the United Nations Framework Convention on Climate Change
- Vienna Convention on the Law of Treaties
- Comprehensive Nuclear Test Ban Treaty
- The Treaty on the Non-Proliferation of Nuclear Weapons
- Prevention and Punishment of the Crime of Genocide1949 Geneva Conventions and 1977 Additional Protocols I and II,
- International Covenant on Civil and Political Rights
- Rio Decleration on Environment and Development
- Convention of 18 May 1977 on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques

2. SECONDARY SOURCES

a. Books

- Malcolm N. Shaw, International Law (Cambridge University Press 2008)
- Robert Kolb, '*The International Court Of Justice'* (Hart Publishing 2013)
- Hanqin Xue, '*Jurisdiction Of The International Court Of Justice'* (10th edn, Brill Nijhoff 2015)
- Alfred P. Rubin, *'The International Legal Effects of Unilateral Declarations'* (1977)
- Ruda J M, *"Intervention Before the International Court of Justice*", Fifty Years of the International Court of Justice, Cambridge, 2. Edition, Melbourne, (1998)
- Wolfrum, R., Sources of International Law. In: Max Planck Encyclopedia of Public International Law. (2011)
- Cedric Cotter & Ellen Policinski, 'A History of Violence: The Development of International Humanitarian Law Reflected in the International Review of the Red Cross' (2020) 11 Journal of International Human Legal Studies

- Dieter Fleck, The Handbook of International Humanitarian Law (4th edn, Oxford University Press 2021)
- Solis GD, The Law of Armed Conflict: *International Humanitarian Law in War* (2nd edition Cambridge
- University Press 2016)
- Thedor Meron , Development and Principles of International Humanitarian Law (Martinus Nijhoff 1985)
- Elli Lauka, International Environmental Law-Fairness, Effectiveness, and World Order (1nd edn, Cambridge University Press 2006)
- Joseph S. And Macbeth A, *Research Handbook on International Human Rights La*w (1st edn, Edward Elgar 2010)
- Carey J, Dunlap WV and Pritchard RJ, *International Humanitarian Law: Origins, Challenges adn Prospects* (1st edn. BRILL, 2006)
- Bowett DW, *Self-Defence in International Law* (1st edn, Lawbook Exchange 2009)
- Weiden, P.L. (1939) *Necessity in international law*. London: Grotius Society
- Cirincione J, *Bomb Scare: The History and Future of Nuclear Wea*pons (1st edn, Colombia University Press 2008)
- Joseph M. Siracusa, Nuclear Weapons-A Very Short Intrıduction (3nd edn, Oxford University Press 2020)
- *IAEA Yearbook*, 1992. *P. D. Nuclear Safety Review 1992* (IAEA 1992)
- Cunningham J, *Nuclear Weapons: Global Programmes, Challenges and Security Implications* (Nova Science Publishers, Inc 2017)
- Sen Grupta B, *Nuclear Weapons?: Policy Options for India* (Sage Publications 1983)
- Burns H. Weston, 'Nuclear Weapons versus International Law: A Contextual Reassessment' (1983) 28 McGill Law Journal.

b. Journal Articles

- Sienho Yee, 'Forum Prorogatum And The Advisory Proceedings Of The International Court' (2001) 95 American Journal of International Law
- Paolo Palchetti, 'The Power of the International Court of Justice to Indicate Provisional Measures to Prevent the Aggravation of a Dispute' (2008) 21 Leiden Journal of International Law 623
- Gerald Fitzmaurice, *'The Law and Procedure of the International Court of Justice,*
- *1951-54: General Principles and Sources of Law'* (1953) 30 British Year Book International Law 1
- David Kennedy, 'The Sources of International Law' (1987) 2 Amarican University Journal International Law & Policy 1
- Aldo Zammit Borda, 'Introduction to International Humanitarian Law' (2008) 34 Commwelth Law Bulletin
- Loyd van Dijk, 'Human Rights in War: On the Entangled Foundations of the 1949 Geneva Conventions' (2018) 112 Americab Journal of International Law
- Raymund T. Yingling & Robert W. Ginnane, 'The Geneva Conventions of 1949' (1952) 46 American Journal of International Law
- Francois Bugnion, 'Adoption of the Additional Protocols of 8 June 1977: A Milestone in the Development of International Humanitarian Law' (2017) 99 Int'l Rev Red Cross
- M. Cherif Bassiouni, 'A Functional Approach to General Principles of International Law' (1990) 11 Michigan Journal International Law
- Bruce A. Ackerman & Richard B. Stewart, 'Reforming Environmental Law' (1985) 37 Stanford Law Review
- Edith Brown Weiss, 'International Environmental Law: Contemporary Issues and the Enmergence of a New World Order' (1993) 81 Georgetown Law Journal
- Anastasia Telesetsky, 'The Kyoto Protocol' (1999) 26 Ecology Law Quartely

- Jorge E. Vinuales, 'The Paris Agreement on Climate Change' (2016) 59 German Yearbook of International Law
- Theodor Meron, *'The Martens Clause, Principles of Humanity, and Dictates of Public Conscience'* (2000) 94 American Journal of International Law
- Jeffrey Kahn, 'Protection and Empire: The Martens Clause, State Sovereignty, and Individual Rights' (2016) 56 Virginia Journal of International Law
- Theodor Meron, *'The Martens Clause, Principles of Humanity, and Dictates of Public Conscience'* (2000) 94 American Journal of International Law
- Mark David Maxwell & Richard V. Meyer, 'The Principle of Distinction: Probing the Limits of Its Customariness' (2007) 2007 Army Law
- Mark David Maxwell & Richard V. Meyer, 'The Principle of Distinction: Probing the Limits of Its Customariness' (2007) 2007 Army Law
- Noelle Quenivet, 'The War on Terror and the Principle of Distinction in International Humanitarian Law' (2010) 3 ACDI
- *International Humanitarian Law: Answers to Your Questions* (International Comitee of the Red Cross 2014)
- Ian Henderson & Kate Reece, 'Proportionality under International Humanitarian Law: The Reasonable Military Commander Standard and Reverberating Effects' (2018) 51 Vanderbilt Journal Transnational Law
- McCoubrey, 'The Nature of the Modern Doctrine of Military Necessity' (1991) 30 Military of Law & Law of War Rev
- Emily Crawford, 'The Enduring Legacy of the St Petersburg Declaration: Distinction, Military Necessity, and the Prohibition of Causing Unnecessary Suffering and Superfluous Injury in IHL' (2018) 20 Journal of Historical International Law
- U.C. Jha, 'Prohibited Weapons in Armed Conflicts' (2004) 4 ISIL Yearbook International Human & Refugee Law
- Jordan J. Paust, 'Controlling Prohibited Weapons and the Illegal Use of Permitted Weapons' (1983) 28 McGill Law Journal
- Nebojsa Raicevic, 'The History of Prohibition of the Use of Chemical Weapons in International Humanitarian Law' (2001) 1 Facta Universitatis, Series: Law & Politics
- John Norton Moore, 'Ratification of the Geneva Protocol on Gas and Bacteriological Warfare: A Legal and Political Analysis' (1972) 58 Virginia Law Review

- William V. O'Brien, 'Biological/Chemical Warfare and the International Law of War' (1962) 51 Georgetown Law Journal
- Burns H. Weston, 'Nuclear Weapons versus International Law: A Contextual Reassessment' (1983) 28 McGill Law Journal
- Paul G. Cassell, 'Establishing Violations of International Law: Yellow Rain and the Treaties Regulating Chemical and Biological Warfare' (1983) 35 Stanford Law Review
- Louise Doswald-Beck, 'International Humanitarian Law and the Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons' (1996) International Review of the Red Cross
- Burns H. Weston, 'Nuclear Weapons versus International Law: A Contextual Reassessment' (1983) 28 McGill Law Journal

- Christopher Vail, 'The Legality of Nuclear Weapons for Use and Deterrence' (2017) 48 Geo J Int'l L

- Barbara Kwiatkowska, 'New Zealand v. France Nuclear Tests: The Dismissed Case of Lasting Significance' (1996) 37 Va J Int'l L 107

c. Websites and Blogs

- History, International Court of Justice (ICJ) *(International Court of Justice)* https://www.icjcij.org/en/history,
- International Court of Justice, 'Members of the Court (International Court of Justice)'https://www.icjcij.
- org/en/members
- International Court of Justice, 'How to Court Works' https://www.icj-cij.org/how-the-court-works
- United Nations, 'Security Council https://main.un.org/securitycouncil/en
- Advisory Jurisdiction (International Court of Justice) https://www.icj-cij.org/en/advisory

- Merits 'Cornell University Law Faculty' https://www.law.cornell.edu/wex/on_the_merits accesed 11 November, 2024

- ICRC (2002) *What are the Origins of International Humanitarian Law?*, Advisory Service on International Humanitarian Law, Geneva. <www.icrc.org> accesed October 29, 2024
- NRDC, Archive of Nuclear Data, available at http://www.nrdc.org/nuclear/nudb/datainx.asp