

# THE LEGALITY OF NUCLEAR WEAPONS FOR USE AND DETERRENCE

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## ABSTRACT

*After World War II, a new set of treaties concerning the laws of war—the Geneva Conventions—established the standards of international humanitarian law (IHL). Under Additional Protocol I of the Geneva Conventions, the nuclear bombing of Japan would have violated IHL. In fact, using nuclear weapons in any situation would likely violate international law. Due to its potential for utter destruction, nuclear weapons should not exist in our current world and should not be used in any circumstance. But, even today, international law does not ban nuclear weapons. This Note advocates for implementing a stricter amendment to the Non-Proliferation Treaty (NPT)’s disarmament provisions so it can achieve total nuclear disarmament of nuclear-weapon states. The actual use of nuclear weapons—which is a per se violation of current international law—is closely tied to the principle of deterrence under the mutually assured destruction (MAD) doctrine. As a result of maintaining nuclear weapon stockpiles for deterrence purposes under MAD, the United States—a nuclear-weapon state—has had the opportunity to seriously consider using those stockpiles for a nuclear attack in times of conflict. Maintaining nuclear weapon stockpiles for deterrence purposes does not violate current international law or the NPT under the NPT’s current language. However, the fact that nuclear-weapon states have the ability to commit what would inevitably be a violation of international law should they choose to deploy nuclear weapons is sufficient justification for banning nuclear weapons entirely. The NPT should therefore be amended to require complete nuclear disarmament by nuclear-weapon states.*

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I. INTRODUCTION

The enemy has begun to employ a new and most cruel bomb, the power of which to do damage is, indeed, incalculable, taking the toll of many innocent lives. Should we continue to fight, not only would it result in an ultimate collapse and obliteration of the Japanese nation, but also it would lead to the total extinction of human civilization . . . . This is the reason why we have ordered the acceptance of the provisions of the Joint Declaration of the Powers.<sup>1</sup>

On August 6, 1945, a B-29 bomber flew over Hiroshima and dropped a uranium bomb on the city that killed an estimated 70,000 individuals and wounded 50,000 more.<sup>2</sup> Three days later, another American B-29 bomber dropped a plutonium bomb on Nagasaki that killed an additional 20,000 and wounded 40,000 more.<sup>3</sup> Shortly after, on August 15, 1945, Japan surrendered and World War II abruptly ended.<sup>4</sup> The

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1. *Text of Hirohito's Radio Rescript*, N.Y. Times (Aug. 15, 1945), at 3.  
 2. Gabriella Blum, *The Laws of War and the "Lesser Evil"*, 35 YALE J. INT'L L. 1, 24 (2010).  
 3. *Id.*  
 4. *Text of Hirohito's Radio Rescript*, *supra* note 1.

bombings of Hiroshima and Nagasaki marked the first time that nuclear weapons were used on civilians.

The indiscriminate, massive destruction that a single bomb could cause struck fear in the eyes of America's enemies. Within years, other states, i.e., U.S.S.R. and China, developed nuclear weapons as part of their military arsenal.<sup>5</sup> Later in the twentieth century, the United States toyed with, though never acted on, the idea of using nuclear weapons during conflicts such as the Cold War and the Vietnam War.<sup>6</sup> Instead, the United States and other nuclear-weapon states strategically retained their nuclear weapons only to deter nuclear attacks by other states, thus fulfilling the theory of mutually assured destruction (MAD) that neither side to a conflict will use nuclear weapons if both sides possess them because an exchange of nuclear attacks will destroy both sides.<sup>7</sup>

After World War II, a new set of treaties concerning the laws of war, the Geneva Conventions, established the standards of international humanitarian law (IHL). Under Additional Protocol I of the Geneva Conventions, the nuclear bombing of Japan would have violated IHL.<sup>8</sup> In fact, using nuclear weapons in any situation would likely violate international law. Due to their potential for utter destruction, nuclear weapons should not exist in our current world and should not be used in any circumstance. But today international law does not ban nuclear weapons. The Non-Proliferation Treaty (NPT), which will not be the main focus of this paper, only calls on nuclear-weapon states to disarm themselves of their nuclear weapon stockpiles.<sup>9</sup> However, the NPT language is too lax and does not provide a specific time frame for nuclear disarmament.<sup>10</sup> Throughout the late twentieth and early twenty-first century, the United States, along with other nuclear-weapon states that are party to the NPT, have ignored select provisions and continued to own their stockpile of nuclear weapons for different strategic policies, primarily deterrence. Therefore, the NPT should be amended to impose a stricter ultimatum on nuclear-weapon states: disarm within a certain period of time, or else face dire penalties.

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5. Dakota S. Rudesill, *Regulating Tactical Nuclear Weapons*, 102 GEO. L.J. 99, 111–13 (2013).

6. *See infra* Section IV.

7. Jonathan Granoff, *Nuclear Weapons, Ethics, Morals, and Law*, 2000 B.Y.U. L. REV. 1413, 1433 (2000).

8. *See generally* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3 (entered into force Dec. 7, 1979) [hereinafter Additional Protocol I].

9. *See* Treaty on the Non-Proliferation of Nuclear Weapons, *opened for signature* July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161 [hereinafter NPT].

10. *Id.*

This Note consists of four main parts. Part II will discuss the current law on nuclear weapons and arguments from legal scholars on whether the use of nuclear weapons violates IHL. Part III will discuss the use of nuclear weapons against Japan in World War II, analyzing the attacks' legality under both the laws that applied during the time of the bombings (pre-Geneva Conventions) and the current international law (post-Geneva Conventions). Part IV will analyze US nuclear policy after World War II and the legality of certain attacks that almost came into fruition. Part IV will involve a discussion of the NPT—the international treaty closest to a total prohibition on nuclear weapons—and what it covers. It will also discuss the NPT's shortcomings and offer a solution involving a ban on using nuclear weapons in all circumstances. This Note will advocate for implementing a stricter amendment to the NPT disarmament provisions to achieve total nuclear disarmament of nuclear-weapon states. The actual use of nuclear weapons, which is a per se violation of current international law, is closely tied to the principle of deterrence under the MAD doctrine. As a result of maintaining nuclear weapon stockpiles for deterrence purposes under MAD, the United States—a nuclear-weapon state—has had the opportunity to seriously consider using those stockpiles for a nuclear attack in times of conflict. Maintaining nuclear weapon stockpiles for deterrence purposes does not violate current international law or the NPT under the NPT's current language. However, the fact that nuclear-weapon states have the ability to commit what would inevitably be a violation of international law should they choose to deploy nuclear weapons is sufficient justification for banning nuclear weapons entirely. The NPT should therefore be amended to require complete nuclear disarmament by nuclear-weapon states.

## II. THE CURRENT LAW ON NUCLEAR WEAPONS

There is no comprehensive or universal ban on nuclear weapons in international law, which is why some scholars argue that nuclear weapons are not per se illegal under the laws of war and customary international law.<sup>11</sup> The International Court of Justice (ICJ) did condemn the use of nuclear weapons in a 1996 advisory opinion, stating,

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11. *Nuclear Weapons*, INT'L COMM. OF THE RED CROSS (Feb. 19, 2013), <https://www.icrc.org/eng/war-and-law/weapons/nuclear-weapons/overview-nuclear-weapons.htm>; see also John Norton Moore, *Nuclear Weapons and the Law: Enhancing Strategic Stability*, 9 BROOK. J. INT'L L. 263, 264–65 (1983) (arguing that most nations, including the five nuclear powers [which five? The legal five?], have not implemented a per se ban on nuclear weapons use).

“the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law.”<sup>12</sup> However, the ICJ declined to determine the legality of using nuclear weapons in an extreme situation, such as self-defense.<sup>13</sup>

Further complicating matters, the destructive force of nuclear weapons distinguishes them from conventional weapons, making applying the laws of war to the potential use of nuclear weapons difficult.<sup>14</sup> However, nuclear-weapon states such as the United States believe that the laws of war do indeed govern the use of nuclear weapons, just as it governs the use of conventional weapons.<sup>15</sup> As a result, the United States believes that the principles of proportionality and distinction apply to nuclear weapons.<sup>16</sup> The principles of proportionality and distinction come from Additional Protocol I of the Geneva Conventions, which was put into action in 1977.<sup>17</sup> Theoretically, the use of nuclear weapons would be a violation of IHL due to the restrictions (proportionality and distinction) of international law on the types of weapons that states can use.<sup>18</sup>

Legal scholars are split on whether using nuclear weapons is illegal under international law.<sup>19</sup> One approach argues that the health and physical effects of nuclear weapons make their use incompatible with, and illegal under, the humanitarian principles of customary interna-

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12. Legality of the Threat or Use of Nuclear Weapons (United Nations), 1996 I.C.J. 266, 266–67 (July 8, 1996).

13. Jill M. Sheldon, *Nuclear Weapons and the Laws of War: Does Customary International Law Prohibit the Use of Nuclear Weapons in All Circumstances?*, 20 *FORDHAM INT’L L.J.* 181, 183–84 (1996).

14. *See id.* at 237.

15. *See* U.S. DEPARTMENT OF DEFENSE, *LAW OF WAR MANUAL* 393 (2015) [hereinafter *DOD MANUAL*].

16. *Id.*

17. Additional Protocol I, *supra* note 8, arts. 51-52(1) (“distinction” is described as an indiscriminate attack that can also be construed to include a weapon that causes a disproportionate amount of injury to civilians); *id.* arts. 51(5)(b), 57(2)(a)(iii) (proportionality is described as attackers who must “refrain from deciding to launch an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the direct military advantage anticipated.”).

18. *See* Elliott L. Meyrowitz, *PROHIBITION OF NUCLEAR WEAPONS: THE RELEVANCE OF INTERNATIONAL LAW* 2 (1990) (discussing the legality of nuclear weapons and how the laws of war would apply).

19. *See* Sheldon, *supra* note 13, at 182.

tional law.<sup>20</sup> The military advantage, they argue, can never outweigh the vast humanitarian concerns because radiation will spread indiscriminately and uncontrollably.<sup>21</sup> This indiscriminate aspect, by itself, precludes nuclear weapons from ever being used.<sup>22</sup> Even if nuclear weapons could be used strategically, scholars believe that introducing nuclear weapons into a conflict can have the adverse effect of causing a total war in which indiscriminate attacks would likely occur.<sup>23</sup>

Under the other approach, due to the absence of a treaty that prohibits nuclear weapon use in all circumstances, some scholars suggest that customary international law does not completely prohibit using nuclear weapons, and therefore could possibly allow for their use in self-defense.<sup>24</sup> Furthermore, strategically using nuclear weapons would preserve the distinction between civilians and combatants.<sup>25</sup> Military targets can be in very remote locations that lack civilian populations.<sup>26</sup> Combined, these factors offer persuasive support for the proposition that using nuclear weapons for self-defense would, in limited circumstances, not constitute a violation of international law.

Whether the use of nuclear weapons is in fact prohibited by international law—in some or in all circumstances—has been a popular topic of debate. The lack of consensus, however, only contributes to the lack of clarity in international law. It remains unclear whether using nuclear weapons in any fashion is legal under international law—including in situations involving self-defense.

### III. THE LEGALITY OF THE NUCLEAR BOMBING OF JAPAN

President Truman hoped that using nuclear weapons would force Japan to surrender.<sup>27</sup> He reasoned that the alternative route to making Japan surrender—a land invasion—was too costly; he believed an

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20. See Sheldon, *supra* note 13, at 238; see also Meyrowitz, *supra* note 18, at 21–22 (discussing principles of laws of war applicable to nuclear weapons, including limited right to kill enemy, prohibition against unnecessary suffering, and prohibition against indiscriminate attacks).

21. See Meyrowitz, *supra* note 18, at 24 (stating that atomic bombings of Hiroshima and Nagasaki resulted in indiscriminate slaughter of Japanese citizens); see also Sydney D. Bailey, PROHIBITIONS AND RESTRAINTS IN WAR 148 (1972); Rudesill, *supra* note 5, at 102 (stating that even the “small” tactical nuclear weapons have a higher explosive yield than the bombs dropped on Hiroshima and Nagasaki).

22. See Bailey, *supra* note 21, at 148.

23. See *id.*; Richard Falk et al., NUCLEAR WEAPONS AND INTERNATIONAL LAW 22, 23 (1981).

24. See Falk et al., *supra* note 23.

25. See Sheldon, *supra* note 13, at 251.

26. See *id.*

27. See Blum, *supra* note 2, at 2.

invasion would have taken more lives than the bombs themselves.<sup>28</sup> Advocates for the bomb believe it was a proportionate response to end the war because Operation Downfall would have killed many more Japanese and Americans.<sup>29</sup> However, it is clear that the bombing on Hiroshima and Nagasaki completely destroyed two cities and caused mass casualties, the numbers of which are still unknown today because radiation rendered the cities inaccessible.<sup>30</sup> In fact, many civilians suffered and died of radiation poisoning years after the incident.<sup>31</sup>

This Part is an analysis of the bombing of Hiroshima and Nagasaki that ended World War II. Section A will analyze the United States' alternative plan, Operation Downfall, which did not include any use of nuclear weapons. Section B will look at which international laws applied at the time of the bombing, and Section C will conclude with a discussion of how the bombing would have violated current international law if it applied at the time.

#### A. *Operation Downfall*

As an alternative to dropping the bombs, the United States had planned Operation Downfall, a land invasion of Japan. This invasion would have required using the resources of the army, navy, and air force.<sup>32</sup> Casualty predictions for both sides were high. At the time, William Shockley, a member of U.S. Secretary of War Henry Stimson's staff, estimated between 1.7 and 4 million American casualties and between five and ten million Japanese fatalities would result from carrying out Operation Downfall.<sup>33</sup> However, as General Douglas MacArthur pointed out, Shockley's casualty estimates were speculation; due to the speculative nature of these estimated casualties, one could also say that a land invasion could have possibly saved more lives than the dropping of the bombs that, as a matter of fact, caused a large number

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28. See Tom Nichols, *No Other Choice: Why Truman Dropped the Atomic Bomb on Japan*, THE NAT'L INT. (Aug. 6, 2015), <http://nationalinterest.org/feature/no-other-choice-why-truman-dropped-the-atomic-bomb-japan-13504>.

29. Paul J. Goda, *The Protection of Civilians from Bombardment by Aircraft: The Ineffectiveness of the International Law of War*, 33 MIL. L. REV. 93, 113 (1966).

30. See Blum, *supra* note 2, at 25 (discussing that casualties varied—due to lingering and long term effects of radiation—and range from one hundred thirty thousand to more than three hundred fifty thousand).

31. *See id.*

32. See Douglas MacArthur, REPORTS OF GENERAL MACARTHUR: THE CAMPAIGNS OF MACARTHUR IN THE PACIFIC 395–400 (facsimile reprint 1994) (1966).

33. Richard B. Frank, DOWNFALL: THE END OF THE IMPERIAL JAPANESE EMPIRE 340 (1999).

of casualties.<sup>34</sup>

B. *Pre-Geneva Convention Legality: Hague Conventions of 1899 and 1907*

At the time of World War II, the international laws that applied to wars were the Hague Conventions of 1899 and 1907. These regulations set forth rules regarding attacks on civilian populations.<sup>35</sup> The Conventions did not anticipate air warfare and, therefore, did not contain any specific provisions on air attacks.<sup>36</sup> Instead, the Conventions prohibited targeting undefended towns and cities by naval and field artillery.<sup>37</sup> Additionally, the Conventions prohibited using “arms, projectiles, or material calculated to cause unnecessary suffering.”<sup>38</sup> Because Hiroshima and Nagasaki were undefended cities,<sup>39</sup> it seems likely that the nuclear weapons’ destruction would be classified as “unnecessary suffering.”

A 1964 ruling from the Tokyo District Court supports these assertions. In *Shimoda v. State*, the Tokyo court found that the United States’ use of nuclear weapons during World War II violated the Hague Conventions and customary international law by causing unnecessary suffering.<sup>40</sup> The plaintiffs sued the Japanese government for injuries resulting from the nuclear bombings.<sup>41</sup> The Tokyo District Court decided that the nuclear bombing of Nagasaki and Hiroshima violated international standards at the time.<sup>42</sup> The court noted that the nuclear bomb was a “really cruel weapon” that caused massive destruction and mass casualties.<sup>43</sup> Relying on the Hague Conventions and customary

34. See MacArthur, *supra* note 32, at 430.

35. See Hague Convention IV Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 529 [hereinafter Hague Convention].

36. See *id.*

37. *Id.* art. 25. But see Matthew Lippman, *Aerial Attacks on Civilians and the Humanitarian Law of War: Technology and Terror from World War I to Afghanistan*, 33 CAL. W. INT’L L.J. 1, 7 (2002).

38. Hague Convention, *supra* note 35, art. 23(e).

39. The Hague Convention only prohibited unnecessary suffering on undefended cities—those without a military establishment. See *id.* art. 25; Lippman, *supra* note 37, at 7.

40. Jill M. Sheldon, *Nuclear Weapons and the Laws of War: Does Customary International Law Prohibit the Use of Nuclear Weapons in All Circumstances?*, 20 FORDHAM INT’L L.J. 181, 240 (1996).

41. Petitioners claimed that the Japanese government was responsible because the government waived the claims of its citizens against the United States for the bombings. *Id.*

42. See Lippman, *supra* note 37, at 29–30; see also Richard A. Falk, *The Shimoda Case: A Legal Appraisal of the Atomic Attacks upon Hiroshima and Nagasaki*, 59 AM. J. INT’L L. 759, 759 (1965).

43. Lippman, *supra* note 37, at 29.

international law, the court distinguished between conventional and nuclear aerial bombings and between defended and undefended cities.<sup>44</sup> Though the cities contained certain military establishments, the court ruled that the bombings were carried out against *undefended* cities because the attack was not specifically targeted at military establishments—and, instead, was too indiscriminate.<sup>45</sup> The court also ruled that an indiscriminate attack was only legal under international law if it occurred in defended cities. The court then defined a defended city as one that resists an actual attempt at land occupation where enemy soldiers are planning to take control of the city.<sup>46</sup> Therefore, a city with defense installations and armed forces cannot be considered a defended city if it is far away from the battlefield, as is the case with Hiroshima and Nagasaki, unless there is an actual invasion attempt by the enemy to take over the city.<sup>47</sup>

Thus under the *Shimoda* case, the attacks on Hiroshima and Nagasaki violated international law that had yet to account for nuclear weapons and the unique level of destruction they cause.

C. *Post-Geneva Conventions Legality: International Humanitarian Law*

Not only did the bombings violate international law at the time, but the nuclear attacks on Japan also violate modern international law. Today, the Geneva Conventions along with its Additional Protocols—which further added to IHL—comprise the law of armed conflicts.<sup>48</sup> Additional Protocol I (Protocol I) came into action in 1977.<sup>49</sup> Although a signatory of Protocol I, the United States has not ratified its addition to the Geneva Conventions and technically is not bound by its principles.<sup>50</sup> This is notable because many Protocol I provisions are recognized rules of customary international law.<sup>51</sup> The United States has abided by the principles of proportionality and distinction as laid out in

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44. *Id.* at 29–30.

45. *Id.*

46. *Id.*

47. *See id.*; Falk, *supra* note 42, at 772–73.

48. *See* Additional Protocol I, *supra* note 8, at 3.

49. *See id.*

50. *See* Curtis A. Bradley, *Unratified Treaties, Domestic Politics, and the U.S. Constitution*, 48 HARV. INT'L L.J. 307, 309–18 (2007); Brian L. Bengtson, *Legal Constraints Upon the Use of A Tactical Nuclear Weapon Against the Natanz Nuclear Facility in Iran*, 40 GEO. WASH. INT'L L. REV. 323, 350 (2008).

51. *See* Fausto Pocar, *To What Extent Is Protocol I Customary International Law?*, 78 INT'L LAW STUDIES 337, 337–39 (2002); Michael J. Matheson, *The United States Position on the Relation of*

Protocol I and has referred to them as part of binding customary international law.<sup>52</sup>

Protocol I requires parties in armed conflict to abide by the principles of proportionality and distinction.<sup>53</sup> Based on Protocol I, which has done away with the distinctions of defended and undefended cities, the bombings would have been disproportionate and indiscriminate.<sup>54</sup> Additionally, the Geneva Conventions are directly inspired by the principle of humanity, which prohibits causing suffering, injury, or destruction that is not required to realize a lawful military objective.<sup>55</sup> Thus, humanity is incorporated into the concepts of proportionality and distinction.<sup>56</sup> The goal of IHL is to minimize combatant and civilian suffering by placing limits on the type of destruction a state may inflict.<sup>57</sup> The nuclear bombing in Japan would have therefore violated IHL. If current international law applied at the time of the nuclear attacks on Japan, both the distinction and proportionality principles would have been violated, and the nuclear weapons used would not have been permissible weapons under customary international law as outlined in Protocol I.

### 1. Distinction: An Indiscriminate Attack Killed Civilians and Destroyed Civilian Structures

Under Articles 48, 51, and 52 of Protocol I, a state must distinguish carefully between military targets and civilians in order to protect the latter when an attack occurs.<sup>58</sup> A state cannot deliberately target civilians unless the civilians take a direct part in hostilities.<sup>59</sup> Under

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*Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT'L L. & POL'Y 419, 420 (1987).

52. *Id.* at 426.

53. Additional Protocol I, *supra* note 8, arts. 51–52.

54. *Id.* art. 51.5.

55. See DOD MANUAL, *supra* note 15, at 50–51; U.S. DEP'T OF THE AIR FORCE, AIR FORCE PAMPHLET 110–31, INTERNATIONAL LAW—THE CONDUCT OF ARMED CONFLICT AND AIR OPERATIONS ¶¶ 1–3(a)(2) (1976).

56. DOD MANUAL, *supra* note 15, at 50–51.

57. Hans-Peter Gasser, *International Humanitarian Law and the Protection of War Victims*, INT'L COMM. OF THE RED CROSS (Nov. 30, 1998), <https://www.icrc.org/eng/resources/documents/misc/57jm93.htm>.

58. Additional Protocol I, *supra* note 8, arts. 48, 51–52. Articles 51 and 52 are recognized by the United States as reflecting existing, binding customary international law. See DOD MANUAL, *supra* note 15, at 51–52; JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, LAW OF WAR HANDBOOK 164, 23–24 (2005); see also Matheson, *supra* note 51, at 426.

59. Additional Protocol I, *supra* note 8, art. 51(3).

Article 52(1), states are prohibited from attacking purely civilian structures, while Article 51 prohibits indiscriminate attacks—attacks that are not specifically contained to military objectives and causes a disproportionate number of civilian casualties.<sup>60</sup> At the time, Hiroshima and Nagasaki consisted mostly of pure civilian structures, such as hospitals, schools, and civilian homes.<sup>61</sup> Therefore, the United States violated Article 52 of Protocol I by using nuclear weapons on civilians and civilian structures.

In addition to violating Article 52, the United States also violated Article 51 by conducting an indiscriminate attack. The Department of Defense Manual (DOD Manual) and the Air Force Commander's handbook state that an indiscriminate attack consists of weapons that are "incapable of being controlled enough to direct them against a military objective," and cannot with any degree of certainty be directed at the military objective.<sup>62</sup> An indiscriminate attack can also be construed to include a weapon that causes a disproportionate amount of injury to civilians.<sup>63</sup> Clearly, the attacks on Hiroshima and Nagasaki were indiscriminate. For one, the bombing killed mostly civilians and destroyed purely civilian structures. Once the atomic bombs were dropped, hundreds of thousands of individuals (mostly civilians) were either killed or wounded in an instant. Additionally, due to the bombs' massive explosive yield, the attacks could not have been specifically controlled to target any military objective in the city.<sup>64</sup> Hiroshima, a city that had an army depot, was mainly targeted because it had geographical features that favored the use of an atomic bomb.<sup>65</sup> Therefore, the attacks violated Article 51 of Protocol I, which prohibits an attack that causes disproportionate injury to civilians as well as an attack with a weapon that cannot be controlled.<sup>66</sup> The United States knew of the indiscriminate destruction that the bombs would cause and intention-

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60. *Id.* arts. 51–52.

61. C. Peter Chen, *Atomic Bombing of Hiroshima and Nagasaki*, WORLD WAR II DATABASE, [http://ww2db.com/battle\\_spec.php?battle\\_id=49](http://ww2db.com/battle_spec.php?battle_id=49) (last visited June 5, 2017).

62. DOD MANUAL, *supra* note 15, at 340.

63. *Id.*

64. *See* Blum, *supra* note 2, at 24–25.

65. *See* Memorandum from Major J.A. Derry & Dr. N.F. Ramsey to Major Gen. L.R. Groves (May 12, 1945), <http://www.dannen.com/decision/targets.html> [hereinafter Derry & Ramsey Memorandum]; *see also* Notes on Initial Meeting of Target Committee ¶ 15 (May 2, 1945), <http://nsarchive.gwu.edu/nukevault/ebb525-The-Atomic-Bomb-and-the-End-of-World-War-II/documents/009.pdf>.

66. Additional Protocol I, *supra* note 8, art. 51.

ally used them as a way to end the war early.<sup>67</sup> Intentional killing of civilians in an indiscriminate attack for any reason, even to end a war early, is a war crime and violation of IHL.<sup>68</sup>

## 2. Proportionality: The Level of Incidental Civilian Casualties Outweighed the Expected Military Advantage of the Attacks

The second principle governing the legality of an armed attack under Protocol I is proportionality. Proportionality forbids states from exercising any use of force that causes incidental civilian casualties disproportionate to the operation's military advantage.<sup>69</sup> The military advantage must outweigh the anticipated civilian casualties to be legal under current international law.<sup>70</sup> Thus, Article 51(5)(b), which combines distinction and proportionality, requires a balancing test between the expected military advantage and the level of incidental civilian casualties. Article 57(2)(a)(iii) also states that attackers must "refrain from deciding to launch an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the direct military advantage anticipated."<sup>71</sup> The United States recognized this provision as a binding reflection of customary international law.<sup>72</sup>

The indiscriminate attacks with nuclear weapons against Japan resulted in a disproportionate amount of harm to civilians due to the large initial destruction and the subsequent lingering radiation that the nuclear weapons left behind.<sup>73</sup> Even though Hiroshima did have an important army depot and port of embarkation in the middle of the urban area, the area affected by the explosion of the bomb was much larger. The number of civilian lives lost within this much larger affected area was vastly disproportionate to the military advantage the United States sought.<sup>74</sup>

Nagasaki, on the other hand, did not have much military significance and was a last-minute decision by the U.S. government.<sup>75</sup> The original

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67. See Blum, *supra* note 2, at 2.

68. See *id.* at 9–10.

69. Additional Protocol I, *supra* note 8, art. 51(5)(b).

70. See *id.*

71. *Id.* art. 57(2)(a)(iii).

72. See Matheson, *supra* note 51, at 246–47.

73. See Blum, *supra* note 2, at 25.

74. See Derry & Ramsey Memorandum, *supra* note 65.

75. See Chen, *supra* note 61.

plan was to bomb the city of Kokura, which housed an army arsenal. However, due to bad weather, the bombers had to proceed to their secondary target, Nagasaki.<sup>76</sup> Nagasaki was an important seaport in southern Japan and was also a major war production center for warships and other military equipment.<sup>77</sup> Nagasaki was only a secondary target because it housed a greater civilian population than Kokura and had little-to-no military significance.<sup>78</sup> Just as was the case in Hiroshima, the affected area in Nagasaki was much larger than the originally targeted area containing military establishments. The bombing ultimately caused a large number of incidental civilian casualties.<sup>79</sup> Even though there were military objectives that motivated the attacks on Nagasaki and Hiroshima, the objectives did not outweigh the mass casualties and destruction that resulted from the two bombs. Thus, in both cities, the incidental number of casualties substantially outweighed the military advantage sought by the United States.

### 3. Permissible Weapons

Customary international law and Protocol I regulate the types of weapons that can be used in warfare.<sup>80</sup> Under customary international law, if a weapon fails either of two alternative tests, it is illegal.<sup>81</sup> A weapon's use is prohibited if the weapon is (1) calculated to cause superfluous injury, or (2) inherently indiscriminate.<sup>82</sup> Treaty law and customary international law currently prohibits chemical weapons, biological weapons, weapons that injure by fragments that are non-detectable by X-rays, and certain types of mines or other booby-trap devices.<sup>83</sup>

The superfluous injury test is satisfied if the suffering caused by the weapon provides no military advantage, or is otherwise clearly disproportionate to the military advantage reasonably expected from the use of the weapon.<sup>84</sup> The superfluous injury prong only prohibits a weapon

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76. *Id.*

77. *Id.*

78. *Id.*

79. See Blum, *supra* note 2, at 24–25.

80. Additional protocol I, *supra* note 8, art. 36; DOD MANUAL, *supra* note 15, at 317.

81. DOD MANUAL, *supra* note 15, at 317.

82. *Id.*; see also Additional Protocol I, *supra* note 8, art. 35(2) (“It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.”).

83. DOD MANUAL, *supra* note 15, at 317–318.

84. *Id.* at 335.

if the suffering is clearly disproportionate to its military utility.<sup>85</sup> The nuclear weapons dropped on Hiroshima and Nagasaki would have satisfied the superfluous injury test because the weapon caused substantial civilian deaths that outweighed the military advantages in both cities.<sup>86</sup>

Even if the nuclear weapons did not satisfy the superfluous injury test, the weapons would have satisfied the inherently indiscriminate test. Inherently indiscriminate weapons are weapons that are incapable of being used in accordance with the principles of distinction and proportionality.<sup>87</sup> Indiscriminate weapons includes weapons whose use would cause incidental harm that is excessive compared to the military advantage expected from their use and weapons that are specifically designed to conduct attacks against civilian populations.<sup>88</sup> For example, weapons that necessarily cause excessive incidental harm include weapons that are incapable of being controlled and cannot, with any degree of certainty, be directed at a military objective.<sup>89</sup> A weapon is inherently indiscriminate if its use violates the principles of distinction and proportionality.<sup>90</sup> Based on the analysis in Part C(2), the incidental harm was excessive compared to the expected military advantage, and the explosive yield of the weapon itself could not be controlled.<sup>91</sup> Therefore, the use of nuclear weapons on Hiroshima and Nagasaki was inherently indiscriminate.

Based on the analyses under the Hague Conventions of 1899 and 1907 and under Protocol I of the Geneva Conventions, the bombing of Hiroshima and Nagasaki violated international law both at the time of the attacks and under current international law. Under the Hague Conventions, both cities were undefended, rendering the indiscriminate attacks that caused a large number of incidental civilian casualties illegal. Under the revised and current international law, the bombings on both cities would have violated Protocol I because they were indiscriminate and disproportionate to the military advantage sought.

#### IV. MAD: THE CURRENT USE OF NUCLEAR WEAPONRY

Since World War II, the U.S. government has refrained from using any nuclear weapons. Instead, the United States preserves its stockpile

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85. *See id.*

86. *See supra* notes 69–79 and accompanying text.

87. DOD MANUAL, *supra* note 15, at 340.

88. *See id.*

89. *Id.* at 343.

90. *Id.* at 341.

91. *See* Blum, *supra* note 2, at 24–25; *see also supra* notes 58–68 and accompanying text.

of nuclear weapons for an alternative purpose: deterrence. Maintaining a stockpile of nuclear weapons for purposes of deterring another actors' use of nuclear weapons is usually referred to as the mutual assured destruction doctrine.<sup>92</sup> Under MAD, state A's nuclear stockpile deters state B from using its nuclear weapons against A because B knows its use will trigger a nuclear response from A, and the exchange of nuclear weapons will annihilate both A and B.<sup>93</sup> In addition to the potential for retaliatory attacks that the United States could suffer if it initiated a nuclear attack, the United States also has refrained from using nuclear weapons because of the total indiscriminate destruction that was caused in Japan. The United Nations has also deterred any use of nuclear weapons by declaring, in a UN General Assembly meeting that the use of nuclear weapons is contrary to the "spirit, letter and aims of the United Nations . . . and is contrary to the rules of international law and to the laws of humanity."<sup>94</sup> While the General Assembly is not a legislature and cannot create a legally binding obligation on its member states, the force of this declaration remains strong despite the practical limitations of the UN's reach.<sup>95</sup> According to Richard Falk, "[t]he legal status of nuclear weapons is very inconclusive . . . [however,] there is fairly convincing evidence of a gathering consensus expressive of the will of the international community" against the usage of nuclear weapons.<sup>96</sup>

This Part will explore key moments in the U.S. history at which MAD dominated its nuclear policy. During these times, other nuclear weapon policies came along, but they were short-lived. In illustrating MAD's dominance and the brief surfacing of other potential nuclear policy doctrines, this Part will discuss specific conflicts during which the United States debated stepping away from its MAD-deterrence strategy and instead actually considered using nuclear weapons. Even when the policy of deterrence was the prevailing U.S. policy regarding the use of

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92. See Jonathan Granoff, *Nuclear Weapons, Ethics, Morals, and Law*, 2000 B.Y.U. L. REV. 1413, 1433–36 (2000).

93. *Id.* at 1433–34.

94. G.A. Res. 1653 (XVI), (Declaration on the Prohibition of the Use of Nuclear and Thermo-Nuclear Weapons); U.N. GAOR, 16th Sess., Supp. No. 17, U.N. Doc. A/5100 ¶ 1(a) (Nov. 24 1961).

95. See *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 259 (2d Cir. 2003) (describing the General Assembly as "the world's most important political discussion forum," but stating that it does not have the power to bind member states) (citing THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 248, 269 (Bruno Simma ed., 2d ed. 2002)).

96. Falk, *supra* note 42, at 793.

nuclear weapons, the United States still came very close to carrying out another nuclear attack.

Section A will discuss the Cold War and how MAD dominated the policy of both the United States and the Soviet Union. It will also examine specific instances during the Cold War when the United States thought about stepping away from its deterrence policy and actually considered using nuclear weapons. Section B will analyze the Vietnam War before MAD came about and the nuclear plans the United States thought about implementing against the Vietnamese. Finally, Section C will analyze the Iranian Nuclear Program, illustrating how MAD again prevailed over new doctrines that came about in the early 2000s. Given the development of tactical nuclear weapons, which differs from the nuclear weaponry used in the attacks on Japan in World War II, this Part will also discuss the legality of the proposed but unexecuted U.S. attack on the Iranian Nuclear Program. Though the Cold War, the Vietnam War, and the Iranian Nuclear Program incidents all illustrate the prevalence and strength of MAD, these examples also show that the nuclear stockpiles MAD requires leaves a nuclear state with the tempting option to nonetheless use nuclear weapons. Therefore, as Part V will argue, MAD is an insufficient deterrent for the deployment of nuclear weapons. The only way to ensure that nuclear weapons are not used is to prohibit states from having them at all.

#### A. *The Cold War*

MAD was a reactive strategy, a necessary response to an adversary, the Soviet Union, that already possessed nuclear weapons.<sup>97</sup> During the Cold War, there were many instances when the United States considered using nuclear weapons. But throughout the Cold War, MAD prevailed. The United States refrained from actually using nuclear weapons due to the utter destruction that the weapon would cause and, instead, strategically kept them for deterrence purposes.

In a conversation on nuclear strategy, top defense officials and the Joint Chiefs of Staff discussed the terrible destruction of nuclear weapons and how the United States should go about strategically using them.<sup>98</sup> Secretary of State John Dulles expressed concerns over the legality of a nuclear weapons exchange and stated that a nuclear

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97. Memorandum of Conversation Between Participants from the Department of State and the Department of Defense 2-9 (Apr. 7, 1958), <http://nsarchive.gwu.edu/nukevault/special/doc07.pdf>.

98. *Id.* at 2.

exchange between the United States and Soviet Union could destroy the Northern Hemisphere by making it uninhabitable due to the weapons' radiation and power.<sup>99</sup> In effect, Secretary Dulles believed that the United States should have nuclear weapons solely for limited retaliatory purposes.<sup>100</sup> Hence, nuclear deterrence became the strategy between the Soviet Union and the United States during the Cold War.<sup>101</sup> Under MAD, both sides warned each other about retaliatory nuclear strikes if the other side attacked first.<sup>102</sup> The threat of destruction to the aggressor after its original attack is what kept an aggressor from striking in the first place.<sup>103</sup> Thus, the mutual assured destruction of both the United States and the Soviet Union kept both countries from attacking first.

However, even though top U.S. officials spoke of a limited retaliatory use of nuclear weapons, the Strategic Air Command (SAC)—the U.S. military command that served as the bombardment arm of the U.S. Air Force—still developed a preemptive nuclear plan in 1959, which involved the United States striking the Soviet Union first in an attempt to stop them from using their nuclear weapons.<sup>104</sup> During that year, the SAC drafted an analysis of a preemptive nuclear strike against the Soviet Union.<sup>105</sup> The SAC's top priority was to destroy the Soviet bloc's air power, which included missile bases for strategic and tactical forces, military control centers that direct the air battle, and nuclear weapons storage sites.<sup>106</sup> The lists of targets ranged from attacks on Moscow to Leningrad, the latter having twelve airbases in the vicinity along with a variety of military centers.<sup>107</sup> If the United States had succeeded in taking out the Soviet's air power, the last step of the plan would have been to strike "basic industries," which are industries that contribute to

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99. *Id.*

100. *See id.* at 4.

101. *Id.*

102. *Id.*; Memorandum from Department of Defense on Nuclear Forces, Deterrence and National Policy 1 (1954), <http://galenet.galegroup.com/servlet/DDRS?vrsn=1.0&slb=KE&docID=wash74137&srchtp=basic&c=108&ste=4&txb=nuclear+war&sortType=RevChron&docNum=CK2349566929> (explaining that the United States acquires and maintains nuclear weapons to support the national policy of deterrence).

103. *See* Granoff, *supra* note 92, at 1434 (quoting Senator Douglas Roche).

104. *See* William Burr, *SAC Nuclear Planning for 1959*, THE NAT'L SECURITY ARCHIVE (Dec. 22, 2015), <http://nsarchive.gwu.edu/nukevault/ebb538-Cold-War-Nuclear-Target-List-Declassified-First-Ever/>.

105. *See id.*

106. *Id.*

107. *Id.*

war-making capability.<sup>108</sup> Additionally, the SAC planned to use hydrogen bombs during the air power attack and Mark 6 nuclear bombs during the “basic industries” attack.<sup>109</sup>

The Mark 6 nuclear bombs’ explosive yields were eight times greater than that of the nuclear bomb used on Nagasaki, which made the bombs inherently indiscriminate because of the lack of control that the U.S. Air Force had over the number of incidental casualties.<sup>110</sup> The SAC also ruled out “intentional” attacks on civilians due to the international legal norms of the day, which were summarized in the Hague Rules on Aerial Warfare of 1923 (Protocol I, which has the current international targeting rules, went into force in 1977).<sup>111</sup> The SAC believed that bombing a city strictly because it has a large number of civilians was illegal under the Hague Air Rules.<sup>112</sup>

The SAC’s plan was never implemented because the Soviet Union’s counter attack would have caused utter destruction in the United States. According to the National Security Council’s Net Evaluation Subcommittee, a preemptive attack was not possible for the United States without a huge and destructive retaliatory attack from the Soviets.<sup>113</sup> Instead of going through with the attack, the United States went back to its deterrence strategy.

The closest the United States came to nuclear warfare was during the Cuban Missile Crisis. At midday, on October 16, 1962, President John F. Kennedy called a group of advisors to the White House to discuss detailed photo intelligence that identified Soviet nuclear missile installations in Cuba.<sup>114</sup> Most of the conversation that day centered around a military attack on Cuba and the retaliation by the Soviet Union if the attack were to happen.<sup>115</sup> The administration decided against a military

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108. *Id.*

109. *Id.*

110. *See id.*

111. *Id.*; *see also* Commission of Jurists, Hague Rules of Air Warfare art. 22 (Dec. 1922-Feb. 1923), *reprinted in* DIETRICH SCHINDLER & JIRI TOMAN, *THE LAWS OF ARMED CONFLICT* 207 (3d ed. 1988) (“Aerial bombardment for the purpose of terrorizing the civilian population, of destroying or damaging private property not of a military character, or of injuring non-combatants is prohibited.”).

112. *See* Burr, *supra* note 104.

113. U.S. NAT’L SECURITY COUNCIL, NET EVALUATION SUBCOMMITTEE, ORAL REPORT 19 ¶¶ 23-30 (Aug. 27, 1963), <http://nsarchive.gwu.edu/nukevault/special/doc08.pdf>.

114. *THE CUBAN MISSILE CRISIS, 1962: THE 40TH ANNIVERSARY 1* (Laurence Chang & Peter Kornbluh eds., 2nd ed. 1998), [http://nsarchive.gwu.edu/nsa/cuba\\_mis\\_cri/declass.htm](http://nsarchive.gwu.edu/nsa/cuba_mis_cri/declass.htm).

115. *See* Transcript of ExComm Meeting (Oct. 16, 1962), <http://www.jfkclancer.com/cuba/links/Excomm%20meeting%20Oct%2016.pdf>.

attack because of a possible retaliatory exchange of nuclear weapons.<sup>116</sup> Instead, President Kennedy initiated a naval blockade of Cuba against the Soviet ships carrying missile equipment.<sup>117</sup>

President Kennedy's strategy proved successful. The Soviets withdrew the missile carrying ships and, thus, avoided a potential nuclear war. However, the blockade was not smooth all the way through. On October 27, the United States almost reacted with military intervention in Cuba when an American Reconnaissance plane was shot down over the island.<sup>118</sup> After much tension, President Kennedy sent a proposal to Soviet leader Nikita Khrushchev, which stipulated that if the Soviet Union removed the weapons from Cuba, the United States would remove quarantine measures and give assurances against the invasion of Cuba.<sup>119</sup> President Kennedy also agreed to remove all missiles from Turkey and southern Italy.<sup>120</sup> Both sides of the deal were honored and the United States again avoided a possible nuclear war with the Soviets.

In 1969, with a new president in office, the United States found new ways to strategically employ nuclear weapons. President Richard Nixon, along with Secretary of State Henry Kissinger, came up with the Madman Strategy.<sup>121</sup> This deceptive strategy was named "Madman" because both Nixon and Kissinger wanted the enemy states to believe that they were crazy enough to use nuclear weapons against them.<sup>122</sup> They hoped that their strategy would persuade both countries to back down and force the Soviets to cease supporting the North Vietnamese.<sup>123</sup> In October of 1969, President Nixon ordered the military on full war-readiness alert and sent bombers armed with nuclear weapons to

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116. *Id.*

117. THE CUBAN MISSILE CRISIS, 1962: THE 40TH ANNIVERSARY, *supra* note 114, at 1.

118. Jim Hershberg, *Anatomy of a Controversy: Anatoly F. Dobrynin's Meeting with Robert F. Kennedy, Saturday, 27, October 1962*, THE COLD WAR INT'L HISTORY PROJECT BULLETIN (Spring 1995) [http://nsarchive.gwu.edu/nsa/cuba\\_mis\\_cri/moment.htm](http://nsarchive.gwu.edu/nsa/cuba_mis_cri/moment.htm).

119. U.S State Department, *Telegram from the Department of State to the Embassy in the Soviet Union*, OFF. OF THE HISTORIAN (Oct. 27, 1962), <https://history.state.gov/historicaldocuments/frus1961-63v06/d67>.

120. *See* Hershberg, *supra* note 118.

121. William Burr & Jeffrey P. Kimball, *Nixon, Kissinger, and the Madman Strategy During Vietnam War*, THE NAT'L SECURITY ARCHIVE (May 29, 2015), <http://nsarchive.gwu.edu/nukevault/ebb517-Nixon-Kissinger-and-the-Madman-Strategy-during-Vietnam-War/>.

122. *Id.*; Memorandum on Kissinger ¶¶ 3-5 (Aug. 10, 1972), <http://nsarchive.gwu.edu/nukevault/ebb517-Nixon-Kissinger-and-the-Madman-Strategy-during-Vietnam-War/doc%2022%208-10-72%20Kissinger%20conv%20with%20G.%20Tucker.pdf> (declassified in part and released on January 31, 2014).

123. Burr & Kimball, *supra* note 121.

fly along the Soviet border for three consecutive days.<sup>124</sup> Immediately, the Soviets responded by sending an ambassador to the United States to discuss a solution.<sup>125</sup> After a meeting with U.S. officials, the Soviet ambassador went back to the Soviet Union and told Soviet officials that Nixon was unable to control himself and would do anything to end hostilities.<sup>126</sup> This Madman Strategy kept the Soviets guessing what the United States would do next. However, the Madman Strategy failed because it did not compel the Soviets to end their support for North Vietnam.

In the end, MAD kept both countries from attacking each other. However, there were many close calls in which the United States and the Soviet Union were planning on using nuclear weapons. MAD might have restrained both countries from nuclear war, but the retention of these weapons kept usage as a tempting option—an option that would have caused an overwhelming number of casualties on both sides.

### B. *The Vietnam War*

Before the Madman Strategy came about, the U.S. government spoke about using nuclear weapons in a tactical way in Vietnam.<sup>127</sup> In 1966, the United States became frustrated with the bombing campaign against North Vietnam and wanted to use tactical nuclear weapons.<sup>128</sup> A few military officers involved in planning the war effort believed that nuclear bombs should be dropped on strategic locations.<sup>129</sup> The JASONS, the defense consultants drawn up from academia, conducted studies for the U.S. Department of Defense concerning the use of nuclear weapons.<sup>130</sup> The JASONS concluded that the nuclear bombing style that the United States wanted to employ against the North Vietnamese would not make a significant impact in furthering the U.S.

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124. James Carroll, *Nixon's Madman Strategy*, BOSTON GLOBE (June 14, 2005), [http://www.boston.com/news/globe/editorial\\_opinion/oped/articles/2005/06/14/nixons\\_madman\\_strategy/](http://www.boston.com/news/globe/editorial_opinion/oped/articles/2005/06/14/nixons_madman_strategy/).

125. See Jeremi Suri, *The Nukes of October: Richard Nixon's Secret Plan to Bring Peace to Vietnam*, WIRED (Feb. 25, 2008) <http://www.wired.com/2008/02/ff-nuclearwar/> (discussing declassified documents that offered proof of the Madman Theory as well as the plans of October 1969).

126. *Id.*

127. Steve Weintz, *Worst Idea Ever: Dropping Nuclear Bombs During the Vietnam War*, THE NAT'L INTEREST (Aug. 23, 2015), <http://nationalinterest.org/feature/worst-idea-ever-dropping-nuclear-bombs-during-the-vietnam-13668>.

128. *Id.*

129. *Id.*

130. *Id.*

war effort.<sup>131</sup> Instead, it would actually compel the Chinese and Soviets—the two main communist superpowers that supported the North Vietnamese Communist regime—to respond against the United States in a hostile way, leading to a possible nuclear weapon war.<sup>132</sup> Given this prediction of a violent conclusion, the United States refrained from using nuclear weapons on Vietnam and instead kept with its deterrence policy of MAD, in addition to trying to implement the new Madman Strategy.

However, in 1969, President Nixon decided to try stepping away from the United States' nuclear strategies again and considered using nuclear weapons against North Vietnam. One plan, called Operation Duck Hook, had two elements for consideration. The first element was major air strikes against high-value target systems, such as electric power grids and air defenses.<sup>133</sup> The second element involved a clean nuclear deployment where the bomb would not result in dirty, fallout-producing effects and would produce a lower explosion yield—in contrast to the bombs dropped on Japan in World War II.<sup>134</sup> The clean nuclear weapons would have been dropped on three direct military lines that connect North Vietnam to Laos.<sup>135</sup> Policy-makers were still concerned that the low-impact yield of the nuclear weapons would still cause mass incidental casualties.<sup>136</sup> Similarly, another plan, called Decision Point Five, included using nuclear weapons on two railroad lines that connected North Vietnam with China.<sup>137</sup> Neither plans went into action due to the enormous amounts of predicted casualties; however, both were seriously considered, which lends further support to the idea that maintaining a nuclear weapon stockpile for deterrence purposes leads to close calls regarding actual nuclear weapon usage.

In 1972, during an offensive attack by the North Vietnamese, President Nixon told Secretary Kissinger that he would use nuclear weapons

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131. *Id.*

132. *Id.* (explaining that the use of nuclear weapons in Vietnam would have seriously harmed the prestige of the United States and would have taught the wrong lesson to non-nuclear-weapon states: only the ones with nukes could stand against the United States).

133. See Burr & Kimball, *supra* note 121.

134. *Id.*

135. Vietnam Contingency Planning: Concept of Operations 3 (Sep. 13, 1969), <http://nsarchive.gwu.edu/nukevault/ebb517-Nixon-Kissinger-and-the-Madman-Strategy-during-Vietnam-War/doc%2011A%20Concept%20of%20Op%209-13-69.pdf>.

136. See *id.*

137. See Burr & Kimball, *supra* note 121.

if necessary.<sup>138</sup> He even went as far as to say that he cared little about the number of civilian casualties that would come about with the use of nuclear weapons.<sup>139</sup> Secretary Kissinger informed President Nixon that he was concerned about the civilians only because he did not want President Nixon to be viewed as a butcher.<sup>140</sup> Fortunately, President Nixon backed down from his threats and never used any nuclear weapons.<sup>141</sup> In 1985, during an interview, he acknowledged that he considered using nuclear weapons in 1969 and 1972, but said that he rejected them because their use on non-military targets would have caused numerous civilian casualties.<sup>142</sup> President Nixon was able to toy with the idea of using nuclear weapons in Vietnam because he had at his disposal the stockpiled weapons intended for deterrence. Fortunately, his closest advisors advised against it.

In the end, by retaining a nuclear weapon stockpile for deterrence purposes, the United States under President Nixon had the option of actually using nuclear weapons. Nixon's ability to use nuclear weapons led to many close calls in Vietnam that could have caused a nuclear war with the North Vietnamese allies—the Soviet Union and China. As a result of having a stockpile of nuclear weapons readily available, President Nixon was able to also implement the Madman Strategy, which entailed making false, irrational nuclear weapon threats. The Madman Strategy never worked on the North Vietnamese because President Nixon never actually established a “madman” image.<sup>143</sup> Thus, the Madman Strategy died after President Nixon left office, and the only nuclear strategy that remained was MAD and its deterrence effect. Along with the Cold War, Vietnam proved to be another

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138. Executive Office Building Conversation no. 332-35, Nixon and Kissinger, Apr. 25, 1972, White House Tapes, NPMP; Memcon, National Security Council Meeting, May 8, 1972, Box 998, Haig Memcons [Jan.-Dec. 1972], Alexander M. Haig Chronological Files, NSC Files, NPM. For these documents and more discussion of them, see KIMBALL, *THE VIETNAM WAR FILES: UNCOVERING THE SECRET HISTORY OF NIXON-ERA STRATEGY* 214-17 (2004).

139. FRANCIS J. GAVIN, *NUCLEAR STATECRAFT: HISTORY AND STRATEGY IN AMERICA'S ATOMIC AGE* 116 (2012).

140. *Id.*

141. See William Burr, *Nixon White House Considered Nuclear Options Against North Vietnam, Declassified Documents Reveal*, THE NAT'L SECURITY ARCHIVE (July 31, 2006), <http://nsarchive.gwu.edu/NSAEBB/NSAEBB195/#7>.

142. *Nixon Proposed Using A-Bomb In Vietnam War*, N.Y. TIMES (Mar. 1, 2002), <http://www.nytimes.com/2002/03/01/world/nixon-proposed-using-a-bomb-in-vietnam-war.html>.

143. See DAVID A. WELCH, *PAINFUL CHOICES* 154 (2005).

example of how the United States' nuclear deterrence policies led to many close calls concerning actual nuclear weapon usage.

### C. Iran Nuclear Program

Another example in which a nuclear plan came close to being implemented—but where the United States ultimately reverted back to relying solely on a deterrence strategy—is the Iran Nuclear Program. After 9/11, President George W. Bush implemented the Bush Doctrine, which asserted a U.S. right to use force preemptively against an emerging threat of sufficient severity to national security.<sup>144</sup> Bush claimed the doctrine to be a legitimate extension of the customary international legal right of anticipatory self-defense.<sup>145</sup> In 2002, the international community learned from Iranian opposition groups that Iran had secret underground nuclear facilities used in a clandestine nuclear-weapons program.<sup>146</sup> The International Atomic Energy Agency (IAEA) confirmed that one of the main underground uranium-enrichment facilities was in Natanz, Iran.<sup>147</sup> At first, Iran tried to comply with the IAEA rules regarding its nuclear program and made certain concessions.<sup>148</sup> By 2005, however, Iran was largely unwilling to make any further concessions into its nuclear program; it essentially shut out the IAEA, along with its agreements concerning its program.<sup>149</sup>

In 2006, President Bush sought to use nuclear weapons to destroy Iran's uranium-enrichment plant at Natanz.<sup>150</sup> He believed that tactical nuclear weapons were a good option to destroy the fortified, underground Iranian nuclear plant that he believed was being used to create nuclear weapons.<sup>151</sup> However, the plan to use a tactical nuclear device on the plant was rejected because the Joint Chiefs of Staff, as well as both military and foreign policy advisers, pointed to huge gaps in the intelligence information that the United States had on Iran's nuclear

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144. WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 15 (2002), <http://www.globalsecurity.org/military/library/policy/national/nss-020920.pdf>.

145. *See id.* (discussing that states have a right to defend themselves against pending attacks from their enemies).

146. *See* Bengs, *supra* note 50, at 340.

147. *Id.* at 341.

148. *Id.*

149. *See* Karl Vick, *Iran's President Sparks Fears of New Isolation; Nuclear Talks at Risk, Analysts Say*, WASH. POST, Nov. 5, 2005, at A14.

150. Seymour M. Hersh, *Would President Bush Go to War to Stop Tehran from Getting the Bomb?*, NEW YORKER (Apr. 17, 2006), [http://www.newyorker.com/printables/fact/060417fa\\_fact](http://www.newyorker.com/printables/fact/060417fa_fact).

151. *See* Bengs, *supra* note 50, at 325.

program.<sup>152</sup> The advisors warned the President of dire political, international, and military repercussions, should the United States use the nuclear option against Iran—such as it being a violation of IHL.<sup>153</sup>

For the purpose of conducting an IHL analysis, this Note will presume that *jus ad bellum*—the set of criteria that determines whether entering into war is permissible<sup>154</sup>—applied to Iran’s Nuclear Program. President Bush’s plan to use a tactical nuclear weapon on Natanz would have violated the principle of proportionality, but not the principle of distinction. At the time, Article 52(2) would not have been violated because the Natanz facility was a lawful military objective and not a purely civilian facility immune from attack.<sup>155</sup> Even though the underground Natanz facility could have been considered a legitimate military target based on the fact that it was equipped an air-defense system, the majority of individuals working at or near the facility were civilians.<sup>156</sup> This is where the principle of proportionality comes into play. The tactical nuclear weapon that President Bush considered using was called the B61-11, and has a large explosive yield of four hundred kilotons on impact.<sup>157</sup> For the purpose of comparison, the bomb dropped on Hiroshima in 1945 had a yield between twelve to fifteen kilotons, while the Nagasaki bomb was estimated at twenty-two kilotons.<sup>158</sup> Thus, based on the yield of the B61-11, even if it went to its maximum penetration depth of twenty feet, the explosion and radioactivity would still not have been sufficiently contained to make its use proportional.<sup>159</sup> Structures on the surface would have been destroyed and civilians both inside the facility, and outside in a radius of one mile from the facility, would have been killed.<sup>160</sup> The radioactive fallout would have reached cities near Natanz and resulted in civilians experiencing severe radiation sickness.<sup>161</sup> In terms of proportionality, the

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152. See Hersh, *supra* note 150.

153. *Id.*

154. *What Are Jus ad Bellum and Jus in Bello?*, INT’L COMM. OF THE RED CROSS (Jan. 22, 2015), <https://www.icrc.org/en/document/what-are-jus-ad-bellum-and-jus-bello-0>.

155. See Bengs, *supra* note 50, at 357 (explaining that the fortification of the facility made it a viable military objective).

156. *Id.* at 370.

157. *Guided Bomb Unit-28 (GBU-28)*, *Military Analysis Network*, FAS.ORG (Feb. 22, 1998), <http://www.fas.org/man/dod-101/sys/smart/gbu-28.htm>.

158. THOMAS B. COCHRAN, WILLIAM M. ARKIN & MILTON M. HOENIG, *NUCLEAR WEAPONS DATABOOK* 32 (1984).

159. Bengs, *supra* note 50, at 371.

160. *Id.* at 372.

161. *Id.*

attack would have caused collateral damage resulting in “incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof.”<sup>162</sup> Should Bush have used the B61-11, it was estimated that thousands of civilians would have died.<sup>163</sup> The military advantage of destroying a fortified structure is not substantial enough to outweigh the incidental civilian casualties.<sup>164</sup> The United States did not have concrete proof that nuclear weapons were being produced in the underground facility, and so the only solid justification to attack the facility as a military objective was that it qualified as a fortification with an air defense system.<sup>165</sup> Thus, the military advantage, with its high degree of uncertainty, did not outweigh the disproportionately high collateral damage.<sup>166</sup>

Furthermore, the attack would have been indiscriminate and, therefore, would have violated Article 51 of Protocol I.<sup>167</sup> The B61-11 explosive yield and destruction could not have been controlled and, due to this lack of control and the location of the facility, a disproportionate number of civilians would have died. Thus, the nuclear attack considered by President Bush would have violated international law. Due to the restraints of international law and the principles of IHL, the United States again exercised restraint and reverted to a deterrence-only policy in regards to nuclear weapons.

These examples, from the Cold War and the Vietnam War to Iran’s Nuclear Program, illustrate how many close calls existed in times of conflict. All of these nuclear strategies that involved actual usage, if implemented, would have violated international law. Even in the twenty-first century, with new modified tactical nuclear weapons, as illustrated by the contemplated attack on the Iran Nuclear Program, nuclear weapon use would still violate IHL. Ultimately, the United States has relied most heavily on the deterrence policy—MAD—and holds on to its nuclear weapons for the purposes of deterring an attack on the United States, rather than carrying out attacks of its own. Because MAD has clearly led to the serious consideration of actual nuclear attacks, which are illegal and inhumane, nuclear weapons still pose a very real threat even when used for deterrence purposes under MAD.

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162. Additional Protocol I, *supra* note 8, arts. 51(5)(b), 57(2)(a)(iii).

163. SAMUEL GLASSTONE & PHILIP DOLAN, EFFECTS OF NUCLEAR WEAPONS 241–44 (3d ed. 1977).

164. Bengs, *supra* note 50, at 374.

165. *See id.*

166. *Id.*

167. *Id.*

V. NPT: TOTAL DISARMAMENT OF NUCLEAR WEAPONS AS A SOLUTION

Because MAD requires states to maintain a deterrent nuclear stockpile, the use of nuclear weapons remains a serious threat. The only way to ensure against a nuclear attack is to completely move away from the deterrence strategy and instead to have a total nuclear disarmament in the world. This solution would involve all nuclear-weapons states disarming their nuclear weapon stockpiles. The best vehicle for accomplishing this goal is the NPT, the international treaty currently closest to calling for total nuclear disarmament. The NPT, which already has a framework for nuclear disarmament, is already applicable to all the current nuclear-weapon states, and thus only needs a few amendments to push these nuclear-weapon states into total nuclear disarmament.

This Part will discuss the NPT and its shortcomings. Section A will discuss the NPT's formation. Section B will discuss both the successes and the major shortcomings of the NPT, especially in regards to Article VI, which outlines nuclear disarmament from nuclear-weapon states. Many of the issues stem from the NPT's language itself and the strategic practices of nuclear-weapon states. Finally, a solution will be proposed in Section C that involves amending the NPT in a way that will ensure total nuclear weapon disarmament around the world. The proposed solution will help eviscerate the deterrence policy of the United States, and help to avoid close calls with actual usage of nuclear weapons.

A. *The NPT*

The NPT is the closest treaty to a total prohibition on nuclear weapon use. In 1968, the Eighteen Nation Committee on Disarmament proposed the NPT.<sup>168</sup> The Eighteen Nation Committee included the United States and Soviet Union. During their discussions, many objections were raised about the NPT only dealing with the acquisition and possession of nuclear weapons by non-nuclear states, and not with the use and possession of them by current nuclear-weapon states.<sup>169</sup> France complained that the Treaty did not go far enough, and called for the total destruction of all existing nuclear weapons, as well as a prohibition on any new ones being created.<sup>170</sup> Additionally, the non-nuclear-weapon states protested that the proposed NPT would

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168. See *The Nuclear Non-Proliferation Treaty (NPT), 1968*, U.S. DEP'T OF STATE: OFF. OF THE HISTORIAN <https://history.state.gov/milestones/1961-1968/npt> (last visited June 8, 2017).

169. U.N. Off. of Pub. Information, *Disarmament and Related Matters*, 1971 U.N.Y.B. 3, 14–15, [http://cdn.un.org/unyearbook/yun/chapter\\_pdf/1968YUN/1968\\_P1\\_SECI\\_CH1.pdf](http://cdn.un.org/unyearbook/yun/chapter_pdf/1968YUN/1968_P1_SECI_CH1.pdf).

170. *Id.* at 9.

shut off proliferation to them while permitting the nuclear-weapon states to maintain their nuclear stockpile intact.<sup>171</sup> The United States and Soviet Union proposed new drafts that would become Article VI of the NPT:

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.<sup>172</sup>

On March 5, 1970, the NPT went into force and became applicable to the United States along with other superpowers, such as the Soviet Union and China.<sup>173</sup>

The NPT has three pillars: nonproliferation, the peaceful use of nuclear energy, and disarmament.<sup>174</sup> Nonproliferation, covered by Article I and Article II of the NPT, prohibits nuclear-weapon states from transferring nuclear weapons to any recipient or in any way assisting non-nuclear-weapon states in manufacturing or acquiring nuclear weapons.<sup>175</sup> Under Article II, the non-nuclear-weapon states pledge not to manufacture or acquire nuclear weapons.<sup>176</sup> The second pillar, peaceful uses, is covered by Articles IV and V of the NPT, and acknowledges the right of all Parties to develop nuclear energy for peaceful purposes.<sup>177</sup> Finally, the third pillar, disarmament, is covered under Article VI and requests that all nuclear-weapon states undertake to pursue good-faith negotiations on measures for general and complete disarmament of their nuclear weapons.<sup>178</sup>

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171. *Id.* at 9–10.

172. NPT, *supra* note 9, art. VI.

173. Int'l Atomic Energy Agency (IAEA), *Information Circular: Treaty on the Non-Proliferation of Nuclear Weapons* (Apr. 22, 1970) <https://web.archive.org/web/20070807060917/http://www.iaea.org/Publications/Documents/Infcirc/Others/infcirc140.pdf> (lays out the complete NPT).

174. U.S. DEP'T OF STATE, TREATY ON THE NON-PROLIFERATION OF NUCLEAR WEAPONS 1–3 (U.S. Delegation to the 2010 Nuclear Non-Proliferation Treaty Review Conference 2010), <http://www.state.gov/documents/organization/141503.pdf>.

175. *Id.*; NPT, *supra* note 9, art. I.

176. U.S. DEP'T OF STATE, *supra* note 174, at 3; NPT, *supra* note 6, art. II.

177. U.S. DEP'T OF STATE, *supra* note 174, at 3.

178. *Id.*

B. *NPT: Successes and Shortcomings*

The NPT has led to a growing number of peaceful applications of nuclear energy.<sup>179</sup> Nuclear power reactors supply a substantial amount of the world's electricity.<sup>180</sup> Along with peaceful nuclear programs that bring benefits to a number of people, the NPT has also lessened incentives for states without nuclear weapons to acquire them.<sup>181</sup> For example, South Africa gave up its nuclear weapon program due to the NPT.<sup>182</sup> South Africa signed the NPT in 1991 because it realized that nuclear weapons kept for deterrence was an obstacle for the country's international relations—with a large amount of countries ratifying and acceding the NPT.<sup>183</sup> Additionally, the successor states of the Soviet Union transferred all nuclear weapons left behind after the Cold War to Russia, which helped contain the possession of nuclear weapons to a small number of countries.<sup>184</sup> In 2016, Japan agreed to reduce its stockpile of highly enriched uranium to help the world reduce nuclear matter used in nuclear weapons, thus providing a good example for non-nuclear weapon states to avoid acquiring or creating nuclear weapons.<sup>185</sup> Another success is that nuclear-weapon states have made some progress towards disarmament after the Cold War.<sup>186</sup> Since the end of the Cold War, the United States has reduced its nuclear stockpile significantly—from 22,000 to 4,800.<sup>187</sup> Additionally, in 2010, the United States and Russia signed the Strategic Arms Reduction.<sup>188</sup> In that Treaty, Russia and the United States explicitly recorded their

179. *Id.* at 4–5.

180. *See id.* at 7 (explaining that in 2010 nuclear power reactors in over thirty countries provided 15% of the world's electricity).

181. *Id.* at 5.

182. *Id.*

183. FRANK V. PABIAN, SOUTH AFRICA'S NUCLEAR WEAPON PROGRAM: LESSONS FOR U.S. NONPROLIFERATION POLICY 10 (1995), <http://www.nonproliferation.org/wp-content/uploads/npr/31pabian.pdf>.

184. U.S. DEP'T OF STATE, *supra* note 174, at 5.

185. Oren Dorell, *Japan Agrees to Reduce Nuclear Stockpiles*, USA TODAY (Apr. 3, 2016), <http://www.usatoday.com/story/news/world/2016/04/01/japan-reduce-nuclear-stockpiles/82523590/>.

186. U.S. DEP'T OF STATE, *supra* note 174, at 8.

187. *Id.*; David Wright, *Then vs Now: Progress on Nuclear Weapons Since the End of the Cold War*, UNION OF CONCERNED SCIENTISTS (Dec. 17, 2014), <http://blog.ucsusa.org/david-wright/nuclear-weapons-end-of-the-cold-war-769>.

188. Treaty Between the United States of America and the Russian Federation on Measures for the Further Reduction and Limitation of Strategic Offensive Arms, U.S.-Russ., Apr. 8, 2010, S. Treaty Doc. No. 111-5 (2010).

desire for nuclear weapon reduction with a step-by-step process to reduce and limit nuclear arms.<sup>189</sup>

Despite the NPT's positive impact on reducing the prevalence and spread of nuclear weapons, many holes remain in the NPT regime. The NPT does not include sanctions for violators of the Treaty's obligations,<sup>190</sup> which has led to many instances of noncompliance by NPT states.<sup>191</sup> North Korea violated the NPT when it acquired nuclear weapons and subsequently withdrew from the Treaty in 2003.<sup>192</sup> Since then, North Korea has conducted nuclear tests and has yet to return to the NPT.<sup>193</sup> Along with no sanction provisions, the NPT's withdrawal clause under Article X, which sets forth the right of Parties to withdraw from the Treaty's obligations, can and has been abused.<sup>194</sup>

Finally, another major issue of the NPT stems from the third pillar, disarmament. An estimated 16,300 nuclear weapons still exist.<sup>195</sup> There has not been a complete and total nuclear disarmament by the nuclear-weapon states, as many non-nuclear-weapon states expected. The goal of Article VI is for complete disarmament of nuclear-weapon states' nuclear stockpile.<sup>196</sup> However, complete nuclear disarmament has not happened for two reasons: the lax language of the NPT and the strategic policies of nuclear-weapon states.

Article VI's wording imposes only a vague obligation on the nuclear-weapon states to move in the general direction of total nuclear disarmament.<sup>197</sup> The Article only requires all signatories "to pursue negotiations in good faith."<sup>198</sup> During the NPT's drafting,

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189. Tim Caughley, *Analyzing Effective Measures: Options for Multilateral Nuclear Disarmament and Implementation of NPT Article VI 2* (United Nations Inst. for Disarmament Res. 2015), <http://www.unidir.org/files/publications/pdfs/analysing-effective-measures-en-628.pdf>.

190. *Id.*

191. U.S. DEP'T OF STATE, *supra* note 174, at 9. See KATHLEEN C. BAILEY, STRENGTHENING NUCLEAR NONPROLIFERATION 6–7, 11 (1993) (discussing noncompliance of certain states, such as Iran, Iraq, and North Korea, by developing nuclear programs).

192. U.S. DEP'T OF STATE, *supra* note 174, at 9.

193. *Id.*

194. *See id.* at 12 (explaining a large concern among Parties about the potential abuse of Article X and that withdrawal from the NPT will terminate the NPT-mandated safeguards agreement).

195. *See* H.M. Kristensen & R.S. Norris, *Worldwide Deployments of Nuclear Weapons, 2014*, 70 BULLETIN OF THE ATOMIC SCIENTISTS (Sept. 1, 2014), <http://thebulletin.org/2014/september/worldwide-deployments-nuclear-weapons-20147595>.

196. NPT, *supra* note 9, art. VI.

197. *See* NPT, *supra* note 9, art. VI.

198. *See id.*; Stephen Rademaker, *US Compliance with Article VI of the NPT*, *US Assistant Secretary of State for Arms Control Stephen Rademaker*, ACRONYM INST. FOR DISARMAMENT DIPL. 2 (Feb. 3, 2005),

there were proposals that would have required the nuclear-weapon states to agree on certain specific disarmament measures.<sup>199</sup> The states drafting the NPT, however, recognized that it was almost impossible to make a binding legal commitment in advance on such complex measures because many of the nuclear-weapon states at the time were firmly against a set timeline for complete nuclear disarmament.<sup>200</sup> Additionally, because the language of Article VI establishes no deadline for total nuclear disarmament, nuclear-weapon states can maintain their strategic deterrence policies without violating the Treaty.<sup>201</sup>

Along with the wording of Article VI, the strategic policies of nuclear-weapon states have also blocked the path to total nuclear disarmament. Most nuclear-weapon states, such as the United States, still follow the MAD doctrine.<sup>202</sup> The United States still has a large amount of nuclear weapons for deterrence purposes.<sup>203</sup> The U.S. government believes that the cost inflicted upon those who would attack the United States will be so high that it would deter them from acting in the first place.<sup>204</sup> In essence, nuclear-weapon states choose not to completely eliminate their nuclear stockpile in order to deter an opponent's nuclear attack against them. The United States along with other nuclear-weapon states made this argument about deterrence stabilizing the international system in front of the International Court of Justice (ICJ) in 1995.<sup>205</sup> On July 8, 1996, the ICJ issued an advisory opinion stating that the text of Article VI implies that "there exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control."<sup>206</sup> To this day, nuclear-weapon states

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<http://www.acronym.org.uk/building-security/nuclear-non-proliferation-treaty/npt-review-conferences/npt-review-conference-2005/us-compliance-article-vi-np?>

199. Rademaker, *supra* note 198.

200. *Id.*

201. *Id.*

202. Winston P. Nagan & Erin K. Slemmens, *Developing U.S. Nuclear Weapons Policy and International Law: The Approach of the Obama Administration*, 19 TUL. J. INT'L & COMP. L. 1, 41 (2010).

203. *See id.* (discussing that U.S. policy of deterrence has helped discourage recourse to nuclear weapons, but at the same time has caused tensions with conventional international law, such as the NPT).

204. HENRY D. SOKOLSKI, GETTING MAD: NUCLEAR MUTUAL ASSURED DESTRUCTION, ITS ORIGINS AND PRACTICE 341 (2004), <http://www.strategicstudiesinstitute.army.mil/pdffiles/pub585.pdf>.

205. Granoff, *supra* note 92, at 1429.

206. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 266–67 (July 8).

have not taken the words of the ICJ to heart and continue to maintain their nuclear weapon stockpiles even though Article VI speaks to total nuclear disarmament. The United States' reliance on nuclear weapons for its national security has affected the implementation and goal of Article VI of the NPT. The deterrence policy also has reinforced a double standard: some countries can have nuclear weapons while others cannot.<sup>207</sup> As discussed in Section IV, the nuclear deterrence policy has pushed the United States close to the brink of using nuclear weapons against enemy states. The NPT is the only treaty that speaks of a total nuclear disarmament concerning nuclear-weapon states; therefore, a solution addressing the NPT's shortcomings is needed to help these states eliminate their nuclear weapon stockpiles.

C. *Solution: An Amendment to the NPT*

To solve the issues concerning Article VI, the signatories of the NPT should amend Article VI and Article X.<sup>208</sup> The current language of Article X makes it much too simple for states to withdraw from the NPT. Article X should be amended to make withdrawal from the Treaty much harder. The Treaty must be considered irreversible in times of

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207. See, e.g., Steve Rendall, *Ignoring the U.S.'s "Bad Atoms,"* EXTRA! (July 1, 2005), <http://fair.org/extra/ignoring-the-u-s-s-quotbad-atomsquot/> (quoting John Burroughs).

208. Before amending takes place, the United States along with other states need to ratify the Comprehensive Test Ban Treaty (CTBT) first and propel it into force. The CTBT prohibits states party to the treaty from conducting any nuclear test explosions or any other form of nuclear explosions. Comprehensive Nuclear Test Ban Treaty (arts. VI, X), Sept. 24, 1996, S. Treaty Doc. No. 105-28 (1997), 35 I.L.M. 1439 [hereinafter CTBT]. Article I of CTBT also prohibits from encouraging or assisting in nuclear weapon test explosions. *Id.* art. I. The only nuclear-weapon states that have not ratified the CTBT are the United States and China. For current state signatories, see *Status of Signature and Ratification*, PREPARATORY COMM'N FOR THE COMPREHENSIVE NUCLEAR-TEST-BAN TREATY ORG., <http://www.ctbto.org/the-treaty/status-of-signature-and-ratification/> (last visited Apr. 18, 2017). If these two states ratify the CTBT, it will be a key element leading to eventual nuclear disarmament because the CTBT has a dual purpose of banning the testing of nuclear weapons along with also promoting nuclear disarmament. Hon. John D. Holum, Dir. U.S. Arms Control and Disarmament Agency, Remarks to the Arms Control and Disarmament Committee of the American Bar Association (Sept. 26, 1996); David S. Jonas, *The Comprehensive Nuclear Test Ban Treaty: Current Legal Status in the United States and the Implications of A Nuclear Test Explosion*, 39 N.Y.U. J. INT'L L. & POL. 1007, 1036 (2007). Vertical proliferation refers to nuclear weapon states and the improvement and increase in quantity of the nuclear weapons that they possess, while horizontal proliferation refers to "new states developing nuclear weapons capabilities." *Id.* at 1036 n. 170. One might argue that inhibiting vertical/horizontal proliferation is a necessity to eventual disarmament. *Id.*

peace and war.<sup>209</sup> In regards to amending Article VI, the language should specify a timeline that nuclear-weapon states must abide by, with the ultimate goal of total nuclear disarmament by a set date.<sup>210</sup> For the amendments to be successful, the nuclear-weapon states must ratify it in order for them to be bound by the provisions.<sup>211</sup>

Along with amendments to these Articles, a new Article should also be drafted for the purpose of imposing sanctions on violators of the NPT. There has been no punishment for nuclear-weapon states keeping their nuclear stockpiles. There should be serious sanctions that would deter nuclear-weapon states from holding onto them. For example, if a nuclear-weapon state stops negotiating nuclear disarmament and passes the set deadline(s), economic and diplomatic sanctions should be imposed. The United Nations Security Council would need to investigate the state and, upon a finding of non-compliance, it would have to impose sanctions. The investigation would consist of checking each registered nuclear facility that houses the stockpiles of nuclear weapons. If certain reductions were not met by certain deadlines, the imposition of sanctions would be immediate.

The most difficult hurdle in achieving these amendments would likely be getting all the nuclear-weapon states to align and ratify them.

209. Article X(1) and its proposed new languages states that “Each Party shall in exercising its national sovereignty have the right to withdraw from the Treaty if it decides that extraordinary events, related to the subject matter of this Treaty, have jeopardized the supreme interests of its country. It shall give notice of such withdrawal to all other Parties to the Treaty and to the United Nations Security Council three months in advance. Such notice shall include a statement of the extraordinary events it regards as having jeopardized its supreme interests.” *The Security Council must vote on the issue of whether or not the extraordinary events are justified to withdraw. If Security Council votes in the negative, the party shall remain with the Treaty. If Security Council votes in favor, the Party may withdraw until the extraordinary events have ceased. Once the extraordinary events have ceased, the Party will become a part of the treaty again. To ensure that extraordinary events exist or have ceased, the Security Council will review the Party’s current situation once a year.* See NPT, *supra* note 9, art. X (proposed new language italicized).

210. Studies would need to be conducted on all the nuclear-weapon states as to when complete disarmament would be possible. Article VI and its proposed new language states that “Each of the Parties to the Treaty undertakes to pursue negotiations *to completely disarm all nuclear weapons by January 1, 2025. If a Party still retains a nuclear arsenal after the set date, sanctions will be placed on the non-complying Party.*” See NPT, *supra* note 9, art. VI (proposed new language italicized).

211. See David S. Jonas, *Significant Ambiguity in the NPT: A Continuing Issue*, 40 GA. J. INT’L & COMP. L. 37, 64 (2011). States that do not ratify the amendment will only be bound to the original NPT provisions. Jacqueline R. Smith, *Strengthening the Nuclear Non-Proliferation Treaty Toward the 1995 Extension Conference*, 87 AM. SOC’Y INT’L L. PROC. 82, 97 (1993) (“On the other hand, the amendment would bind only those NPT parties that had ratified it. Existing problems that arise as a result of non-uniform treaty obligations could only intensify under such circumstances.”).

However, with new missile defense systems coming into place that can essentially destroy nuclear weapons before they land on its targets,<sup>212</sup> and MAD becoming irrelevant because of these new defense systems, it should not be difficult for nuclear-weapon states to move together towards letting go of their nuclear weapons. These amendments, working together, would surely help accomplish total disarmament of nuclear weapons. By providing sanctions and setting a timeline for total nuclear disarmament against nuclear-weapon states under Article VI, states would have an incentive to abide by the amendments or face international punishment. If any state wishes not to abide by the new amendments, Article X would restrain them from withdrawing from the Treaty and give them a choice to either violate the NPT and face sanctions, or to abide by it.

## VI. CONCLUSION

From the moment the first bomb dropped on Hiroshima, the fighting of war as we knew it changed. The total destruction caused by nuclear weapons makes the use of such weapons a clear violation of International Humanitarian Law. Even before the Geneva Conventions existed, bombing Japan violated the Hague Conventions, because the United States bombed undefended cities and the attack itself was indiscriminate, causing disproportionate casualties and destruction beyond the military establishments. The United States has always believed that an intentional killing of civilians with a weapon that causes great suffering is against the laws of humanity. Thus, instead of physically using nuclear weapons, the United States has maintained nuclear weapon stockpiles for deterrence purposes, under the principle of mutual assured destruction. Even though this policy has not backfired yet, it is still dangerous to follow because nuclear-weapon states possess terrible, destructive weapons and often consider using such weapons outside the scope of the deterrence strategy. Every nuclear attack considered by the United States throughout its history would have been a violation of international law if carried out. Both the United Nations and the ICJ have spoken out against nuclear weapon use, which is significant because both are major international institutions. Because the use of nuclear weapons would undoubtedly violate international law, and because deterrence strategies still leave open the

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212. *Aegis Ballistic Missile Defence (BMD) System, United States of America*, NAVAL TECH., <http://www.naval-technology.com/projects/aegis-ballistic-missile-defence-bmd-us/> (last visited Apr. 19, 2017).

opportunity to consider nuclear attacks, nuclear stockpiles should be completely eliminated. Therefore, the NPT must be amended to accomplish the goal of total disarmament. States must instead build up their missile defenses to accomplish their national security goals, while complying with the amended NPT. With the amendments in place, MAD will disappear and nuclear-weapon states, such as the United States, will not be tempted to actually use nuclear weapons in a time of war.