IN THE INTERNATIONAL COURT OF JUSTICE

AT THE PEACE PALACE
THE HAGUE, THE NETHERLANDS

THE QUESTION ON THE OBLIGATION OF STATES UNDER INTERNATIONAL LAW ON NUCLEAR WEAPONS AND TECHNOLOGICAL DISARMAMENT

REQUEST FOR ADVISORY OPINION SUBMITTED BY THE NON-NUCLEAR WEAPON STATES (NNWS)

MEMORIAL FILED ON BEHALF OF THE NNWS

2nd Antonio Oposa Intergenerational
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TABLE OF CONTENTS

I. STATEMENT OF JURISDICTION .......................... 7
II. INTRODUCTION ............................................. 8
III. IN CONTEXT .................................................. 9
   A. The theory of deterrence .................................. 9
   B. States and nuclear weapons ............................... 10
IV. THE USE OF NUCLEAR WEAPONS IS PROHIBITED UNDER INTERNATIONAL LAW ............................................. 13
   A. Non-Proliferation Treaty .................................. 13
   B. The United Nations Charter prohibits member States from using threat or use of force over other States ............................................. 15
      1. Even under the concept of self-defense, the use of nuclear weapons is not allowed under general principles of international humanitarian law ............................................. 16
   C. Use of nuclear weapons even in times of war is prohibited under international law ............................................. 17
      1. The duty not to cause widespread, long-term, and severe damage to the natural environment under the Geneva Convention is a customary norm ............................................. 18
         i. There is significant state practice .......................... 18
         ii. There is opinio juris ...................................... 19
      2. This obligation requires NWS to disarm since use of nuclear weapons cause irreversible environmental damage which has widespread, long—lasting and severe effects ............................................. 20
V. NUCLEAR WEAPON STATES HAVE THE DUTY TO DISARM TO COMPLY WITH THEIR TREATY LAW OBLIGATIONS UNDER INTERNATIONAL HUMAN RIGHTS LAW ............................................. 21
   A. States have the duty to comply with the obligations under the Universal Declaration of Human Rights ............................................. 21
   B. States have a treaty obligation under the ICCPR to protect the right to life ............................................. 22
      1. Arbitrary deprivation of human life is prohibited under international law ............................................. 22
      2. States have the obligation to uphold the Right to Peace ............................................. 22
VI. NUCLEAR WEAPON STATES HAVE THE DUTY TO DISARM TO COMPLY WITH THEIR CUSTOMARY OBLIGATIONS UNDER INTERNATIONAL ENVIRONMENTAL LAW ............................................. 24
   A. States have the obligation to protect the environment ............................................. 24
1. This obligation is customary under international law.
   i. There is sufficient state practice.
   ii. Existing state practice is coupled with *opinio juris*...

2. Any use of nuclear weapons is harmful to the environment.

B. NWS have the duty to prevent transboundary harm.

1. NWS’ nuclear testing activities violate their duty to prevent transboundary harm.

2. The transboundary harm by using these weapons is sufficiently significant to constitute a departure from the obligation of states.

C. Even mere possession of nuclear weapons violates the prevention principle.

1. The duty to prevent irreversible damage is a customary norm.

2. Possession even without the use of nuclear weapons violates the obligation to prevent harm.

VII. THE PROHIBITION ON THE USE AND POSSESSION OF NUCLEAR WEAPONS HAS RIPENED INTO A CUSTOMARY NORM.

A. There is evidence of state practice.

1. Multilateral Treaties.


3. UN General Assembly Resolutions.

B. State practice is coupled with *opinio juris*.

VIII. REVISITING THE NUCLEAR DISARMAMENT REGIME.

A. The NPT has gaps which prevents its effective enforcement.

IX. MOVING FORWARD.

A. Codifying the norm of the obligation for complete nuclear disarmament.

X. ALSO, SUSTAINABLE DEVELOPMENT CAN BE ACHIEVED IF STATES COMPLY WITH THEIR OBLIGATION TO DISARM.

A. Apart from the obligations established under the principle of Sustainable Development, NWS must also act in accordance with the Principle of Intergenerational Equity.

XI. CONCLUSION AND PRAYER.
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I. STATEMENT OF JURISDICTION

The Representative of Non-Nuclear Weapon States submits this memorial in response to the request for advisory opinion of the International Court of Justice ("The Court") concerning the obligations and responsibilities of states under existing treaties and rules of international law regarding the use and possession of nuclear weapons and nuclear disarmament, consistent with paragraph 2 of Article 65 and paragraph 4 of Article 66 of the Statute of the International Court of Justice (ICJ Statute). This submission is recognition of The Court’s jurisdiction pursuant to Article 36, paragraph 1 of the ICJ Statute.
II. INTRODUCTION

The present time has been dubbed as the Second Nuclear Age, wherein there has been a shift from a bipolar competition between two technologically advanced states, the US and the Former Soviet Union, to a multipolar world with many emerging threats and unstable actors.¹ This was largely due to the development of nuclear weapons and military modernization done by most states in the post-cold war era.

The arms race during the cold war was caused by the fear that each side of the bipolar world felt towards each other. As a result, they started to build up their armies and weapons. Eventually, the United States felt more threatened that the Former Soviet Union was leading in terms of military advantage, which fueled the arms race further.² At the time, the main consideration was the principle of mutual deterrence, often referred to as “mutual assured destruction” [MAD]. In the context of the US-Soviet Union Arms race, “in essence it meant stockpiling a huge nuclear arsenal. In the event of a Soviet attack the US would have enough nuclear firepower to survive a first wave of nuclear strikes and strike back. The response would be so massive that the enemy would suffer ‘assured destruction’.”³

Since then, the principle of deterrence has been used by states as a reason for their reluctance to commit to absolute nuclear disarmament policy. The United States vowed not to use or threaten to use nuclear weapons against non-nuclear weapons states and observe a policy of “no first use” of nuclear weapons, which meant that the United States would only


use nuclear weapons in response to a nuclear attack on the United States, its allies or partners. In the same token, the Democratic People’s Republic of Korea said that its nuclear deterrence was not a bargaining chip but a means to defend its sovereignty.

III. IN CONTEXT

A. The Theory of deterrence

The rise of nuclear technology motivated states to modernize their military capabilities and rely on the principle of deterrence, exemplified by the cold war. This led to an increase in the number of nuclear weapon states and those wanting to develop such technology.

Although the theory of deterrence has been the main consideration of the increase in military arsenals and acquisition of nuclear weapons, there has been doubt as to its effectiveness in maintaining security and stability even during the cold war.

The efficacy of nuclear deterrence is doubtful because the characteristic attack threatened in most nuclear deterrence scenarios — city attack — is not militarily effective or likely to be decisive; 2) the psychology of terror that is supposed to work in nuclear deterrence’s favor actually creates the circumstances for unremitting resistance; and 3) even though the field is mostly conjectural, what little unambiguous evidence does exist contradicts the claim that nuclear deterrence works.

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4 Steven Pifer et al., *U.S. Nuclear and Extended Deterrence: Considerations and Challenges*, 3 Arms Control Series 2010.


More so in the second nuclear age, today’s “rogue” states and terrorist organizations…may not be as deterrable as the Soviets and the Americans were during the first nuclear age. The rise of transnational actors, including terrorist organizations, in the second nuclear age has brought the principle of deterrence into question.

B. States and Nuclear Weapons

Due to the serious threat brought about by nuclear arsenals and other various actors, some states moved for total disarmament or reduction of nuclear weapons in the form of bilateral and multilateral/regional treaties. At present, a total of nine [9] countries around the world are believed to have access to nuclear weapons. All in all, there are 16,300 nuclear weapons between the nuclear weapons states as of 2014. The nuclear weapons states include the United States, Russia, UK, France, China, India, Pakistan, Israel and North Korea. Some states including, South Africa, Kazakhstan, Belarus and Ukraine dropped their nuclear weapons and opted for disarmament.

Over the last decade, there have been proposals toward a more concrete and feasible nuclear disarmament regime. Yet, there has been no worldwide absolute commitment to such effect. There are only bilateral and regional treaties entered into by states across the globe. As of 2016, 122 states have stated their intention ‘to identify and pursue effective measures to fill the legal gap’ in the nuclear non-proliferation regime through their

7 Francis Gavin, Same as It Ever Was, 34 MIT Press Journals 3, 13 (2010).
8 supra note 1 at 6.
9 Eleanor Ross, The Nine Countries that have Nuclear Weapons, Independent, January 6, 2016, 1.
10 Ibid.
endorsement of the humanitarian pledge, a document introduced by the Austrian hosts of the Third Conference on the Humanitarian Impact of Nuclear Weapons in December 2014.\(^\text{13}\)

The nuclear non-proliferation regime refers mainly to the non-proliferation treaty which prevents non-nuclear weapon state parties from receiving nuclear weapons or having any control over them. Likewise, ‘nuclear-weapon States Parties’ are prohibited from transferring nuclear weapons or control over such weapons to any recipient and from assisting any non-nuclear-weapon state in manufacturing or acquiring such weapons.

Amidst the legal framework of the nuclear weapons disarmament and non-proliferation, non-nuclear weapons states [NNWS] urge States to affirm their commitments towards global nuclear disarmament, despite the reshuffling of powers in the international arena. This is to avoid the catastrophic consequences that would result from deadly weapons falling into the wrong hands, or a scenario known as the “black swan of our age”.\(^\text{14}\) Some of the nuclear weapon states expressed their intention towards the attainment of such goal. The United States expressed the need for the conventions to establish verification capabilities and build the security conditions needed to advance disarmament. Also, France is actively and concretely committed to disarmament at both national and international level.\(^\text{15}\)

The issue of the legality of the use or possession of such weapons has always been a controversial one. The ICJ on the *Legality of Nuclear Weapons* found that there is neither in customary nor conventional law ‘any specific authorization of the threat or use of nuclear


\(^\text{15}\) *Nuclear Disarmament*, France Diplomatie (Ministry for Europe and Foreign Affairs, France), 2017, at 1.
weapons’ (unanimously), but also no ‘comprehensive and universal prohibition’ (by eleven votes to three).\textsuperscript{16}

The court however refused to rule definitely on the legality of the use of nuclear weapons in extreme cases of self-defense. The decision was rendered on 1996 and in consideration of the growing sentiment of nuclear disarmament and humanitarian pledges, it is more than enough to impose an obligation on states to a complete disarmament.

\textsuperscript{16} Peter Malanczuk, Akehurst’s Modern Introduction to International Law 348 (1997).
IV. THE USE OF NUCLEAR WEAPONS IS PROHIBITED UNDER INTERNATIONAL LAW

Treaty provisions entered by states impose binding obligations upon them under international law. The obligatory nature of treaties is founded upon the customary international law principle *pacta sunt servanda*. Thus, agreements must be complied with in good faith.

A. Non-Proliferation Treaty [NPT]

The NPT was a treaty originally entered into by UK, US and the Soviet Union [Russia] with fifty-nine [59] other states. The NPT aims to prevent the spread of nuclear weapons and weapons technology, to foster the peaceful uses of nuclear energy, and obliges state parties to further the goal of disarmament. In 2016, there are ninety-three [93] signatory states and one hundred ninety one [191] state parties, who gather every five [5] years to review the operation of the treaty, in the NPT Review Process. The relevant state obligations are as follows:

1. Article I & II of the NPT, imposes an obligation upon nuclear weapon state parties not to transfer such weapons to non-nuclear weapon states on one hand, and a correlative obligation for non-

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21 NPT, Art. 8.
nuclear weapon state parties not to receive the transfer of such weapons from any transferor or to seek the manufacture thereof.22

2. Under the preamble of the NPT, the state parties affirm the principle that peaceful applications of nuclear technology for peaceful purposes shall be available to all parties to the treaty. Moreover, Article III (1) provides that the state parties shall accept the safeguards system provided by the International Atomic Energy Agency [IAEA] “with a view to preventing diversion of nuclear energy from peaceful uses to nuclear weapons or other nuclear explosive devices.”23 Article IV(1) also talks about the inalienable right of all the parties to develop research, production and use of nuclear energy for peaceful purposes without discrimination and in conformity with the treaty.

3. Another object of the NPT is to foster the use of nuclear energy for peaceful purposes and for nuclear weapons disarmament. The ordinary meaning of the word “peace” is the termination or absence of armed conflict between states; or freedom from civil disturbance.24 By analogy, under the NPT, the use or threat of use of nuclear weapons is not permitted for it will run counter to the object of the treaty; which is the beneficial use of nuclear

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22 NPT, Art. 1.
23 NPT, Art. 3.
technology for peaceful purposes and nuclear weapons disarmament. States have an obligation not to defeat the object and purpose of a treaty when it has expressed its consent to be bound by it.\(^{25}\)

4. States have a positive obligation to pursue negotiations in good faith towards nuclear disarmament.

Article VI of the NPT provides that the parties to the treaty undertake to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament.

The ICJ stated that this obligation went “beyond…a mere obligation of conduct” and was an “obligation to achieve a precise result—nuclear disarmament in all its aspects—by adopting a particular course of conduct, namely the pursuit of negotiations on the matter in good faith.”\(^{26}\)

B. The United Nations Charter prohibits member States from using threat or use of force over other States

The Charter provides that member states shall refrain in their international relations from the threat or use of force against the territorial integrity or political


\(^{26}\) Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I), at 264.
independence of any state. Thus, generally, the threat or use of nuclear weapons as a military tool is not allowed under international law because the use of force per se is proscribed.

1. Even under the concept of self-defense, the use of nuclear weapons is not allowed under general principles of international humanitarian law.

The inherent right of self-defense under Article 51 of the UN Charter is an exception to the general rule under Article 2(4) and under the rule of interpretation, exceptions to a principle should be interpreted restrictively. The prohibition against the use of force was considered as a peremptory norm, thus the right to self-defense must be strictly construed. Any ambiguity as to the legality of the use of nuclear weapons in self-defense must be construed against it.

Furthermore, the force used in self-defense must be necessary, immediate and proportional to the seriousness of the armed attack. Though the ICJ held in an advisory opinion in *The Legality of Nuclear Weapons* that the proportionality principle may thus not in itself exclude the use of nuclear weapons in self-defense in all

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28 *supra* note 16 at 312.


circumstances, self-defense must also meet the requirements of the law in armed conflict and rules of humanitarian law.\textsuperscript{32}

i. Principle of Distinction/Discrimination

Under International Humanitarian Law, combatants must distinguish between military and non-military objectives and attack only military objectives.\textsuperscript{33}

ii. The Rule on Protection of Non-Combatants.

Complementary to the principle of distinction under IHL is the rule on protection of non-combatants.\textsuperscript{34} In an armed conflict, non-combatants, including \textit{hors de combat} must be spared.

iii. Principle of Humanity and Necessity

This principle provides the limits on the means and methods of warfare which aims to eliminate unnecessary injury or suffering.

iv. The corollary rule of Controllability

This rule provides the prohibition against the usage of weapons, the effects of which cannot be controlled.

If an envisaged use of weapons would not meet the requirement of IHL, a threat of such use would also be contrary to that law.\textsuperscript{35} Thus, the use of nuclear weapons as a tool of aggression or self-defense would be contrary to the general principles of IHL.

C. Use of nuclear weapons even in times of war is prohibited under international law.

\textsuperscript{32} \textit{Ibid.}

\textsuperscript{33} Miša Zgonec-Rožej et al., International Criminal Law Manual at 88.

\textsuperscript{34} \textit{Ibid.}

\textsuperscript{35} Legality of the Threat or Use of Nuclear Weapons, \textit{Advisory Opinion}, I.C.J. Reports 1996, 8 July 1996 at 78.
It is widely accepted norm that environmental law treaties and principles remains enforceable even in times of armed conflict. This has been impliedly recognized by the ICJ in its opinion in expressing that environmental law indicates important factors that has to be considered in the implementation of the rules applicable in armed conflict.

1. The duty not to cause widespread, long-term, and severe damage to the natural environment under the Geneva Convention, a customary norm.

   i. There is significant state practice.

   There is significant state practice to the effect that the prohibition against causing “widespread, long—lasting or severe effects” on the natural environment as embodied in Articles 35(3) and 55(1) of Additional Protocol I to the Geneva Convention have become customary. The military manuals and see, e.g., the military manuals of Argentina (ibid., § 163), Australia (ibid., §§ 164–165), Belgium (ibid., § 166), Benin (ibid., § 167), Canada (ibid., § 168), Colombia (ibid., § 169), France (ibid., § 170), Germany (ibid., §§ 171–173), Italy (ibid., § 174), Kenya (ibid., § 175), Netherlands (ibid., §§ 176–177), New Zealand (ibid., § 178), Russia (ibid., § 179), Spain (ibid., § 180), Sweden (ibid., § 181), Switzerland (ibid., § 182), Togo (ibid., § 183), United Kingdom (ibid., § 184), United States (ibid., §§ 185–186) and Yugoslavia (ibid., § 187).

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36 supra note 9.

37 Nuclear Tests Case (New Zealand v. France) 57 ILR 605.

38 Widespread: encompassing an area of several hundred square kilometers.

39 Long-lasting: lasting for a period of months, or approximately a season.

40 Severe: involving serious or significant disruption or harm to human life, natural and economic resources or other assets.

legislation of numerous States treating the matter as an offense shed light upon this well established state practice. And these state practices show the widespread, representative and virtually uniform acceptance of the customary law nature of said rules. Further, for a rule to be established as customary, the corresponding practice need not be in absolute rigorous conformity with the rule. Hence, practice by a few states though contrary is not enough to prevent the emergence of this customary norm.

ii. There is opinio juris.

The duty not to bring about widespread, long-term and severe damage to the environment in times of armed conflict has been incorporated in legal systems of several States and in various conventions, statements and declaration of States. The ICJ

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42 See, e.g., the legislation of Australia (ibid., § 190), Azerbaijan (ibid., § 191), Belarus (ibid., § 192), Bosnia and Herzegovina (ibid., § 193), Canada (ibid., § 195), Colombia (ibid., § 196), Congo (ibid., § 197), Croatia (ibid., § 198), Georgia (ibid., § 201), Germany (ibid., § 202), Ireland (ibid., § 203), Mali (ibid., § 206), Netherlands (ibid., § 208), New Zealand (ibid., § 209), Norway (ibid., § 211), Slovenia (ibid., § 213), Spain (ibid., § 214), United Kingdom (ibid., § 218) and Yugoslavia (ibid., § 220); see also the draft legislation of Argentina (ibid., § 188), Burundi (ibid., § 194), El Salvador (ibid., § 199), Nicaragua (ibid., § 210) and Trinidad and Tobago (ibid., § 216).


44 Nicaragua v. USA § 98.

45 infra at 23.


47 See e.g. 9 Yugoslavia, Appeals and Letter of the Federal Ministry for Development, Science and the Environment; Iraq, Letter to the UN Secretary-General; Kuwait, Letter to the UN Secretary-Genera; Sweden, Statement before the
found that States must abide by their ‘general obligation to protect the natural environment against widespread, long-term and severe environmental damage.’ The court adds that methods and means of warfare which are intended, or may be expected to cause such damage are also prohibited. This pronouncement furthers the point that the obligation to protect the environment is enforceable at all times.

2. **This obligation requires NWS to disarm since use of nuclear weapons cause irreversible environmental damage which has widespread, long—lasting and severe effects.**

The General Assembly in its resolution affirms further the general view that environmental considerations form part of the elements to be taken into account in the implementation of the principles and rules of law applicable in armed conflict. Taken altogether, these instruments embody the general obligation of all States to protect the natural environment against widespread, long-term and severe environmental damage. States can only do this by disarming and totally prohibiting the use of nuclear weapons which are expected to bring about such destruction.

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49 *Id.*


V. NUCLEAR WEAPON STATES HAVE THE DUTY TO DISARM TO COMPLY WITH THEIR TREATY LAW OBLIGATIONS UNDER INTERNATIONAL HUMAN RIGHTS LAW.

A. States have the duty to comply with the obligations under the Universal Declaration of Human Rights.

Article 3 of the Universal Declaration of Human Rights provides that everyone has the right to life, liberty and security of person. This right exists both in times of peace and in times of armed conflict.\(^{52}\)

The catastrophic humanitarian consequence of nuclear weapons is uncontested. According to the World Health Organization [WHO], the use of a single nuclear weapon or one involving multiple weapons would cause deaths varying from 1 million to 1 billion.\(^{53}\) This estimate is without regard to the possibilities of a nuclear winter, and radiation poisoning. Similarly, the World Commission on the Environment and Development expressed its concern against the threat of nuclear weapons by stating that “the likely consequences of nuclear war make other threats to the environment pale into insignificance.”\(^{54}\) The ICJ has held on the consequences of the use of nuclear weapons in the Nuclear Weapons Case\(^{55}\), to wit:

“the radiation from nuclear weapons is not containable in space or time and unique as a source of “continuing danger to human health, even

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\(^{52}\) Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Request for advisory opinion, 9 July 2004 ICJ Rep 136 (2004).

\(^{53}\) Winston P. Nagan, Simulated ICJ Judgment: Revisiting the Lawfulness of the Threat or Use of Nuclear Weapons, 1 Cadmus Journal 4, 100 (2012).

\(^{54}\) Ibid.

\(^{55}\) Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, 8 July 1996.
long after its use,” given the half-lives in the many thousands of years of the by-products of a nuclear explosion.”

Thus, the usage of nuclear weapons would constitute human rights violations in a large scale.

B. States have a treaty obligation under the ICCPR to protect the right to life.

The International Covenant on Civil and Political Rights (hereinafter “ICCPR”) was entered into force on March 23, 1976. ICCPR’s goal is the promotion of universal respect for, and observance of, human rights and freedoms. The ICCPR has 169 parties and 74 signatories including nuclear weapons states specifically United States, Britain, France, Israel, Russia, Pakistan, North Korea, China and India. The ICCPR is enforceable in times of peace and of war.

The current threat of nuclear weapons is conflicting with several international conventions on human rights. The ICCPR imposes the obligation to secure the right to life which is inherent to every human being. It also prohibits the arbitrary deprivation of human life. Consistent with this mandate, the states are encouraged to uphold its commitment in the ICCPR.

1. Arbitrary deprivation of human life is prohibited under international law.

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57 Ibid, Art.6 (1).
International law has advocated the prohibition of arbitrary deprivation of human life. Arbitrary is defined as procedures or law of a judicial decision founded on prejudice or preference rather than on reason or fact.\(^{58}\) In *Zambrano Vélez et al. v. Ecuador* before the Inter-American Court of Human Rights, the court maintained that there is arbitrary deprivation of life when excessive force is used. This is based on the state of absolute necessity in relation to the force or threat to be repealed.\(^{59}\)

States have the obligation to uphold the right to life through the prohibition of arbitrary deprivation of human life. The force employed through the use of nuclear weapons does not distinguish if it would be used on non-combatants or combatant or civilians even in times of peace.\(^{60}\) Further, it has been observed that the use of nuclear force could never reach as a minimum necessary force.\(^{61}\)

2. **States have the obligation to uphold the Right to Peace.**

States also have the obligation in the maintenance and preservation of peace which is a fundamental obligation of every State contained in the General

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\(^{58}\) Black’s Law Dictionary (8th ed. 2004).

\(^{59}\) IACtHR, Zambrano Vélez et al. v. Ecuador, Judgment (Series C No. 166), 4 July 2007, § 84, with other references.


Assembly Resolution 39/11. The possession of states with nuclear weapons coupled with the threat or use of nuclear weapons is a harm to the right to peace. Further emphasis is placed on the elimination of the threat of nuclear war as a policy of every state.

Compliance with this obligation is done by several states in the regional level such as the Treaty of Tlatelolco (1967) which prohibits nuclear weapons in Latin America and the Caribbean, the Treaty of Rarotonga (1985) in the South Pacific, the Treaty of Bangkok (1995) in Southeast Asia, the Treaty of Pelindaba (1996) in Africa, and the Treaty of Semipalatinsk (2006) in Central Asia. The remaining challenge is to strengthen peace in an international level by the complete nuclear disarmament of every state.

VI. NUCLEAR WEAPON STATES HAVE THE DUTY TO DISARM TO COMPLY WITH THEIR OBLIGATIONS UNDER INTERNATIONAL ENVIRONMENTAL LAW.

A. States have the obligation to protect the environment.

Nuclear weapons are the greatest environmental threat in history. Evidence from several scientific research supports the view that nuclear weapons pose a serious threat.

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63 Ibid.

64 supra note 12.

of devastation to humanity and the environment. The United Nations Human Rights Committee confirmed this and noted that it is not only the use but the production, testing, possession and deployment of nuclear weapons that should be prohibited and recognized as against humanity.\textsuperscript{67} Therefore, it is imperative for NWS to disarm to make sure that the environment is protected and their obligations complied.

1. \textbf{This obligation is customary under international law.}

   i. \textbf{There is sufficient state practice.}

The duty to protect the environment is a customary norm. State practice is shown by 177 of the world's 193 UN member nations recognizing this through their constitution, environmental legislation, court decisions, or ratification of international agreements.\textsuperscript{68} Numerous treatises\textsuperscript{69} espousing this obligation are signed and ratified by numerous states including both nuclear and non-nuclear

\begin{thebibliography}{99}

  \bibitem{Human Rights Committee} Human Rights Committee General Comment 14, Article 6 of the International Covenant on Civil and Political Rights, 23\textsuperscript{rd} Sess., U.N. Doc. HRI/GEN/1/Rev.1 (1994) at 18.


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weapon states. It is also found in many international instruments such as the Stockholm Declaration \(^{70}\) and Rio Declaration. \(^{71}\)

**ii. Existing state practice is coupled with *opinio juris.*

The ICJ stated that the States’ consent to and attitude towards the text of a resolution evidence *opinio juris.* \(^{72}\) The abovementioned covenants and declarations prove that there is already an expectation of compliance among states, which together with ensuing practice establishes the obligation to protect the environment as a customary norm. And as a binding norm, States are bound not to engage in activities harmful to the environment.

**2. Any use of nuclear weapons is harmful to the environment.**

Of all activities concerning nuclear weapons, nuclear testing has been the most destructive of human health and the environment. \(^{73}\) Before nuclear-testing freeze conventions came into effect, locations such as Soviet sites in Central Asia and Britain’s testing grounds in central Australia became uninhabitable for almost all forms of life. In the southern Pacific Ocean, islands and their coastal reefs likewise became unfit for life as a result of American and French nuclear-

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\(^{72}\) Nicaragua v. USA § 99-101.

\(^{73}\) Alyn Ware, Health and Environmental Effects of the Production and Testing of Nuclear Weapons Available at http://www.nuclearfiles.org/menu/key-issues/nuclear-weapons/issues/effects/effects-of-nuclear-weapons.htm.
Memorial on behalf of the NNWS

weapons testing.\textsuperscript{74} The global fallout resulting from these activities will lead to over 2 million cancer fatalities alone, not counting other health effects.\textsuperscript{75} Certainly, the effects of the use of nuclear weapons do not respect borders and brings unwanted changes in the conditions in violation of the affected State’s rights under international law.

B. NWS’ have the duty to prevent transboundary harm.

1. NWS’ nuclear testing activities violate their duty to prevent transboundary harm.

The no-harm principle, as embodied in many international instruments\textsuperscript{76} and upheld by ICJ decisions in cases such as the \textit{Trail Smelter arbitration}\textsuperscript{77}, \textit{Corfu Channel}\textsuperscript{78}, and \textit{Nuclear Tests Cases}\textsuperscript{79} prohibits States from conducting activities within their territories without due regard to the rights of other States or for the protection of the environment. A State which is responsible for the administration of territory is under an obligation not to bring about changes in the conditions of


\textsuperscript{77} U.S. and Canada (1938/1941) 3 R.I.A.A. 1905.

\textsuperscript{78} Assessment of Compensation, (United Kingdom v. Albania) 15 XII 49, ICJ, December 15, 1949.

the territory which will cause irreparable damage to, or substantially prejudice, the existing or contingent legal interest of another State.\textsuperscript{80}

A nuclear winter, which occurs after a detonation of nuclear weapons, can affect noncombatant countries and threaten the world population by the effects of global climate.\textsuperscript{81} Scientific estimates also show that a regional war between India and Pakistan will dramatically damage Europe, the US, and other regions through global ozone loss and climate change.\textsuperscript{82} Due to the nature of nuclear weapons, its effects can never be contained and it will always bring changes in the territory of others thus affecting their interests that are protected under international law.

Also, implicit under this doctrine is the denial of the existence of a sovereign “right” to engage in or allow activities having harmful transboundary effects.\textsuperscript{83} Thus, NWS can never use their sovereignty as a defense.

2. \textbf{The transboundary harm by using these weapons is sufficiently significant to constitute a departure from the obligation of states.}

The International Law Commission has recognized the threshold as “significant” and emphasized that the harm must lead to a real detrimental effect on matters such as human health, industry, property, environment or agriculture in

\begin{footnotesize}
\begin{enumerate}[\textsuperscript{80}]
\item C. Sagan, Foreign Affairs. 62, 257 (983/84).
\item Id.
\end{enumerate}
\end{footnotesize}
other States. To be legally relevant, damage should at least be “greater than the mere nuisance or insignificant harm which is normally tolerated.

In the case of nuclear weapons, the scientific community is one in saying that it can bring serious irreversible harm not only to humanity but to the environment as well. Having the ability to bring changes across border, the extent and intensity of harm these nuclear weapons bring is significant enough to permit no other conclusion than that its use constitute a departure from the obligation of States not to cause transboundary harm.

C. Even mere possession of nuclear weapons violates the prevention principle.

1. The duty to prevent irreversible damage is a customary norm.

The prevention principle as a customary principle, which binds all states, highlights the obligation to prevent damage to the environment. The ICJ established the customary nature of this principle in its Advisory opinion on the Legality of Nuclear Weapons and subsequently in the Gabčíkovo-Nagymaros Project case, affirming that “in the field of environmental

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85 supra note 17.

Memorial on behalf of the NNWS

protection, vigilance and prevention are required on account of the often irreversible character of damage to the environment."87

2. Possession even without the use of nuclear weapons violates the obligation to prevent harm.

Possession of nuclear weapons even without actually using them is still harmful. This is shown in nuclear weapon production where facilities have already polluted vast amounts of soil and water.88 The substances obtaining from these things are carcinogenic and mutagenic and remain hazardous for hundreds of thousands of years. Disposal of nuclear wastes and its safe containment continue to be a big problem considering there are currently no technologies that can clean up radiation.89 And this is currently confronting States such as the United States and Germany.

These events establish that actual harm comes not only by using but even its mere possession. Therefore, not possessing these weapons and disarming them complies with the obligation to prevent the irreversible damage.

VII. THE PROHIBITION ON THE USE AND POSSESSION OF NUCLEAR WEAPONS HAS RIPENED INTO A CUSTOMARY NORM.

A. There is evidence of state practice.


88 What’s the damage? Greenpeace International (2006)


89 Ibid.
1. Multilateral Treaties

Treaties can be evidence of customary international law. This is so even if the treaty has not received enough ratifications to come into force. Various regional and multilateral treaties have been created to address the obligation of states toward nuclear disarmament. Showing a widespread and consistent state practice.

To pursue a nuclear free world, various states intend on forming nuclear weapon-free zones [NWFZ]. Examples include the Treaty of Tlatelolco in Latin America, Treaty of Pelindaba in Africa, Treaty of Semey / Semipalatinsk in Central Asia, Bangkok Treaty in Southeast Asia, and Rarotonga Treaty in South Pacific. These treaties prohibit nuclear weapons within the zone, including the production, testing, receipt, stationing, storage or use of nuclear weapons.

Similarly, there is a customary prohibition against nuclear testing which was manifested by multilateral treaties like Partial Test Ban Treaty (1963), the implicit prohibition under the Non-proliferation Treaty, the prohibitions under Nuclear Weapons-Free Zones Treaties, and the Comprehensive Test Ban Treaty (1996). Furthermore, the customary prohibition on nuclear testing was manifested when the nuclear testing by

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91 supra note 16 at 131.


93 supra note at 2.
Democratic People’s Republic of Korea in 2006, 2009 and 2013 met with strong condemnation.94

2. **State Pronouncements and Practices**

In the 2000 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, the letter presented by the representatives of the recognized NWS, speaks of their “unequivocal commitment to the ultimate goals of the complete elimination of nuclear weapons and a treaty on general and complete disarmament”95

Moreover, the 2000 Review Conference of NPT agreed on “Principles and Objectives for Nuclear Non-Proliferation and Disarmament” thirteen [13] steps, which include a moratorium on nuclear weapon tests explosions and an unequivocal undertaking by NWS toward disarmament.96

As to state practices, South Africa has voluntarily destroyed its nuclear arsenals in 1991 and joined the NPT as a NNWS. The letter of the Permanent Representative of South Africa to the United Nations addressed to the Chairman of the Disarmament Commission in 1993 acknowledged

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94 *supra* note at 3.


the existence of the “global disarmament obligations” of states. 

Also, in the Prague Speech by former President Obama of the United States, he condemned the nuclear testing done by North Korea in violation of existing regimes and urged that “the path to security and respect will never come through threats and illegal weapons”.

In the early 1990s, Argentina and Brazil abandoned their nuclear programs and signed the NPT as a NNWS. The National Statement of Brazil in the IV Nuclear Security Summit, referred to nuclear weapons as “detrimental to the most elementary foundations of international humanitarian law.” Other states who abandoned nuclear weapon programs include, Sweden and Switzerland. These state practices shows the recognized illegality of the use of nuclear technology other than peaceful for a peaceful purpose.

3. UN General Assembly Resolutions

In the 497th plenary meeting of the United Nations General Assembly, “the total prohibition of the use and manufacture of nuclear

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weapons and weapons of mass destruction of every type,” was adopted unanimously as one of the three points of a coordinated programme of disarmament. The prohibition in the resolution was then later on cited on the preambular portion of the Treaty of Tlatelolco.

Also, The United Nations General Assembly passed a resolution in 1961 declaring that the use of nuclear weapons was illegal. Fifty-five states (consisting mainly of communist and Third World countries) voted in favor of the resolution, twenty states (consisting mainly of Western countries) voted against, and twenty-six states (consisting mainly of Latin American countries) abstained. This shows that the sentiment of nuclear weapons being illegal was not new, especially today where even the Latin America is a Nuclear Weapons-free Zone, and most states support nuclear disarmament.

B. State practice is coupled with opinio juris

In the case of nuclear disarmament and prohibition, such recognition of the obligatory character of nuclear disarmament has been expressly acknowledged in Nuclear Weapons-Free Zones Treaties such as the Treaty of Pelindaba, Treaty of Semipalatinsk, and the Treaty of Rarotonga. These treaties both recognize the

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102 G.A. Res. 808 (IX). Regulation, limitation and balanced reduction of all armed forces and all armaments: report of the disarmament commission; conclusion of an international convention (treaty) on the reduction of armaments and the prohibition of atomic, hydrogen and other weapons of mass destruction, 49th Plenn. Meeting, 1954.


104 supra note 16 at 346.
common end of a complete nuclear disarmament and also the positive obligation of states to contribute to such end.

VIII. REVISITING THE NUCLEAR DISARMAMENT REGIME

A. The NPT has gaps which prevents its effective enforcement.

There is a broad consensus among scholars that the NPT has either failed or is on the verge of failure.\(^{105}\) There are several reasons:

First, it lacks a universal, non-discriminatory verification and treatment. Nations, particularly India, never complied with the treaty because of the lack of fairness for already nuclear nations to impose limiting sanctions on nuclear weapon development while they observe no signs of disarmament and liquidation of nuclear stockpiles from NWS.\(^{106}\)

Second, its lacks safeguards for transparency. The International Atomic Energy Agency (IAEA) is the body which acts as a nuclear inspectorate and verifies whether states are obeying the terms of the treaty.\(^{107}\) However, it is the Additional Protocol that grants the IAEA extensive access to a country’s nuclear program and allows a comprehensive and thorough inspection. But since it relies upon the consent of member states, it becomes difficult for the IAEA to definitively confirm that a nuclear weapons


\(^{106}\) Donish Khan, Nuclear Non Proliferation Treaty, (Stanford University 2012).

state’s nuclear materials are being properly managed, or that a non-nuclear weapons
state’s civilian program is not actually being used for non-peaceful purposes.

Third, the NPT does not contain a standardized framework for dealing with
violators, as a result, the treaty faces difficulties in dissuading non-compliance, and in
building consensus among signatories regarding how to impose compliance.108 Lastly, the
treaty itself allows discretionary withdrawal of its members “if it decides that
extraordinary events…have jeopardized its supreme interests.”109 This provision only
makes exploitation possible and thus places the whole nuclear regime at stake.

IX. MOVING FORWARD

A. Codifying the norm of the obligation for complete nuclear disarmament

The ICJ in one case110 stated that the States’ consent to and attitude towards the
text of a resolution evidence opinio juris. The UNGA, in a resolution which enjoyed
favor among 123 states called for a world free of nuclear weapons.111 It adopted another
resolution to advance a legally binding instrument to prohibit nuclear weapons which also
gained consistent predominant acceptance from NNWS and nuclear-reliant countries
alike. Indeed, in these instances, the endorsement by a number of these countries
indicates that nuclear disarmament has become a norm under international law. And the

108 ibid at 33.

109 ibid.


111 UNGA, General and complete disarmament: taking forward multilateral nuclear disarmament negotiations,
near-universal participation by States implies that there is a widespread acceptance for its codification.\footnote{Julia Choe, “Problems of Enforcement,” Harvard International Review, (2007) (last accessed May 1, 2017).}

The NPT though binding on nuclear-weapon States still proves to be inefficient and ineffective in achieving its goal of disarmament because of the inherent weakness in its provisions. Thus, a new and comprehensive treaty reflecting customary international law on nuclear prohibition is vital. With government support for a nuclear weapons convention to outlaw and eliminate nuclear weapons having grown considerably,\footnote{Towards a Treaty Banning Nuclear Weapons: A Guide to Government Positions on a Nuclear Weapons Convention, International Campaign to Abolish Nuclear Weapons (ICAN) (2012) § 2.} achieving this end is not impossible.

\section*{X. ALSO, SUSTAINABLE DEVELOPMENT CAN BE ACHIEVED IF STATES COMPLY WITH THEIR OBLIGATION TO DISARM.}

or State practice, there is a wide and general acceptance of the concept. In the present case, possession and use of nuclear weapons totally runs counter to achieving the goal of sustainable development. With the increase in the number of countries possessing weapons and are planning to develop one, tensions also develop making nuclear conflict more likely. Thus, it is only logical to conclude that States can only fulfill this obligation by disarming to eliminate any risk that comes along with the possession of these harmful weapons.

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

1. Apart from the obligations established under the principle of Sustainable Development, NWS must also act in accordance with the Principle of Intergenerational Equity.

118 For example, the Rio Declaration on Environment and Development, 1992, emphasizes sustainable development in several of its Principles (e.g., Principles 4, 5, 7, 8, 9, 20, 21, 22, 24 and 27 refer expressly to "sustainable development" which can be described as the central concept of the entire document); and the Copenhagen Declaration, 1995 (paras. 6 and 8), following on the Copenhagen World Summit for Social Development, 1995.

119 For example, in 1990, the Dublin Declaration by the European Council on the Environmental Imperative stated that there must be an acceleration of effort to ensure that economic development in the Community is "sustainable and environmentally sound" (Bulletin of the European Communities, 6, 1990, Ann. II. p.18). It urged the Community and Member States to play a major role to assist developing countries in their efforts to achieve "long-term sustainable development" It said, in regard to countries of Central and Eastern Europe, that remedial measures must be taken "to ensure that their future economic development is sustainable" (ibid.). It also expressly recited that:

“As Heads of State or Government of the European Community, . . . [w]e intend that action by the Community and its Member States will be developed . . . on the principles of sustainable development and precautionary action.” (Ibid., Conclusions of the Presidency. Point 1.36, pp. 17-18.)


121 Principle 24 Rio Declaration
Closely connected with the principle of Sustainable development is the principle of Intergenerational Equity (IE). It is an equitable principle that all generations are partners for caring and using the earth. It places the obligation on the present generation to conserve and maintain the present resources by minimizing long-term and irreversible damage to the environment through conservation. Its development as a customary norm was further demonstrated by the ICJ in the Case Concerning the Gabcikovo-Nagymaros Project and in the Case Concerning Pulp Mills on the River Uruguay.

Exposure to nuclear and chemical contamination can last for generations. The effects stay with the victim for years and even decades to come or enter the genetic chain and affect later generations. To secure the present and future generations and to comply with its obligations, all States must therefore disarm and eliminate all nuclear armaments.

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123 *supra* note 42 § 88.
XI. CONCLUSION AND PRAYER

There has been unanimous recognition by states of the destructiveness and far reaching implications of nuclear weapons, yet there is a lack of codified regimes and jurisprudence concerning the issue. For several years, the NPT comprises the bulk of the nuclear non-proliferation and disarmament regime. Despite its inherent weakness, it embodies binding obligations of states that needs to be complied with under the context of international law such as the obligation to pursue negotiations in good faith towards total disarmament, and the limited use of nuclear energy for peaceful purposes.

Consistently, other relevant treaties and conventions affirm the view that the use of nuclear weapons is not sanctioned by international law. This includes the UN Charter, Rio Declaration, Sustainable Development Goals (SDGs), International Convention on Civil and Political Rights (ICCPR), and the Universal Declaration of Human Rights (UDHR). Nevertheless, there is a customary norm against the possession and use of nuclear weapons as reflected in the uniform state practices and recognition of the positive obligation of states toward disarmament. It also runs counter to the rudimentary obligations and principles of international humanitarian law, and environmental law.

Thus, there is a necessity to codify the existing customary norm against the use and possession of nuclear weapons, consistent with the recognized end of nuclear disarmament. This would not only comply with state obligations that were already existing but also reflect the unanimous sentiment of the community of nations vis-à-vis the principles of international law. Further, the it would determine the responsibilities,
obligations and liabilities of states that would be vital for existing jurisprudence and as a
guiding principle for future actions that are yet to be taken.

In consideration of the weight of the dangers and indiscriminate effects of the use
of nuclear weapons that lasts for ages, and the shift of the political dynamics of the
international arena, the significance of the policy of deterrence pales into comparison.

It is then our prayer that this Honorable Court lay down and determine the
responsibility of states so as to ensure compliance of the states’ obligation and the extent
of their liability for its failure to act with regard to the climate crisis for the benefit of
ours and that of the future generations.