

**NUCLEAR WEAPONS UNDER INTERNATIONAL  
LAW AND SHARĪ'AH; A COMPARATIVE STUDY**

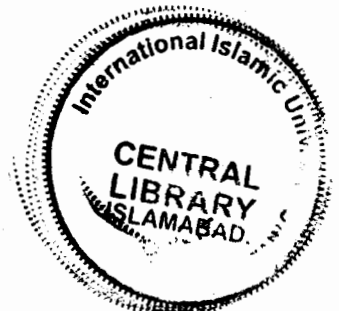
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## APPROVAL SHEET

The thesis attached here entitled, Nuclear Weapons under International Law and Shari'ah; a comparative study, submitted by Muhammad Jan accepted by the Faculty of Shari'ah and Law International Islamic University Islamabad, in partial fulfillment of the requirement for the degree of LLM (International Law)

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## **LIST OF ABBREVIATIONS**

<b>NPT</b>	Non Proliferation Treaty
<b>CTBT</b>	Comprehensive Test Ban Treaty
<b>FMCT</b>	Fissile Material Cut off Treaty
<b>NC</b>	Nuclear Club
<b>UN</b>	United Nations
<b>UNGAR</b>	United Nations General Assembly Resolutions
<b>WMD</b>	Weapons of Mass Destruction
<b>DRK</b>	Democratic Republic of Korea
<b>NFU</b>	No First Use
<b>IAEA</b>	International Atomic Energy Agency
<b>ICJ</b>	International Court of Justice

# **DEDICATION**

**TO MY PARENTS**

## **ACKNOWLEDGEMENT**

The researcher is greatly thankful to Allāh Almighty who gave the courage and potential to complete the research assignment. The researcher is thankful to his research supervisor Professor Mr. Muhammad Munir Faculty of Shari'ah and Law International Islamic University Islamabad, for his excellent supervision, guidance and kind who has guided me on every occasion.

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## ABSTRACT

In the following pages I have discussed the Nuclear Weapons in the light of Sharī'ah and International Law. In the introduction to this study I have discussed the basic issues that I have discussed in the following chapters. I have clarified the object of my writing and the areas of my discussion.

In chapter one I have discussed international law with regard to the acquisition of nuclear weapons. After the emerging of nuclear weapons the scientists and rulers were worried and they said that these weapons are very dangerous to the human beings.

In the law of proliferation the first international treaty came into being in 1968, Non Proliferation Treaty. This treaty was extended in 1995 for indefinite time. But this treaty failed to achieve its goals due to some problems in the treaty itself and some problems from the conduct of nuclear powers. Today nuclear weapons are still spreading in the world like cancer in the body of man and nuclear power States are increasing day by day.

Likewise efforts have been made to prevent the testing of nuclear weapons. For this purpose in 1963 Partial Test Ban Treaty was introduced, but it was limited in its scope. In 1995, a Comprehensive Test Ban Treaty was brought by the international community to control the test of these weapons but this treaty is not effective up till now.



Firstly this treaty is not a binding instrument like other treaties as no State is bound to become party to it. Also there are some States that want to acquire nuclear weapons in any circumstance.

Secondly most of these States have international disputes with other States or threat from other nuclear powers. So these States did not desire to become party to such treaties. These States are right because international community failed to solve their problems and there is no guarantee for them that they will be protected from nuclear war. These reasons have created problems for Comprehensive Test Ban Treaty and did not effective. Same is the problem with proposal of Fissile Material Cut off Treaty. It has been suggested by many writers that this treaty will reduce the spread of nuclear weapons.

International Atomic Energy Agency, which is the only international agency controls the nuclear activity all over the world, is also a weak agency. The object of this agency is to ensure that nuclear energy will be used for peaceful purposes and not for the nuclear weapons. The Agency cannot confront State sovereignty. The agency requires entering agreement with concerned State to inspect the nuclear reactors. It also complains its smaller amount of budget, less workers and burden of work all over the world. At the same time although there may be agreement with concerned State but there is no guarantee that the concerned State will not make nuclear weapons.

In this study I have discussed the position of Sharī'ah with regard to the nuclear weapons. There is no prohibition in Sharī'ah to acquire any kind of weapons. Acquiring weapons and making every kind of preparation is

obligatory under the Sharī'ah. Muslims are ordered to keep every kind of weapon whether it is nuclear or others against their enemy. For this purpose Muslims can get assistance from the non-Muslims in the opinions of jurists.

I have also discussed the status of existing treaties in Sharī'ah. Under the Sharī'ah general rule is that Muslims can become party to any treaty. But the teachings of Islam and the interest of Muslims will be considered. They will see to the contents of treaty if it is not against the philosophy of Islam and it is not against the interest of the State then Muslims can become party to it

In chapter two I have discussed the use of nuclear weapons. There is no specific international law, which prevents the use of nuclear weapons. United Nations Resolutions, which are passed from time to time, in which the use of nuclear weapon is declare inhumane and crimes against humanity did not reduce the threat of nuclear war in the world. These resolutions are only there on papers, no effect of these resolutions is seen in the world in practice.

In this regard the clear example is the conclusion of International Court of Justice decision in 1996. After complete assessment of international treaties and customs the Court concluded that there is no specific prohibition under international law on the use of nuclear weapons. The Court clearly said that we couldn't say about the use of nuclear weapons in extreme circumstances of self-defence.

So international law is not yet perfect with regard to the use of nuclear weapons. There is need to make it ideal if we want to remove the threat of nuclear weapons from the earth.

But the policies of big powers are such that they will never intend to do so. Every nuclear State has the policy that they will use nuclear weapons

in the first strike or in response to the conventional weapons. And they do not seem to change their policies in the near future. From the birth of nuclear weapons they have threatened other States from the use of nuclear weapons.

Although there is an agreement between Russia and USA which was concluded in 1973, that they will not be the first to start nuclear war against each other. But there is nothing for other States. Likewise there is an agreement between Pakistan and India but it only says that they will not attack nuclear installations and facilities of each other.

Under the heading of Shari'ah I have discussed the position of Shari'ah with regard to the use of nuclear weapons.

The general principles of Shari'ah, in the laws of war, are very clear. There is prohibition under the Shari'ah to make unnecessary destruction. There is also a prohibition to kill minors and women in the war. But these general rules can be ignored in some circumstances when there is need and the situation of war makes it absolutely necessary. Jurists have discussed these exceptional circumstances in which the extended destruction is allowed and also the situations in which the killing of women and minors permissible.

The nuclear weapons are the product of 20<sup>th</sup> century. There were no nuclear weapons in the life of the Prophet (peace be upon him) not at the time of classical jurists, but there were weapons which were making wide destruction. Example is the Mangonel (*Manjaneeq*), which was used by the Prophet (peace be upon him). Also the Prophet (peace be upon him) burnt in some circumstances the property of enemies. So killing the minors and women is allowed in some circumstances. Like wise Muslims can also be targeted if there is a need to do so. Also the property of enemy can be ruined

if there is no other way to smash the supremacy of the enemy. Enemy forts can be burnt if this becomes the necessity of war.

I have concluded that nuclear weapons will not be used and we cannot extend the order (*Hukm*) of Mangonel (*Manjaneeq*) and other weapons, which were used by the Prophet (peace be upon him) through analogy to the nuclear weapons. The jurists' texts show that extensive destruction can be made but it does not show that mass destruction will be permitted.

In chapter three I have discussed the conduct of nuclear powers. What are their efforts in the elimination of nuclear weapons from the earth? What are their practices and what are their views? How they addressed the nuclear issue in the past and how they will take it in the future?

Over the years the practice and views of nuclear States especially the practice of United States and United Kingdom show that they are not ready to get rid of the policy of use of nuclear weapons and they are not sincere to do this in the near future.

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**Introduction**

Self-defence against external threats to existence or well-being is in the nature of all living beings. This quality is all the more obvious in human beings. Equally obvious is the tendency to gain dominance and prevalence over adversaries. These two conflicting tendencies result in tensions in relations between individuals as much as tensions between nations. This inevitably results in the use of force by one side against the other. An unavoidable aspect of human behaviour, the use of force has manifested itself in a variety of forms. Man, since times immemorial, has sought to develop new ways to successfully defend himself against aggression or to succeed in his own aggression against another. Thus early historical records show the improvised use of stones and wooden tools as weapons for protection in hostile environments. A major development, in this respect, was the discovery of iron and its subsequent use in weaponry. Indeed, the history of the use of metals in weaponry shows an interesting journey starting from primitive swords and spears to modern day weapons of mass destruction.

With the end of the Dark Ages, and the subsequent Scientific and Industrial Revolutions in Europe, the development of armaments took new dimensions. Weapons, which were unthinkable, only a few centuries back, soon made their way to the battlefield. Battleships manufactured from metals instead of wood, the revolutions in artillery and infantry weapons, the use of

gunpowder to inflict massive damage against the enemy, the gradual development of submarines, and the introduction of tanks and airpower in World War I are all important landmarks in a historical journey. The use of destructive firepower against the adversary that began with the gunpowder reached its peak in the nuclear bomb. Before the arrival of the nuclear bomb on the scene, the concept of Mass Destruction was already there. Thus by 1937, the term was well in use.<sup>1</sup> However, the advent of the nuclear bomb gave it new dimensions which were previously unthinkable.

The First World War witnessed immense casualties on the battlefield. However, these casualties were caused not as much by weapons of mass destruction, as by the scale of the fighting and the number of men involved. True chemical weapons were tested on the battlefield, and tanks and artillery power had evolved to new heights, but this use of weapons, which would cause mass casualties, was only perfected in World War II. Indeed, the end of World War II was marked by the triumph against humanity of the deadliest weapon man has ever known: the nuclear bomb. The death of more than a hundred thousand men with a single drop of a bomb was unthought-of even in those days. Even the developers of the weapon were taken aback by the sheer scale of destruction it had left on the ground.

The race for the development of the bomb was well underway during the war. Successful allied bombing raids against German facilities for research and development of the nuclear weapon, along with the escape of

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<sup>1</sup> [www.global/arms/treaties/mtrc\\_anx.html](http://www.global/arms/treaties/mtrc_anx.html), (last visited on 15 February 2006)

some German scientists westwards during the war prevented Germany from claiming the 'honour' of being the first nation to add to its arsenal the nuclear bomb. After the war, the nuclear race was essentially between the Soviet Union and the United States. By 1949, the Soviet Union had tested its own bomb. United Kingdom, France and China followed the two superpowers down the same dark road in 1952, 1960 and 1964 respectively. India and Pakistan, in 1998, joined the exclusive club of nations that had tested the nuclear weapon.<sup>2</sup>

Given the scale of destruction that a single instance of the use of nuclear weapons can result in, an international legal framework has gradually been put in place to control the proliferation of nuclear weapons and to minimize the possibility of its use. The reason behind the concern regarding nuclear weapons is obvious: even a single instance of its use can result in millions of casualties within a few seconds. A nuclear response in turn would result in what is known as Mutually Assured Destruction (MAD). Following the end of the Cold War, the possibility of use of nuclear weapons by the superpowers was significantly reduced. However, the post-cold war era has seen a rise in international conflicts. Though most of these conflicts have been localized, the present so-called War on Terror poses new challenges with respect to acquisition and proliferation of nuclear weapons. The tensions with Iran regarding the development of nuclear energy and international concerns over a possible covert weapons program run by Iran highlight the importance of the issue. Similarly, after the fall of the Soviet Union, thousands of Soviet

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<sup>2</sup> *The Encyclopedia of Americana*, International Edition, (Danbury, Connecticut: Grolier, Incorporation, 1984), 518. Imran Gul, "History of nuclear proliferation" *Pakistan Horizon*, volume 53 number 1, 2000; also see [www.Wikipedia.com](http://www.Wikipedia.com), (last visited on 20<sup>th</sup> January 2006).



scientists were ready to offer their services to the right bidder for the right price. There has even been speculation regarding the acquisition of nuclear weapons by non-State actors.

It is important to know that the debate in international law regarding nuclear weapons focuses on two issues: acquisition and proliferation. The entire body of treaties on the issue is designed to prevent the acquisition of nuclear weapons by countries that are not members of the club of five nuclear powers as well as the subsequent possibility of proliferation of nuclear weapon technology to other countries. In this study, an effort has been made to assess the threat of nuclear weapons' proliferation, besides discussing other issues.

A lot of work has been done on the issue of acquisition and proliferation of nuclear weapons. It has been discussed under various headings, such as disarmament, proliferation and others. Some studies have tried to identify parties responsible for proliferation and spread of nuclear weapons. Some blame the casual attitude of the major powers in the early years and sometimes their willful participation in exporting nuclear technology. Others lay the blame on underground networks selling this technology in the black market. What is important for us is to ascertain whether the laws and the enforcement mechanism in place are adequate to prevent proliferation or not.

With regard to the use of nuclear weapons, two different views exist. Some of the views expressed before recent decision of the International Court of Justice regarding the right to use nuclear weapons tend towards prohibition. However, certain views expressed in the light of the International Court of Justice judgment tend towards the existence of a right to use nuclear weapons in certain circumstances.<sup>3</sup> The same judgment, it must be pointed out, is interpreted in different ways.

An important aspect that is often neglected is the actual conduct of the major powers regarding the use of nuclear weapons. Policy statements on this issue are important to analyze since they gave an insight to the mindset of the members of the nuclear club as far as the right to use is concerned. Without fail, all the major powers seek to deny others this right while reserving it for themselves.

With regard to the position of Shari'ah on the issue, it must be said that literature specifically addressing the issue of the acquisition, use and proliferation of nuclear weapons from the viewpoint of Islamic Law is rare to find. The reason is obvious: the period in which the jurists wrote was not the nuclear age. Recently, some Islamic scholars have tried to address the issue in the light of general principles that can be gleaned from the Qurān, the Sunnāh as well as the texts of the jurists. These principles are relevant especially with regard to the doctrine of use of force and the limits within which it operates. Generally, it must be said, studies on the issue, even when written solely from

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<sup>3</sup> Advisory opinion on the legality of the use of nuclear weapons (WHO Case) 1996, ICJ Press Release 546.

the perspective of Sharī'ah, lack in terms of deriving benefit from the works of classical jurists. In this study, however, an effort has been made to understand the position of classical jurists regarding weapons, which, in their own days, killed without discriminating between combatants and non-combatants.

The study has been divided into three chapters.

The issue of acquisition of nuclear weapons is discussed in Chapter One. The efforts of the international community to control acquisition will be highlighted, in view of the laws and treaties in place. The concept of nuclear free zone, its relevance to acquisition, as well as treaties like Non Proliferation Treaty, Comprehensive Test Ban Treaty and proposals such as Fissile Material Cut off Treaty receive mention in the same chapter. In this study I will take the role of the International Atomic Energy Agency and the gaps in the laws in place as well as their enforcement.

With regard to acquisition, the position of Sharī'ah is discussed under the heading of acquisition. Besides this, the position of Sharī'ah regarding seeking assistance from non-Muslims and the status of existing treaties is highlighted in detail.

### **Chapter one: International Law on the Acquisition of Nuclear Weapons**

- **The concept of Free Zone**
- **Non Proliferation Treaty**
- **Comprehensive Test Ban Treaty**
- **Fissile Material Cut off**
- **International Atomic Energy Agency**
- **Effectiveness of International Law relating to Nuclear Weapons**
- **Gaps in the law**

**The Sharī'ah position on:**

- **Acquisition of Nuclear Weapons**
- **Seeking Assistance from Non-Muslims**
- **Status of Existing Treaties in Sharī'ah**

Chapter Two goes to highlight the development of international law on the use of nuclear weapons from a historical perspective. The decisions of the International Court of Justice as well as United Nations resolutions on the issue are also analyzed, along with the question of effectiveness of international law on the issue.

Finally, a detailed analysis of the position of Shari'ah about the use of weapons, which inflict mass casualties, is also included in the study. The general principles in the Islamic Law of War, which relate to the Use of Force and the limits within which the doctrine operates is discussed and related to the issue of Weapons of Mass Destruction.

**Chapter two: International Law on the Use of Nuclear Weapons**

- **Law before the United Nations Charter**
- **Law after the United Nations Charter**
- **United Nations Resolutions**
- **The opinion of the International Court of Justice**
- **Current Position of International Law**

**The Sharī'ah position on:**

- **First-Strike and Nuclear Retaliation**

Chapter Three addresses the role of nuclear powers in curbing the spread of nuclear weapons, as well as their stated policy positions with regard to the right to use nuclear weapons, and the circumstances, which allow such use. An effort is made to understand the level of commitment or otherwise of

nuclear powers with regard to eliminating the danger of the use of nuclear weapons.

**Chapter three: The conduct of Nuclear Powers**

- **Their practices and views**

This is followed by a conclusion, which sums up the issues discussed.

At the end, a detailed bibliography is given.

**CHAPTER ONE****ACQUISITION OF NUCLEAR WEAPONS UNDER THE  
INTERNATIONAL LAW**

Nuclear technology is one of the most important sources of energy. But at the same time it can be converted to nuclear weapon, which is the core issue of international law.

International community from the beginning of nuclear age has struggled to prevent or limit the military use of nuclear technology. Many efforts have been made to restrict the States to the peaceful uses of nuclear technology and not convert it to nuclear weapons.

Some of these efforts are the following:

**1.1 The concept of free zone.**

The concept of free zone emerged in the mid-1950s. "Its aim was to exclude the production, storage, holding, and use of nuclear weapons within geographically delimited areas."<sup>1</sup> Some of the treaties regarding this concept are the following:

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<sup>1</sup> *Encyclopedia of Public International Law, Use of Force War and Neutrality Peace Treaties*, vol. 4 (New York: North-Holland Publishing Company, 1982), 39. Also Schwarzenber Ger George, *International Law and Order*, (London: Stevens and Sons, 1971), p.210.

- i. Antarctic Treaty, 1959. This describes that Antarctic will be used for peaceful purposes. The Antarctic will not be used as a station for nuclear weapons or a place for the use of nuclear weapons.
- ii. The Outer Space Treaty, 1967. It describes that moon and other celestial bodies shall be used by all states, parties to the treaty, exclusively for peaceful purpose. No party to the treaty is allowed to place in orbit around the earth any object in any other manner.
- iii. Treaty for the prohibition of nuclear weapons in Latin America, 1967, which also called the treaty of Tlatelolco. This treaty is valid for all Latin American States, who are parties to it. This treaty requires from the parties to prohibit and prevent the testing, use, manufacture, production, or acquisition by any means whatsoever of any nuclear weapons, as well as the recipe, storage, installation, development and any form of possession of any nuclear weapons.
- iv. Treaty on the prohibition of the emplacement of nuclear weapons and other weapons of mass destruction on the seabed and the ocean floor and the subsoil thereof, 1971. In this treaty the contracting parties are forbidden to implant or emplace on the seabed, the ocean floor, on its subsoil any nuclear weapons or any other mass destruction weapons.

“These treaties are there but they are limited in their range and did not concentrate on the whole world.”<sup>2</sup>

## 1.2 Control over proliferation.

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<sup>2</sup> Nagendra Singh, *Nuclear Weapons and Contemporary International Law*, (London: Martinus Nijhoff, 1989), p. 239.

The concept of non-proliferation came into being soon after the United States used atomic weapons in Nagasaki and Hiroshima.

The first treaty which specifically deals with the problem of proliferation was signed in 1968. This was the time when all five permanent members of Security Council had tested their weapons.

### **1.2.1 Non Proliferation Treaty 1968**

This is the most important and basic document of international law, which deals with the acquisition of nuclear weapons.

“The Non Proliferation Treaty’s main objective was to stop the further spread of nuclear weapons, to provide security for non-nuclear weapon States, which had given up the nuclear option, to encourage international co-operation in the peaceful uses of nuclear energy, and to pursue negotiations in good faith towards nuclear disarmament leading to the eventual elimination of nuclear weapons.”<sup>3</sup>

The basic articles of Non Proliferation Treaty are the following:

Article (1)“ Each nuclear weapons State party to the treaty undertakes not to transfer to any recipient whatsoever nuclear weapons or other nuclear explosive devices or control over such weapons or explosive devices directly, or indirectly and not in any way to assist, encourage, or induce any nuclear weapons State to manufacture or otherwise acquire

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<sup>3</sup> John Dewar, *Nuclear Weapons the Peace Movement and the Law* (London: Macmillan, 1986), p. 22.



nuclear weapons or other nuclear explosive devices, or control over such weapons or explosive devices”.<sup>4</sup>

Article (2) “Each non-nuclear weapons State party to the treaty undertakes not to receive the transfer from any transferor whatsoever of nuclear weapons or other nuclear explosive devices directly, or indirectly; not to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices; and not to seek or receive any assistance in the manufacture of nuclear weapons or other nuclear explosive devices”.<sup>5</sup>

The treaty is significant in imposing an obligation on the nuclear and non-nuclear States to abstain from expanding nuclear weapons. However the treaty granted the right to member States to develop research, production and use of nuclear energy for the peaceful purposes without discrimination.

In 1995, review conference of the member States further legitimized it and extended the period of the treaty for indefinite time.

At present, 189 States are parties to the 1968 Nuclear Non-Proliferation Treaty. These include all five declared Nuclear Weapons States; the People's Republic of China, France, the Russian Federation, the United Kingdom, and the United States of America.<sup>6</sup>

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<sup>4</sup> Article 1 of NPT 1968.

<sup>5</sup> Article 2 of NPT 1968.

<sup>6</sup> [http:// www.iaea.org](http://www.iaea.org) and Carnegie endowment. Org/npp/ (last visited on 25<sup>th</sup> February 2006).

### 1.2.2 Draw-backs in the Non Proliferation Treaty

- i. The Non Proliferation Treaty divides the countries of the world into two categories nuclear weapons states and non-nuclear weapons states. It defines nuclear weapons states as countries that detonated a nuclear explosion before January 1969, namely the USA (First detonation in (1945) former Soviet Union in (1949), Great Britain in (1952), France (1958), and China 1962.<sup>7</sup> A lot of thinkers say; that this is discrimination to divide the world into two regimes. For example David Fischer says “non-proliferation is not by a long chalk the basis of the discriminatory regime in the world today. The United Nations Charter embodies the same fundamental discrimination by giving permanent seats in the Security Council and according the right of veto to the same five States that are officially recognized as nuclear weapons States by the Non Proliferation Treaty.<sup>8</sup>
- ii. The provision with regard to nuclear installation inspection also does not apply to five nuclear powers.
- iii. The abrogation clause, Article 10 of the Non Proliferation Treaty, is a major concern to some countries. ‘Under it a party can withdraw from the treaty with three months’ notice if it decides that ‘extra ordinary events’ have occurred which’ it regards as having jeopardized its supreme interest’. Under the Non Proliferation Treaty a country can legally manufacture the

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<sup>7</sup> Imran Gul, “History of nuclear proliferation” *Pakistan Horizon*, volume 53 number 1, 2000.

<sup>8</sup> David Fischer, *Stopping the Spread of Nuclear Weapons the Past and Prospects*, (London and New York: Rutledge, 1992), p.16.

components of nuclear weapons, notify the International Atomic Energy Agency and the United Nations Security Council that it is withdrawing from the treaty, and then assemble its nuclear weapons.<sup>9</sup>

- iv. International disputes among the different States are one of the basic reasons for the spread of nuclear weapons. States are acquiring nuclear weapons to deter other States from any aggression specially the States that had disputes with other State. Pakistan and India are the clear example in this regard.<sup>10</sup>
- v. There is the duty on the non nuclear weapons States not to acquire nuclear weapons. There is no such duty on the nuclear weapons States. In the Article 3(4) of the Non Proliferation Treaty non nuclear weapons States are obliged to make agreement with International Atomic Energy Agency not to convert nuclear technology to nuclear weapons.<sup>11</sup>
- vi. The role of nuclear powers is not satisfactory; they themselves contributed to the proliferation. For example the United States assisted France in its nuclear program; the United States, Canada, and Britain assisted India; Germany, Britain, the United States, and Israel assisted South Africa; France and United Sates assisted

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<sup>9</sup> Frank Barnaby' *How Nuclear Weapons spread*, (London and New York: Rutledge, 1993), p.124.

<sup>10</sup> Michael Atiyah, *A Nuclear Weapons Free World Steps along the Way*, (London: Macmillan Press Limited, 2000) pp.208, 209.

<sup>11</sup>Article 3(4) of the NPT 1968.

Israel; France West Germany and the United States assisted Iran; the Soviet Union assisted Libya, Syria, Iraq, and Cuba.<sup>12</sup>

The India–US strategic alliance, which was officially blessed by the US administration in July 2005, was seen as a threat to the Non Proliferation Treaty regime. George Bush declared that he would endeavour to change US law and international rules to permit trade in US civilian nuclear technology with India.<sup>13</sup>

vii. No State is bound to become party to the treaty as other international treaties. Every State is free to decide according to its own interest.

These are the reasons that proliferation is still there and nuclear weapon States are increasing with the passage of time.

### **1.3 Ban on the testing of nuclear weapons**

Apart from the Non Proliferation Treaty, there are also other treaties, which prohibit the testing of nuclear weapons.

“Some thinker says that previous US President Dwight Eisenhower was among the first to propose the treaty to ban the testing of nuclear weapons, in the 1950s, and while he actively built up nuclear stockpiles, he said his failure to successfully finalize a deal was the greatest disappointment of his administration.”<sup>14</sup> “Some thinker says that a ban on

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<sup>12</sup> L. Bender, David and Leone, Bruno, *Nuclear Proliferation: Opposing View Point*, (London: Green haven Press, Inc, 1992), 63.

<sup>13</sup> <http://www.fmprc.oxford.universitypress.site>, 2005, (last visited 10<sup>th</sup> October 2006).

<sup>14</sup> <http://www.BBCNews.online> Friday, 5 January, 2001 15:48 GMT, (last visited on 13<sup>th</sup> January 2006).

the testing of nuclear weapons was first proposed by the Indian Prime Minister Jawaharlal Nehru in 1954.”<sup>15</sup>

In 1945 the first nuclear test explosion called 'Trinity' was conducted by the United States of America near Alamogordo in New Mexico. During the period of 1945 to 1962 many tests were conducted by the USSR and the USA. In 1963, for the first time Partial Test Ban Treaty was signed. This treaty forbids nuclear tests in the atmosphere, in outer space and under water. But this treaty was partial, and its scope was limited. In 1990 the International community felt the necessity of the comprehensive test ban.

### 1.3.1 Comprehensive Test Ban Treaty 1996

The Comprehensive Test Ban Treaty (CTBT) is one of the most complex treaties ever written and its ratification is proving just as testing.

“After decades of false starts, the traditional "big five" nuclear powers United States of America, Russia, China, the United Kingdom and France backed talks which led to the Comprehensive Treaty Ban Treaty being created at the United Nations in September 1996. President Bill Clinton was the first world leader to sign the historic document. Currently 159 States have followed.”<sup>16</sup>

The most important and the basic article of CTBT is Article 1 which states that “Each party undertakes not to carry out any nuclear

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<sup>15</sup>Kazim Dekiba, “Comprehensive Test Ban Treaty: is it comprehensive?” *Pakistan Horizon*, volume 53, number, 1 January 2000, p. 7.

<sup>16</sup>[http://www, B.B.C News online](http://www.bbc.com/news/health-2001-01-05) Friday, 5 January 2001, 15:48 GMT, (last visited on 7<sup>th</sup> April 2006).

weapon test explosion or any other nuclear explosion, and to prohibit and prevent any such nuclear explosion at any place under its jurisdiction or control.”<sup>17</sup> Article (2) says “Each State party undertakes, furthermore, to refrain from causing encouraging, or any way participating, in the carrying out of any nuclear weapon test explosion or any other nuclear explosion.”<sup>18</sup>

According to the article 15 the treaty will enter into force after a group of 44 nuclear-capable States including Pakistan and India, approve. So this treaty is not approved by the above States up till now and it is very difficult in the near future to be approved.

#### **1.4 Fissile material cut off**

The first proposal towards a fissile material cut off was made by the United States of America as part of the more comprehensive Baruch plan over 50 years ago. The Baruch plan envisaged the setting up of an authority called the International Atomic Energy Agency, which would be entrusted with managerial control or ownership of all atomic energy activities in the world. At that stage the United States of America had a monopoly of nuclear weapons and the USSR felt that it would be vulnerable in the asymmetric situation that would persist until the existing stocks were destroyed.<sup>19</sup>

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<sup>17</sup> Article 1 of CTBT 1996.

<sup>18</sup> Article 2 of CTBT 1996.

<sup>19</sup> David Fischer, pp.31-32.

As a result, the USSR made a counter proposal in which the convention on outlawing nuclear weapons and providing for their destruction was to precede the establishment of a control system.

“The Baruch plan was rejected by the USSR essentially because in the asymmetric situation prevailing between the USA and the USSR agreement was not reached on the question as to whether disarmament or non-proliferation should take precedence.”<sup>20</sup>

“In 1956, again USSR rejected the USA proposal that all fissile material produced in future should be used under international supervision exclusively for non-weapon purposes. The argument of USSR was that banning fissile material without banning weapons is impractical.”<sup>21</sup>

A similar proposal by the USA in 1964 was again rejected by the USSR on similar grounds. At that stage the US nuclear stockpile was about 30,000 and that of the USSR about 5,000. By 1964, all the members of the Security Council had acquired nuclear weapons. ‘Nuclear freeze’ (in respect of fissile materials or nuclear weapons or both) was the subject of several resolutions that came before the United Nations General Assembly (UNGA) in the 1950s, 1960s, 1970s and 1980s.

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<sup>20</sup> *The Encyclopedia of Americana International Edition*. (Grolier incorporated, 1984), 520.

<sup>21</sup> David Fischer, p.32.

In the 1993 United Nations General Assembly declare that “Fissile Material cut off would be a significant contribution to nuclear non-proliferation in all its aspects.”<sup>22</sup>

Jan Petersen, Minister for Foreign Affairs of Norway, in Non Proliferation Treaty review conference 2005, gave the following statement.

“It was high time to negotiate a treaty banning the production of fissile materials for nuclear weapons. Pending that, all nuclear weapon states should reaffirm their moratoriums on the production of fissile materials. Those who had not yet done that should do so now, and nuclear weapon states should place fissile material designated by each of them as no longer required for military purposes under International Atomic Energy Agency arrangements for disposition. The Non Proliferation Treaty was a core pillar of collective, global security, but it lacked an institutional machinery to deal with new and emerging challenges. There was an urgent need, therefore, for a mechanism that facilitated dealing with important challenges, as they arose. Meeting every five years was not enough. The conference was an opportunity to “roll back the erosion of confidence in the Non Proliferation Treaty”. He added, “We must walk the extra mile to achieve a positive, balanced and forward-looking outcome”.<sup>23</sup>

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<sup>22</sup> Michael Atiyah, p. 66.

<sup>23</sup> <<http://www.norway.org.za/policy/organizations/npt.htm>>. (last visited on 10<sup>th</sup> July 2006).



Aleksandr Baichov (Belarus) gave the following statement:

“A lack of progress in fulfilling steps towards disarmament and the limited headway made in bringing into force the Comprehensive Nuclear-Test-Ban Treaty (CTBT). The Conference on Disarmament should start, without further delay, negotiations on the fissile material cut-off treaty, as well as on the issues of nuclear disarmament, negative security assurances and the prevention of the arms race in outer space”.<sup>24</sup>

So Fissile Material Cut off Treaty is only proposal in international law, which did, not considered by the international community up till now. Fissile material cut off is a partial measure; it cannot control the proliferation of nuclear weapons. It has been claimed that a fissile material cut off would limit the size of potential nuclear arsenals. The arsenals of the five nuclear powers, already quite large, are not going to be reduced by a fissile material cut off.

The five nuclear powers have huge stocks of fissile material, accumulated over decades, and have therefore either stopped production of fissile for weapons purposes, or are in the process of doing so. So they do not need a fissile material cut off for themselves. A fissile material cut off is also not needed for the non nuclear weapons States, parties to the Non Proliferation Treaty, since they are already subject to safeguards. That leaves only India, Pakistan and Israel.<sup>25</sup>

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<sup>24</sup> Ibid.

<sup>25</sup> Ibid.

### 1.5 Formation of International Atomic Energy Agency

“The International Atomic Energy Agency was set up in 1957 to help nations develop nuclear energy for peaceful purposes. Allied to this role is the administration of safeguards arrangements to provide assurance to the international community that individual countries are honouring their commitments under the treaty.”<sup>26</sup>

“The Agency's genesis was the US President Eisenhower's "Atoms for Peace" address to the General Assembly of the United Nations on 8<sup>th</sup> December, 1953. This idea developed the International Atomic Energy Agency Statute, which 81 States unanimously approved in October, 1956. The Statute outlines the three pillars of the Agency's work, nuclear verification and security, safety and technology transfer.”<sup>27</sup>

“The International Atomic Energy Agency regularly inspects civil nuclear facilities to verify the accuracy of documentation supplied to it. The agency checks inventories, samples and analyzes materials. Safeguards are designed to deter diversion of nuclear material by increasing the risk of early detection. They are complemented by controls on the export of sensitive technology from countries such as UK and USA through voluntary bodies such as the Nuclear Suppliers Group. The main concern of the International Atomic Energy Agency is that uranium should not be refined into a form that would be suitable for bomb production.”<sup>28</sup>

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<sup>26</sup>David Fischer, p.41.

<sup>27</sup>Barnaby Frank, 26. Also see [www.iaea.org](http://www.iaea.org).

<sup>28</sup>[http://en.wikipedia.org/wiki/History\\_of\\_nuclear\\_weapons](http://en.wikipedia.org/wiki/History_of_nuclear_weapons) (last visited on 20<sup>th</sup> May 2006).

<sup>28</sup> <http://www.Wikipedia,FreeEncyclopedia.htm> (last visited on 13<sup>th</sup> May 2006).

**1.5.1 Scope of safeguards**

Traditional safeguards are arrangements to account for and control the use of nuclear materials. This verification is a key element in the international system which ensures that uranium in particular is used only for peaceful purposes.

Parties to the Non Proliferation Treaty agrees to accept technical safeguard measures applied by the International Atomic Energy Agency. These require that operators of nuclear facilities maintain and declare detailed accounting records of all movements and transactions involving nuclear material. Inspections by the International Atomic Energy Agency are complemented by other measures such as surveillance cameras and instrumentation.

The inspections act as an alert system providing a warning of the possible diversion of nuclear material from peaceful activities. The system relies on;

- i. Material Accountability tracking all inward and outward transfers and the flow of materials in any nuclear facility. This includes sampling and analysis of nuclear material, on-site inspections, and review and verification of operating records.
- ii. Physical Security restricting access to nuclear materials at the site.

- iii. Containment and Surveillance, use of seals, automatic cameras and other instruments to detect unreported movement or tampering with nuclear materials, as well as spot checks on-site.

But the terms of the Non Proliferation Treaty cannot be enforced by the International Atomic Energy Agency itself, nor can States be forced to sign the treaty.<sup>29</sup>

### **1.5.2 Additional Protocol to the Agreement(s) between State(s) and the International Atomic Energy Agency for the Application of Safeguards**

In 1993 a program was initiated to strengthen and extend the classical safeguards system, and the International Atomic Energy Agency's Board of Governors approved a model protocol in 1997. These measures boosted the International Atomic Energy Agency's ability to detect undeclared nuclear activities, including those with no connection to the civil fuel cycle.

Introduction of new things were of two kinds. Some could be implemented on the basis of International Atomic Energy Agency's existing legal authority through safeguards agreements and inspections. Others required further legal authority to be conferred through an Additional Protocol. This must be agreed by each Non-weapons State with International Atomic Energy Agency, as a supplement to any

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<sup>29</sup> <http://www.carnegieendowment.org/npp/> (last visited on 25 February 2006).

existing comprehensive safeguards agreement. Weapons States have agreed to accept the principles of the model additional protocol.

Key elements of the model Additional Protocol 1997:

- i. The International Atomic Energy Agency is to be given considerably more information on nuclear and nuclear-related activities, including, production of uranium and thorium (regardless of whether it is traded), and nuclear-related imports and exports.
- ii. International Atomic Energy Agency inspectors will have greater rights of access. This will include any suspect location, it can be at short notice (e.g., two hours), and the International Atomic Energy Agency can deploy environmental sampling and remote monitoring techniques to detect illicit activities.
- iii. States must streamline administrative procedures so that International Atomic Energy Agency inspectors get automatic visa renewal and can communicate more readily with International Atomic Energy Agency headquarters.
- iv. Further evolution of safeguards is towards evaluation of each State, taking account of its particular situation and the kind of nuclear materials it has. This will involve greater judgment on the part of International Atomic Energy Agency and the development of effective methodologies, which reassure Non Proliferation Treaty States.

Currently 54 States have signed and 18 have ratified the Additional Protocol.<sup>30</sup>

### 1.5.3 The de-merits of International Atomic Energy Agency

- i. There is a need of agreement for International Atomic Energy Agency with a State to inspect its nuclear reactors and other nuclear activities. The agency can not itself inspect without prior permission of concerned State.
- ii. Nuclear technology will be used for the peaceful purposes, it is the basic aim of International Atomic Energy Agency. But when it will be converted to nuclear weapons, it is difficult for Agency to find . One State may be making nuclear weapons within the agreement with the Agency.
- iii. Impartiality of inspectors is also one issue in this regard. Sometime, inspectors are condemned by bending to the concerned State.
- iv. This is single Agency and the work is very difficult so it is not possible for a single Agency to control all nuclear activities all over the world.<sup>31</sup>
- v. Agency also does not has enough budgets to carry out activities more effectively.<sup>32</sup>

It is clear from the above efforts that international community has done a lot of things. But the law can not control the acquisition of nuclear weapons.

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<sup>30</sup> <http://www.ciel.com>, (last visited 5<sup>th</sup> September 2006).

<sup>31</sup> Frank Barnaby, p.127.

<sup>32</sup> Ibid.

One of the reason is, that international law is soft law. Secondly some States want to have monopoly over the nuclear weapons. And thirdly, some States does not want to make such a law which change their policy.

#### Acquisition of nuclear weapons under Sharī'ah

Under the Sharī'ah there is no specific provision about the acquisition of nuclear weapons but there are general rules from which we can dig out the guidelines of Sharī'ah in this regard.

Firstly I am taking the guidelines of the Qurān and the Sunnāh.

#### 1.6 The Qurān:

“And make ready against them all you can of power, including steeds of war to threaten the enemy, and other besides whom, you may not know but whom Allāh does know. And whatever you shall be repaid unto you, and you shall not be treated unjustly.”<sup>33</sup>

In this verse Allāh described that any kind of preparation for the deterrence of enemy is obligatory.

According to Imām al-Tabarī “it means that any kind of instrument which grant you the supremacy whether it is weapons or steeds. Both

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<sup>33</sup> The Qurān, 10:30

were mentioned because they were the basic instruments of battle at that time and strong power.”<sup>34</sup>

“And if they have intended to march out, certainly, they would have made some preparation for it.”<sup>35</sup>

“These peoples were condemned due to non-preparation before they meet the enemy.”<sup>36</sup>

### 1.7 The Sunnāh

“Uqba ibn ‘Amir narrated that Prophet (peace be upon him) was addressing the people provide the power as much as you can and power is Ramy (throwing arrows).”<sup>37</sup> Uqba ibn ‘Amir narrated that the Prophet (peace be upon him) said; “the person who gets the knowledge of throwing stones and then left it, he is not among us, and he is making sin.”<sup>38</sup>

“Uqba ibn ‘Amir narrated that the Prophet (peace be upon him) said that: “By making one arrow three persons will go to heaven, one of them is the maker.”<sup>39</sup>

There are many other Ahadīth which clearly states that making of weapons and using of these weapons are necessary for the Muslims. The Qurān and the Sunnāh does not forbid the possession of any kind of

<sup>34</sup> Muhammad Ibn Ahmad Al-Qartabī, *al-Jami al-Ahkām al-Qurān*, vol.7 (Beirut: Maktabah, *Manahil a-l Irfan*), p.102.

<sup>35</sup> The Qurān, 9:46

<sup>36</sup> Abū Bakr Ahmad al-Rāzī al-Jassās, *al-Ahkām al-Qurān*, vol. 3 (Pakistan: Kūtab Khana Karachi), p.102.

<sup>37</sup> Muslim Ibn Al-Hajjāj al-Qūsharī, *Sahih Muslim*, Vol. 2 (Pakistan: Ministry of Federal Education, Islamabad), p.142.

<sup>38</sup> Ibid.

<sup>39</sup> Abū Abd Allāh Muhammad ibn Yazīd ibn Mājah, *Sūnānī ibn Mājah*, Vol. 2 (Beirut: *Dar al-ahya al-Turath al-‘Arabī*), p.940.



weapons. The Qurān and the Sunnāh does not prevent from making and development of new weapons.

### 1.8 Assistance from Non-Muslims

Majority of the jurists are of the opinion that assistance from non-Muslims can be obtained in some circumstances for the participation in the holy war. When the jurists have allowed the participation of these peoples in the holy war, their assistance for acquiring and development of weapons cannot be rejected.

The following are the opinions of different schools of thoughts:

#### 1.8.1 Hanif'i School of Thought

It is not appropriate for the Muslims to get assistance from non-Muslims for the war against non-Muslims because they may be cheated by non-Muslims. That is their religious hostility, which is pursuing them to do so. But when there is necessity for the Muslims, then they can take their assistance.<sup>40</sup>

Ibn Abbass (may Allāh be pleased with him) narrated that the Prophet (peace be upon him) got assistance of the Jews of Qainqá against Quraiyzah and nothing was given from the spoil of war. This is the motive that Muslims cannot be condemned if they get assistance for war from non-Muslims. Their assistance may anger other non-Muslims.

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<sup>40</sup> Abū Bakr ibn Mas'ūd al-Kāsānī, *Badá'i' al-Saná'i' fi tartib al-Sharā'i*, vol. 6, (Beirut Lebanon: *Dar al-Ahya Al-Turath Al-Arabi*, 2000), p.63.

Taking assistance from non-Muslims is as such, as taking assistance from dogs, against non-Muslims.<sup>41</sup>

### 1.8.2 Shaf'i School of Thought

According to Shaf'i School of Thought generally, assistance from non-Muslims is not allowed but when there is necessity and they have good feeling for the Muslims then it can be obtained. For the assistance of these peoples we can hire their services.<sup>42</sup>

### 1.8.3 Malik'i School of Thought

The assistance of non-Muslims is allowed for the services like digging, destruction, using and manufacturing of Mangonel (a kind of destructive weapon).<sup>43</sup>

### 1.8.4 Hanbal'i School of Thought

According to the majority of Hanbal'i School of Thought's jurists generally it is not allowed but some jurists say it could be obtained in some circumstances when there is necessity. There is also one narration from Imam Ahmad, which shows that their assistance can be obtained<sup>44</sup>.

For holding and acquiring of nuclear weapons, assistance from non-Muslims is allowed under Shari'ah, as this is clear from the views of the jurists. Basically the issue of assistance has been discussed by the

<sup>41</sup>Abū Bakr Muhammad ibn Ahmad Abū Ismā'el al-Sarakhsī, *al-Mabsūt*, vol.10, (Quetta: *Maktabah al-Rashidiyya*, 2005), pp.27-28.

<sup>42</sup>Abū Ishaq Ibraheem ibn 'Ali Muhazzab, *al-Muhazzab*, vol. 2 (Egypt: *Matbagha, Esa al- Hilbi*), p. 230.

<sup>43</sup> Muhammad, Al-Zarqa, *Sharh al-Zurqānī*, vol. 3 (Beirut: *Dar al-Kutab a-l Ilmiyyah*), p.202.

<sup>44</sup> Muhammad ibn Ahmad al- Maqdasi Ibn Qudama, *Al Mughnī*, vol. 2 (Lebanon: *Biatul Afkār al-Duwaliā* 2004), p.2302.

jurists in relation of the participation of these peoples in actual war with Muslims. The jurists who said that the assistance of these peoples is not allowed they give the reason that these peoples are untrustworthy and they can cheat Muslims. But the danger of these things can be arises in actual war, not in the normal situation.

So any arrangement with non-Muslims for receiving weapons material or other instrument of war cannot be unlawful under the Sharī'ah. Taking of armaments from non-Muslims is allowed whether it is from State or individuals. When the Prophet (peace be upon him) intended to go to Hawazin he took some ammunition and armour from Safwan who was non-Muslim at that time. But this arrangement will not be against any treaty if concluded between Muslim and non-Muslim State. Islam reserves special respect to treaties and assign to them all possible guarantees. As Allāh says "You shall fulfill your covenants, for a covenant is a great responsibility".<sup>45</sup>

Muslims became parties to many treaties during the life of the Prophet (peace be upon him) and they faithfully perform their obligations.

Historically Muslims had never broken any of their covenants with the non-Muslims.<sup>46</sup>

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<sup>45</sup> The Qurān: 17:34

<sup>46</sup> Muhammad Munir, "the Protection of Women and Children in Islamic Law and International Humanitarian Law" *Hamdard Islamicus*, vol. XXV No.3, July-September 2002.

### 1.9 The status of International treaties under Sharī'ah

Generally, Muslims are allowed to enter into any treaty, which is not against Islam and against the interest of Muslims. As Allāh said "But if the enemy inclines towards peace, do thou (also) incline towards peace, and trust in Allāh: for Allāh is the one that heareth and knoweth (all things)".<sup>47</sup>

And Allāh says "How can there be a covenant before Allāh and His Messenger, with the pagans, except those with whom ye made a treaty near the Sacred Mosque; As long as they stand true to you, stand ye true to them: for Allāh doth love the righteous."<sup>48</sup>

The best example from the life of the Prophet (peace be upon him) is Hudibiyyah. When the Prophet (peace be upon him) came to Medina he made treaties with non-Muslims, like Banu Nadir, Banu Qainqá, Banu Qurayzah and other tribes.<sup>49</sup>

Ibn Rushd says that some people have permitted the treaty from the beginning without any reason and some have permitted it when there is necessity.<sup>50</sup>

Imām Sarakhsī said if there was supremacy for enemy or there was any other reason, Muslim's ruler could conclude any type of treaty for the best interest of Muslims.<sup>51</sup>

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<sup>47</sup> The Qurān: 8:61

<sup>48</sup> The Qurān: 9:7

<sup>49</sup> Al- Jassās. Vol. 3, p.103

<sup>50</sup> Ibn Rushd, *al- Bidāya*, vol.1, p.731.

<sup>51</sup> Al- Sarakhsī, *al-Mabsūt*, vol.10, p.96. Muhammad Munir, "Public International law and Islamic international law: Identical Expression of World Order" *Islamabad Law Review* vol.1, No 3-4, p.429.

Imām Kāssānī says that treaty is allowed under Sharī'ah without any condition. If the Muslims were required to give something in return, it will also be given when there was necessity to do this.<sup>52</sup>

Wahba al-Zuhali says any kind of treaty can be concluded for peaceful relation, for the exchange of economic benefits or for any other reason.<sup>53</sup>

So, any arrangement with non-Muslims in the shape of bilateral or multilateral treaty will not be against the Shari'ah if it does not violates the Sharī'ah itself.

If we examine the treaties of nuclear weapons like Non Proliferation Treaty, Comprehensive Test Ban Treaty and others we notice that there is no equality among the States.

Five permanent members of the Security Council have right to possess nuclear weapons but other States are not allowed to do so. Although other States are trying to acquire it and some of them have acquired it like Pakistan and India.

Also there is no guarantee from nuclear powers to non-nuclear States that nuclear weapons will not be used against them.

During the cold war International Law, about nuclear weapons, was the law which was acceptable to the USSR and USA. These two powers developed the law for their own interest and they gave very less importance to the other States.

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<sup>52</sup> Al-Kāssanī, *Badā'i' al-Sanā'i*, vol. 6, p.76.

<sup>53</sup> Wahba al-Zuhali, *Al-Fiqh al-Islami wā Addilatuhu*, vol.6, (Publisher and Date of Publication unknown), p.438.

After the disintegration of USSR, USA emerged as a single Super Power in the world. Nowadays USA has the important role in making laws. It is clear that USA does not accept any law, which is against her interest. Also USA interprets the law according to her own necessities. The attitude towards Muslims States in this regard is very awful. USA and big powers does not want that the Muslims States should acquire nuclear weapons. The evidence of this attitude can be seen in the war of Iraq and the problem of Iran. The people also saw and heard propaganda against Pakistan when it made its nuclear test in 1998.

The States those posses' nuclear weapons politically have dominant position over other States.

In My opinion in this situation Muslims States are required to take great care before entering into such treaties. And if they become party to such treaties then they are required to fulfill their obligations which were already discussed.

**Chapter Two**

**USE OF NUCLEAR WEAPONS UNDER THE  
INTERNATIONAL LAW**

**2.1 Law before the United Nations**

Nuclear weapons first came into use during the Second World War. There was no such weapon known to the world before the Second World War but there were laws about weapons which caused unwarranted destruction. Many thinkers say that these laws have relevance to the possession and use of nuclear weapons.

Many old treaties, declarations and agreements on the laws of war, which are currently in force, contain either specific provisions, or important statements of general principle which have potential relevance to the question of the use of nuclear weapons. The first is the St Petersburg Declaration 1868, which was indeed the first major international agreement prohibiting the use of a particular weapon in warfare namely the explosive bullet. Its Preamble stated:

“Considering that the progress of civilization should have the effect of alleviating as much as possible the calamities of war; that the only legitimate object which States should endeavor to accomplish during war is to weaken the military forces of the enemy; that for this purpose it is sufficient to disable the greatest possible number of men; that this object would be exceeded by the employment of arms which uselessly aggravate the suffering of disabled men, or render their death inevitable”.<sup>1</sup>

The Hague Convention VI 1907 on Land War contains statements of broad principle which is seemingly relevant to the nuclear question. In the regulations which are annexed to the Convention, Article 22 states that “the right of belligerents to adopt means of injuring the enemy is not unlimited”.<sup>2</sup>

In addition, Article 23 says that it is especially forbidden:

- i. To employ poison or poisoned weapons
- ii. To declare that no quarter will be given; and
- iii. To employ arms, projectile or material calculated to cause unnecessary suffering.<sup>3</sup>

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<sup>1</sup> Preamble to the St Petersburg Declaration, 1868.

<sup>2</sup> Article 22 the Hague Rules, 1907.

<sup>3</sup> Article 23 the Hague Rules, 1907.



From the period between the two world wars, the main surviving agreement on the laws of war is the Geneva Protocol 1925 on Gas and Bacteriological Warfare. The parties to it declare that “the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, material or devices, has been justly condemned, and they agree to extend this prohibition to the use of bacteriological methods of warfare”.<sup>4</sup>

## **2.2 Law after the United Nations**

After the United Nations Charter many laws were made on the issue of nuclear weapons. Many efforts have been made to prevent the proliferation and use of nuclear weapons.

Article 2, paragraph 4, of the Charter of the United Nations calls on all members' States to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purpose of the United Nations.<sup>5</sup>

Some treaties concluded after the United Nations Charter are as follows:

- i. The Peace Treaties of 10 February, 1947.

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<sup>4</sup> Edmund Jan, *the United Nations and international agreements Encyclopedia*, (London: Taylor and Francis, 1995), p. 294.

<sup>5</sup> Article 2(4) of UN Charter.

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- ii. The Austrian State Treaty, 1955.
- iii. The Nuclear Test Ban Treaty of, 1963.
- iv. The Outer Space Treaty, 1967.
- v. The Treaty of Tlatelolco of 14 February, 1967 on the prohibition of nuclear weapons in Latin America.
- vi. The Nuclear Non-Proliferation Treaty of 1968 (extended indefinitely in 1995).
- vii. The Treaty on the Prohibition of the Emplacement of Nuclear Weapons on the Ocean Floor and Sub-soil, 1971.
- viii. The Treaty of Rarotongo of 6 August, 1985, on the Nuclear Weapons-Free Zone of the South Pacific.
- ix. The Treaty of Final Settlement with respect to Germany, 1990.
- x. The Treaty on the South East Asia Nuclear Weapons-Free Zone, 1995.
- xi. The Treaty on an African Nuclear Weapons-Free Zone, 1996.

Some of these treaties have been discussed in chapter one. These treaties did not discuss the use of nuclear weapons in any circumstance. They only limit or restrict the access of non-nuclear weapons States to get the status of nuclear power or limit the nuclear weapons States to use it in some areas.

“Some thinkers suggest that there are laws which may be related to the use of nuclear weapons which came into being after the United Nations

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Charter. For example the Genocide Convention 1948 prohibits the variety of acts committed with intent to destroy a national, ethnic or religious group.”<sup>6</sup>

“This only confirms already existing customary law; and inasmuch as it depends on proving an actual intent partially or completely to destroy a particular group, it may be of only limited relevance as a basis for assessing the legality of nuclear possession or use.”<sup>7</sup>

The four Geneva Conventions 1949 reflect the principle that parties to a conflict should spare the wounded, prisoners of war, and civilians as much as possible from the effect of armed conflict and occupation.

“Civilian hospitals organized to give care to the wounded and sick, the infirm and maternity cases, may in no circumstances be the object of attack, but shall at all times be respected and protected by the Parties to the conflict.”<sup>8</sup>

The central concern of all four of these Conventions 1949 is the protection of victims of war, especially victims who, in one way or another, find themselves in the hands of the adversary. The Conventions say little or

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<sup>6</sup> Article 2 of the Genocide Convention, 1948.

<sup>7</sup> John Dewar, *Nuclear Weapons the Peace Movement and the Law* (London: Macmillan, 1986), pp. 29-30.

<sup>8</sup> Article 18 of the Geneva Convention IV, 1949.

nothing about actual combat, and were seen as supplementary to the Hague regulations 1907, which remain in force.

“The Hague Cultural Property Convention 1954 extends protection to movable or immovable property of cultural value, and obliges the parties to avoid actions (such as placing a military base next to a cathedral) which are likely to expose cultural property to damage in the event of armed conflict.”<sup>9</sup>

The United Nations Convention on the prohibition of military use of environment modification techniques 1977 prohibits the deliberate manipulation of natural process as weapons.

The Geneva Protocol 1 1977 on International Armed Conflict, supplements the four Geneva Conventions 1949 in various important ways – not least in that it concentrate on directly two key matters; methods and means of warfare, and the protection of the civilian population against the effects of hostilities. Article 35 echoes the terms of agreement of St Petersburg Declaration 1868 and the Hague Convention VI of 1907 as well as breaking some new ground, when it says:

- i. In any armed conflict the right of the parties to the conflict to choose methods or means of wars is not unlimited.

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<sup>9</sup>Preamble to the Hague Cultural Property Convention, 1954.

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- ii. It is prohibited to employ weapons, projectile and material and methods of warfare of nature to cause superfluous injury or unnecessary suffering.
- iii. It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long term and severe damage to the natural environment.<sup>10</sup>

The tendency to restrict the use of conventional weapons, while apparently leaving the use of conventional weapons almost untouched, is also evident in the 1981 United Nations Convention on specific conventional weapons<sup>1981</sup>. However, the Preamble to the Convention reaffirms certain broad humanitarian principles of considerable potential relevance to the nuclear weapons issue, and *inter alia* it repeats almost word for word the term of Article 35 of Geneva Protocol 1 1977.<sup>11</sup>

The Chemical Weapons Convention 1993, effective since April 1997, bans the development, production, stockpiling or retention of chemical weapons, and also provides for their destruction.<sup>12</sup> The Anti-Personnel Mines Convention 1997, bans the development, production, acquisition by other

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<sup>10</sup> Article 35 the Geneva Protocol, 1 1977.

<sup>11</sup> John Dewar, p.31.

<sup>12</sup> Chemical Weapons Convention, 1993.

means, stockpiling and retention or transfer of anti-personnel mines, and provides for their destruction as well.<sup>13</sup> However, there exists in international law no specific norm prohibiting or significantly restricting the use of nuclear weapons. This may be one of the main reasons why there have been no negotiations on the elimination of these weapons, as recommended by the very first resolution of the United Nations General Assembly.<sup>14</sup>

### **2.3 United Nations Resolutions**

Over the years, the General Assembly has passed a great number of resolutions dealing with various aspects of the non-use of nuclear weapons and prevention of nuclear war. With the exception of procedural resolutions, all resolutions have been adopted by vote.

In 1961, the United Nations General Assembly adopted a resolution stating that the use of nuclear weapons was contrary to the 'spirit, letter and aims' of the United Nations and, as such, a direct violation of the United Nations Charter. The resolution proclaims the use of nuclear weapons to be a 'crime against mankind and civilization.' The United States and other North Atlantic Treaty Organization countries opposed this resolution, contending

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<sup>13</sup> Preamble to the Anti-Personnel Mines Convention, 1997.

<sup>14</sup> [www.webmaster@sipo.gess.ethz.ch](http://www.webmaster@sipo.gess.ethz.ch) Center for Security Studies and Conflict Studies, (last visited on 10<sup>th</sup> March 2006).

that in the event of aggression the attacked nations must be free to take whatever action with whatever weapons not specifically banned by international law.<sup>15</sup>

In addition to the pronouncement of illegality of nuclear weapons, the Assembly asked the Secretary General to ascertain the views of the United Nations member's States on the possibility of convening a special conference for signing a convention on the prohibition of the use of nuclear weapons. The Secretary General's consultations proved inconclusive and requested conference was never convened.<sup>16</sup>

At the request of the Soviet Union, in 1967, the General Assembly placed on its agenda a separate item on the conclusion of a convention on banning the use of nuclear weapons. The request was accompanied with the text of a draft convention. In this connection, the General Assembly adopted a resolution in which it, *inter alia*, expressed its conviction that it was essential to continue the examination of the question of the prohibition of the use of

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<sup>15</sup> GA/RES/1653(XVI) 1961.

<sup>16</sup> Michael Atiyah, *A Nuclear Weapons Free World Steps along the Way*, (London: Macmillan Press Limited, 2000), p.101.

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nuclear weapons and of the conclusion of an appropriate international convention.<sup>17</sup>

The 1978 special session of the General Assembly devoted to disarmament marked a new phase in the search for ways to eliminate the danger of nuclear war. The final document declared “removing the threat of a world war – a nuclear war-is the most acute and urgent task of the present day”. It emphasized that “the responsibilities to undertake measures aimed at preventing the outbreak of nuclear war, and of use of nuclear force in international relation, subject to the provisions of the Charter of the United Nations, including the use of nuclear weapons. Furthermore all States were called upon to” actively participate in efforts to bring about conditions in international affairs could be agree and which would preclude the use or threat of use of nuclear weapons”.<sup>18</sup>

In 1983, the General Assembly expressed its alarm at the growing threat of nuclear war, which can be lead to the destruction of civilization on earth. It drew the attention of all States and peoples to the conclusion arrived at by the most eminent scientists, military and civilian experts to the effect

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<sup>17</sup> GA/RES/2373(XXII) 1967.

<sup>18</sup> GA/RES/33/71 1978.



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that it is impossible to limit the deadly consequences of nuclear war and that there can be no victors in a nuclear conflict.

The Assembly concluded that “the prevention of a nuclear catastrophe is the most profound aspiration of billions of peoples on earth, reaffirming its call for the conclusion of an international convention on the prohibition of the use of nuclear with the participation of all nuclear weapon States: resolutely, unconditionally and for all condemns nuclear war as being contrary to human conscience and reason, as the most monstrous crime against peoples and as a violation of the foremost human right to life.”<sup>19</sup>

“In 1987 General Assembly convinced that any use of nuclear weapons constitutes a violation of the Charter of the United Nations and a crime against humanity.”<sup>20</sup>

“Under the 1995 United Nations Security Council Resolution 984, the non-nuclear weapons States which were parties to the 1968 Nuclear Non Proliferation Treaty obtained assurance (the so-called negative security assurance) that nuclear weapons would not be used against them. These politically (but not legally) binding assurances were conditional: the United

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<sup>19</sup> GA/RES 38/64 1983.

<sup>20</sup> GA/RES 42/39 1987.

States, the United Kingdom, France and Russia stated that the assurance given by each of them would cease to be valid in the case of an invasion or any other attack on them, their territories, their armed forces or other troops, their allies, or on a State towards which they have a security commitment, carried out or sustained by a non-nuclear weapon State 'in association or alliance' with a nuclear weapon State."<sup>21</sup>

What is the value of the above law and United Nations Resolutions? Whether they have the relevancy with the use of nuclear weapons or not? This issue was discussed by the International Court of Justice in 1996, in its advisory opinion.

#### **2.4 The advisory opinion of the International Court of Justice**

The issue of the legality of the use of nuclear weapons was brought before the International Court of Justice on the basis of two requests for an advisory opinion; one filed by the World Health Organization (WHO) on September 3, 1993 and the other filed by the United Nations General Assembly on January 6, 1996. As it was doubtful whether the request on the question of legality of the use by State of nuclear weapons in armed conflict submitted by the World Health Organization was within the mandate of the

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<sup>21</sup> GA/RES (1984) 1995.

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<sup>21</sup> GA/RES (1984) 1995.

World Health Organization, it was supplemented by the request from the United Nations General Assembly which has the competence to ask the Court any kind of legal question. The question set forth in the resolution adopted by the World Health Organization Assembly on May 14, 1993, was as follows: "In view of the health and environmental effect, would the use of nuclear weapons by State in war or other armed conflict be a breach of its obligation under International law?"<sup>22</sup>

The request made by the World Health Organization was dismissed (by eleven votes to three) with the reasoning that under the principle of specialty; which governs the International Organizations and limits their power, the World Health Organization had no competence to deal with the legality of the use of nuclear, even in view of their health and even environmental effects.<sup>23</sup>

The Court considered whether it had the jurisdiction to give a reply to the request of the General Assembly for an advisory opinion whether, should the answer be in the affirmative and whether there is any reason it should decline to exercise any such jurisdiction.

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<sup>22</sup> Akehurst, *Modern Introduction to International Law*, edited by Peter Malanczuk, (London: Routledge, 1997), pp. 347-348

<sup>23</sup> Ibid.

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The Court observed that it draw its competence in respect of advisory opinions from Article 65 paragraph 1 of its Statute while Article 96 paragraph 1 of the Charter provides that:

"The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question."<sup>24</sup>

Some States which opposed the giving of an opinion by the Court argued that the General Assembly and Security Council can ask for an advisory opinion on any legal question only within the scope of their activities. In the view of the Court, it matters little whether this interpretation of Article 96, paragraph 1, is or is not correct. "In the present case, the General Assembly has a competence in any event to seize the Court. Referring to Articles 10, 11 and 13 of the Charter, the Court found that, indeed, the question put to the Court had a relevance to many aspects of the activities and concerns of the General Assembly including those relating to the threat or use of force in International relations, the disarmament process, and the progressive development of international law."<sup>25</sup>

The Court found that the question put to the Court by the General Assembly was indeed a legal one, since the Court was asked to rule on the

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<sup>24</sup> Article 96 Para 1 of UN Charter.

<sup>25</sup> Akehurst, p. 349.

compatibility of the threat or use of nuclear weapons with the relevant principles and rules of international law. To do this, the Court must identify the existing principles and rules, interpret them and apply them to the threat or use of nuclear weapon offering a reply to the question which is legal one.

The fact that this question also has a political aspects as in the nature of things, is the case with so many questions which arise in international law, does not suffice to deprive its character as a "legal question" and to "deprive the Court of a competence expressly conferred on it by its Statute". Nor is the political nature of the motive which may be said to have inspired the request or the political implications that the opinion given might have of relevance in the establishment of the Court's jurisdiction to give such an opinion.

The Court by thirteen votes to one decided to comply with the request for an advisory opinion.<sup>26</sup>

The Court examined the law applicable in situations of armed conflict by addressing the question: are there specific rules in international law regulating the legality or illegality of recourse to nuclear weapons *per se*.<sup>27</sup>

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<sup>26</sup> Advisory Opinion on the Legality of the Use of Nuclear Weapons (WHO Case) 1996, ICJ Press Release 546. Also <http://www.gthunt@mdo.net>, (last visited on 24<sup>th</sup> March 2006).

<sup>27</sup> Ibid.

The International Court of Justice noted that international customary and treaty law not contains any specific prescription authorizing the threat or use of nuclear weapons or any other weapon in general or in certain circumstances, in particular those of the exercise of legitimate self-defence. Nor, however, is there any principle or rule of international law that would make the legality of the threat or use of nuclear weapons or of any other weapons dependent on a specific authorization. State practices shows that the illegality of the use of certain weapons as such does not result from an absence of authorization but is rather formulated in terms of prohibition.

After discussing all the treaties about nuclear weapons the Court concluded that they did not expressly prohibit the use of nuclear weapons. Rather, they only narrow the acquisition, development, testing, manufacture and possession of nuclear weapons.

The Court determined that the non-use of nuclear weapons does not amount to a customary prohibition, because the world community is extremely divided on the issue. Secondly, certain General Assembly resolutions that deal with nuclear weapons did not signify the existence of a rule of customary international law prohibiting recourse to nuclear weapons.

## CHAPTER TWO USE OF NUCLEAR WEAPONS UNDER INTERNATIONAL LAW

The Court concluded that, there is neither customary nor conventional International law any comprehensive and universal prohibition of the threat or use of nuclear weapons as such.<sup>28</sup>

The Court also considered the provisions of the United Nations Charter relating to the threat or use of force. Although Article 2(4) (generally prohibiting the threat or use of force), Article 51 (recognizing every State's inherent right of individual or collective self-defence if an armed attack occurs) and Article 42 (authorizing the Security Council to take military enforcement measures) do not refer to specific weapons, the Court held that they are apply to any use of force, regardless of the type of weapon employed. The Court noted that the United Nations Charter neither expressly prohibits, nor permits, the use of any specific weapon (including nuclear weapons) and that a weapon that is already unlawful *per se* by treaty or custom does not become lawful by reason of its being used for a legitimate purpose under the Charter. Whatever the means of force used in self-defence, the dual customary condition of necessity and proportionality and the law applicable in armed conflict apply, including such further considerations as

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<sup>28</sup> Advisory Opinion on the Legality of the Use of Nuclear Weapons (WHO Case) 1996, ICJ Press Release 546. Also <http://www.gthunt@mdo.net>, (last visited on 24<sup>th</sup> March 2006).



the very nature of nuclear weapons and the profound risks associated with their use.<sup>29</sup>

The International Court of Justice also considered the question whether a signaled intention to use force if certain events occur qualifies as an unlawful "threat" under Article 2(4) of the United Nations Charter. According to the Court, the notions of "threat" or "use" of force under Article 2(4) work in tandem in that the illegal use of force in a given case will likewise make the threat to use such force unlawful. The Court pointed out that the mere possession of nuclear weapons would not constitute an unlawful "threat" to use force contrary to Article 2(4), unless the particular use of force envisaged would be directed against the territorial integrity or political independence of a State or would be inconsistent with the purposes of the United Nations or, in the event that it were intended as a means of defence, such envisaged use of force would violate the principles of necessity and proportionality.

The Court concluded that , a threat or use of force by means of nuclear weapons that is contrary to Article 2, paragraph 4, of the United Nations Charter and that fails to meet all the requirements of Article 51, is unlawful.<sup>30</sup>

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<sup>29</sup> [http:// www. Nuclear Age Peace Foundation 1998-2001](http://www.NuclearAgePeaceFoundation1998-2001), (last visited on 10<sup>th</sup> December 2006).

<sup>30</sup> *Ibid.*

The International Court of Justice next considered whether recourse to nuclear weapons must be considered as illegal in the light of the principles and rules of International Humanitarian Law applicable in armed conflict and of the law of Neutrality. The Court stated that the basic principles of International Humanitarian Law prescribing the conduct of military operations are: (1) the protection of the civilian population and civilian objects and the prohibition of the use of weapons incapable of distinguishing between combatants and non-combatants, and (2) the prohibition on causing unnecessary suffering to combatants by using certain weapons. According to the Court, the fundamental rules of Humanitarian Law applicable in armed conflict must be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of International customary law. The International Court of Justice agreed with the vast majority of States as well as writers that there can be no doubt as to the applicability of the principles and rules of Humanitarian Law in armed conflict to a possible threat or use of nuclear weapons, despite the fact that these principles and rules had evolved prior to the invention of nuclear weapons. It also found that the customary principle of neutrality is applicable, subject to the relevant provisions of the United Nations Charter, to all International armed conflict, whatever type of weapons might be used

(although the principle of Neutrality is not well defined, and the International Court of Justice left its content undefined here, it is generally regarded as requiring at least that no attack be made on a State that has declared itself a neutral and is conducting itself accordingly).<sup>31</sup>

The Court concluded that a threat or use of nuclear weapons should also be compatible with the requirements of the International law applicable in armed conflict, particularly those of the principles and rules of International Humanitarian Law, as well as with specific obligations under treaties and other undertakings which expressly deal with nuclear weapons.<sup>32</sup>

Despite the undisputed applicability of the principles and rules of Humanitarian law and of the law of neutrality to nuclear weapons, the International Court of Justice found that the conclusions to be drawn from this applicability were controversial. The Court admitted that, in view of the unique characteristics of nuclear weapons, their use "in fact seems scarcely reconcilable" with the strict requirements dictated by the law applicable in armed conflict. However, in view of the current state of International law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in

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<sup>31</sup> [http:// www A.Malten@net.HCC.nl](http://www.A.Malten@net.HCC.nl) at The Hague,( last visited on 20<sup>th</sup> July 2006).

<sup>32</sup> Ibid.

an extreme circumstance of self-defence, in which the very survival of a State would be at stake.

Finally, the Court examined the obligation to negotiate in good faith a complete nuclear disarmament, recognized in Article 4 of the Treaty on the Non-Proliferation of Nuclear Weapons of 1968. The International Court of Justice judges held unanimously that the obligation enshrined in Article 4 involves "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." The Court noted that this two fold obligation to pursue and conclude negotiations in accordance with the basic principle of good faith formally concerns the 182 States parties to the Treaty on the Non-Proliferation of Nuclear Weapons, constituting the vast majority of the international community.<sup>33</sup>

## **2.5 Does International Law Adequately Address the Nuclear Issue?**

The simple answer of this question is no as it is clear from the conclusion of the International Court of Justice decision. The judges unanimously said that international law is not effective in this regard.

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<sup>33</sup> Ibid.

In an interview with the President of the International Court of Justice Bedjaoui, when he was asked in what ways the International Court of Justice advisory opinion on nuclear weapons had contributed to the global community, he replied that the Court has found that the current international law is not yet perfect regarding the nuclear weapons issue. He went on to say that the international community has an obligation to bring in place rules to forbid the use of nuclear weapons.<sup>34</sup>

“Judge Fleischhauer highlights that international law is still grappling with and has not yet overcome the dichotomy that is created by the very existence of nuclear weapons between the law applicable in armed conflict, and in particular the rules and principles of humanitarian law on the one side, and the inherent right of self-defence on the other. The known qualities of nuclear weapons let their use appear scarcely reconcilable with humanitarian law, while the right to self-defence would be severely curtailed if for a State, victim of an attack with nuclear, chemical or bacteriological weapons or otherwise constituting a deadly menace for its very existence, nuclear weapons were totally ruled out an ultimate legal option.”<sup>35</sup>

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<sup>34</sup> Asahi Shimbun, *The Road to the Abolition of Nuclear Weapons*, (Japan: Kotaro Kato), p.149.

<sup>35</sup> [http:// www. Disarmtimes@igc](http://www.Disarmtimes@igc), (last visited on 5<sup>th</sup> May 2006).

In his dissenting opinion Vice-President Schwebel said that the Court thereby concluded "on the supreme issue of the threat or use of force of our age that it has no opinion . . . that international law and hence the Court have nothing to say. After many months of agonizing appraisal of the law, the Court discovers that there is none".<sup>36</sup>

The 1997 United Nations Resolution introduced by India calling for a convention on the prohibition of the use of nuclear weapons.<sup>37</sup>

United Nations Resolution of 2005, on the effective international arrangements to assure non nuclear weapons States against the use of nuclear weapons convinced that nuclear disarmament and the complete elimination of nuclear weapons are essential to remove the danger of nuclear war.<sup>38</sup>

So it is clear from the above that international law with regard to the use of nuclear weapons is not yet perfect. There is no special law with regard to the use of nuclear weapons and the nuclear powers do not want to make the use of nuclear weapons unlawful. So the threat of nuclear war is still exist with the existence of many efforts in international law.

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<sup>36</sup> Ibid.

<sup>37</sup> GA/RES/52/39C 1997.

<sup>38</sup> GA/RES/ 59/290 2005.

### **Use of nuclear weapons under Sharī'ah**

Islamic rules governing the conduct of war are very clear. Islam is the religion of peace and humanity. Islam condemns those who make mischief on earth as Allāh says in the Qurān: "When he turns his back, his aim everywhere is to spread mischief through the earth and destroy crops and progeny but Allāh does not love mischief..."<sup>39</sup>

"Do not do mischief on the earth, after it hath been set in order, but call on him with fear and longing (in your hearts): for the mercy of Allāh is (always) near to those who do well".<sup>40</sup>

Allāh says" Fight in the cause of God those who fight you, but do not transgress limits; God does not love transgressors." <sup>41</sup> In the other verse Allāh says "...and make not your own hands contribute to (your) destruction; but do well; God loves those who do well." <sup>42</sup>

Moreover killing of any person without any valid reason is forbidden and the protection of human life is one of the objectives of Sharī'ah.

In the Qurān, Allāh says, "We ordained for the children of Israel that if

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<sup>39</sup> The Qurān 2:205.

<sup>40</sup> The Qurān 7:56.

<sup>41</sup> The Qurān, 2:190.

<sup>42</sup> The Qurān, 2:195.

any one slew a person-unless it be for murder or for spreading mischief in the land it would be as if he slew the whole people: and if any one saved a life would be as if he saved the life of the whole people”.<sup>43</sup>

Islam has forbidden the killing of those people who are not taking part in the actual war or do not have the capacity to fight.<sup>44</sup>

The Prophet (peace be upon him) witnessing the dead body of a woman in a battle expressed his extreme displeasure and ordered that women and children should not be targeted in war.<sup>45</sup>

When the Prophet (peace be upon him) appointed any commander of any troops he specially instructed him not to kill minors.<sup>46</sup>

The Prophet’s (peace be upon him) instructions to ‘Abd al-Rahman ibn ‘Awf contained the order: “Do not kill any minor or woman”.<sup>47</sup>

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<sup>43</sup> The Qurān: 5:32.

<sup>44</sup> Muhammad Hamidullah, *Muslim Conduct of State*, (Lahore: Sha Muhammad Ashraf, 1987), p.299

<sup>45</sup> Ibid, 300.

<sup>46</sup> Ibid.

<sup>47</sup> Ibid.



Similarly, Abu Bakar, (may Allāh be pleased with him) the first caliph of the Muslims, when sending out an expedition, ordered: "Do not kill minor, nor a man of advanced age and nor a woman".<sup>48</sup>

In the same set of instructions, Abu Bakr (may Allāh be pleased with him) said, "...don't hew down a date-palm nor burn it, do not cut down a fruit tree, and do not slaughter a goat or cow or camel except for food. In another instruction he said ....do not destroy churches, do not inundate palm-trees, do not burn cultivation, and do not bleed animals, and do not cut down fruit-trees. Similarly, in his instructions to the commander Yazid ibn 'abi Sufyan, he said: "...do not devastate any population. Do not cut a tree except for some useful purpose".<sup>49</sup>

Thus the general rule in Islam is to protect the life and property of persons.

With regard to nuclear weapons, the evident problem that it presents is that it does not allow discrimination between combatants and non-combatants. What then is the stance of Sharī'ah with regard to weapons of mass destruction, the use of which erodes the principles of discrimination and proportionality?

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<sup>48</sup> Ibid.

<sup>49</sup> Ibid.

Nuclear weapons are product of the 20<sup>th</sup> century. There were no such weapons during the life of the Prophet (peace be upon him) nor at the time of companions and certainly not at the time of classical jurists. But there were weapons which were similar to nuclear weapons in the sense that they killed without discrimination, although the impact of these relatively primitive weapons differed tremendously from that of a nuclear weapon. For example, the Mangonel (*Manjaneeq*), which was used by the Prophet (peace be upon him), was a weapon that did not discriminate between combatants and non-combatants when they were present together. The jurists have discussed their opinions about this weapon and unintended destruction during war. Their views are the following:

### **2.6.1 The Hanaf'ī School of Thought**

Imām Shaybānī says “there is no blame on Muslims if they burn the fort of the enemy by fire or drown it in water or set on it a Mangonel or cut off water or put in the water some blood or poison to make it horrible for them.” He also said that we are ordained to destroy their power, and this is one way to do so.<sup>50</sup>

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<sup>50</sup> Muhammad ibn Hassan al-Shaybānī, *al-Siyar al-Kabīr*. Vol.4 (Afghanistan: Mullah Mansoor), p.148.

Imām Kāssānī says that there is no harm in burning the forts of enemy by fire or drowning them in water or destroying it or causing it to collapse on them or fixing a Mangonel against the enemy, since Allāh says, “they destroy their own dwellings with their own hands and the hands of believers”. These procedures are means of waging war and this is one way to subjugate and annoy the enemy. The protection of wealth is connected with the protection of persons, if there is no protection for the persons then certainly there is none for their wealth.<sup>51</sup>

It is allowed to target the enemy on Mangonel as the Prophet (peace be upon him) used it against the people of Taif. It is also allowed to put fire on the enemy as the Prophet (peace be upon him) did with the people of *Al-buwairah*. It is also allowed to leave water on the enemy, cut their trees and destroy their crops because these things are disgrace for them, cause of their anger and it makes their power weak and divide their group. While doing this we can target the Muslims prisoners and businessmen because this is a big evil and killing of these people is a lesser evil. The forts of enemy often contain Muslims if we prevent ourselves from targeting them it will close the door of

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<sup>51</sup> Abū Bakr ibn Mas‘ūd al- Kāsānī , *al- Badá'ī' al-Saná'i*, vol.7 (Karachi: M.S'aeed Company, 1990), p. 100.

*jihad*. If they make shelter behind Muslims prisoner or children the killing of these are allowed, but it will be avoided as much as possible.<sup>52</sup>

### **2.6.2 Shaf'i School of Thought**

“If there are combatants in the fort of the enemy who are intermingled with women, minors and Muslim prisoners, there is no harm if we set a Mangonel against them. If they use the Muslims or the minors as human shields, then it is better to avoid attack, if possible”.<sup>53</sup>

“There is no harm in cutting down their fertile trees, destroying houses or burning them. Likewise there is no harm in burning their property and food because the Prophet (peace be upon him) burned the date palms of *Bannu Nadir*”.<sup>54</sup>

“If a Mangonel is used against them or the raid is carried out at night and there were women and minors amongst them, it is allowed because the Prophet (peace be upon him) used the Mangonel against the people of Taif, and there were definitely women and minors in their ranks.

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<sup>52</sup> Burahān al-Dīn Abū al-Hasan ‘Ali ibn Abi Bakr al-Marghanānī, *al-Hidayāh*, vol.2 (Lahore: *Maktabah, al-Misbāh*), p. 561.

<sup>53</sup> Muhammad ibn Idrīs al-Shāfi‘ī, *Kitāb Al-Umm*, vol.3 (Beirut: *Dar al-Maghribā*), p. 278.

<sup>54</sup> *Ibid.*

Also the disbelievers are not always in a condition where women and minors are not with them. If we stop targeting them on this account, it will lead to the abandonment of *Jihad*. We will attack, although there may be Muslims prisoners with them. However, the protection of those Muslims who are with us is more important than the protection of the prisoners they have already taken”.<sup>55</sup>

“It is allowed to let loose water on the cities and forts of enemies, or cut their supply of water or target them by fire, Mangonel or any other way, although there may be women and minors intermingled with them”.<sup>56</sup>

### **2.6.3 Malik‘i School of Thought**

Ibn ‘Arabī says” that there are two view points on the destruction and burning of enemy houses. The first view is that it is allowed in any circumstance. The second is that if the Muslims believe that they will capture these things then it is not allowed to destroy in advance. If the Muslims don’t have any hope of getting hold of these things, then it is allowed. But the first view is correct because the Prophet (peace be upon him) knew that the date

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<sup>55</sup> Abū Ishaq Ibraheem ibn ‘Ali ibn Yūsuf al-Farūz Abadi al-Shirazī, *al Muhazzab*, vol.2 (Egypt: Esā al Baī), p. 234.

<sup>56</sup> Shams al-Dīn ibn Abū al-‘ Abbas, *Nihāyat al-Mūhtāj*, vol.8 (Riyadh: *al-Maktaba al- Islamia*) p, 61.

palms of *Bannu Nadir* would fall in his hands but he chose to burn them down.<sup>57</sup>

“Fighting with enemy is allowed with any kind of weapon. Due to this it is allowed to cut their water, letting them die with thirst or setting loose water on them until they drown”.<sup>58</sup>

There is unanimity among the jurists that the enemy forts can be targeted with Mangonel, whether there are women and minor amongst them or not, because the Prophet (peace be upon him) used Mangonel against the people of Taif.<sup>59</sup>

#### **2.6.4 Hanbal‘I School of Thought**

“It is permissible for the commander to use Mangonel against the forts of the enemies because it was used against the people of Taif. It is allowed to destroy their houses and burn them. It is also allowed to cut their supply of water or prevent their access to water, although there may be women and minors amongst them”.<sup>60</sup>

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<sup>57</sup> Muhammad ibn Abd Allāh ibn al-‘Arabī, *al-Ahkām al-Qurān*, vol.4 (Beirut: *Dar al-Marifa*), p. 174.

<sup>58</sup> Abū abd Allāh Muhammad al-Khirshī, *Sharh al-Khalīl*, vol. 3, p, 113.

<sup>59</sup> Ibn Rushd al-Qartabī, *Bidāya al- Mujtahid wa-Nihāyat al- Muqtasid*, vol.1 (Riyadh: *Maktabal-Nazzar Mustafa al-Baz*), p. 717.

<sup>60</sup> Muhammad ibn al-Husayn Abū Ya‘lā, Qazi, *al-Ahkām al-Sultānīyah*, (Lahore: *Dar al-Nashar al-Islamia*), p. 34

## **CHAPTER TWO USE OF NUCLEAR WEAPONS UNDER INTERNATIONAL LAW**

Ibn Qudamah says “if the killing of disbelievers is possible without burning, then burning is not allowed. If there is no other way, then burning is allowed according to the majority of the jurists”.<sup>61</sup>

“The burning of date palms is not allowed since the Prophet (peace be upon him) had forbidden cutting down dates palms or burning them”<sup>62</sup>.

### **2.6.5 Zahir‘ī School of Thought**

“It is allowed to burn the trees, food supplies and houses of enemies, as Allāh says “Whatever ye cut down (O ye Muslims!) Of the tender palm Trees, or ye leave them standing on their roots, it was by leave of Allāh, and in order that Allāh might cover with shame the rebellious transgressors.”<sup>63</sup>

“It was not proper for the people of Medina and the Bedouin ‘*Arabs* of the neighborhood, to stay behind Allāh’s Messenger, nor to prefer their own lives to his: because nothing could they suffer or do, but was reckoned to their credit as a deed of righteousness,- Whether they suffered thirst, or fatigue, or hunger, in the cause of Allāh, or tread paths to raise the anger of the unbelievers, or gains any gain from an enemy: for Allāh suffereth not the

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<sup>61</sup> Muhammad ibn Ahmad al-Maqdisī ibn Qudāmah, al-Mughnī, vol.8 (Karachi: *Dar al-Kutab al-Khadtha*), p. 448.

<sup>62</sup> Ibid.

<sup>63</sup> Abū Muhammad ‘Ali ibn Ahmad ibn Hazm, Al-Muhallā, vol.8 (Beirut: *Dar al-Afaq*), p. 294.

reward to be lost of those who do good". Thus the Prophet (peace be upon him) burnt the trees of *Banu Nadir* whilst knowing that their orchards will fall in the hands of Muslims".<sup>64</sup>

This is clear from the view point of four schools of thought that the weapon like Mangonel (Manjaneeq) was used by the Prophet (peace be upon him).

Although Islam has given protection to persons and property, but the protection of *Dīn* is more important than the protection of persons and property. This is very clear from the objectives of Sharī'ah. The Muslims are ordained to sacrifice their lives and property for the protection of *Dīn*. In the eyes of Islam, Muslims and their property are of a greater sanctity than non-Muslims and their property.

The intention of Muslim fighters must be to kill the enemy alone. However, if non-combatants, i.e. women, elderly and the minors are killed in some circumstances unintentionally will be not considered as an unlawful action.<sup>65</sup>

If we prevent ourselves from attacking the enemy due to the presence of non-combatants, Muslims, or minors amongst them, it will create

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<sup>64</sup> Ibid.

<sup>65</sup> Al-Shaybānī, vol. 4, p. 1474.



hindrances in and ultimately stop the *Jihad*.<sup>66</sup> The adoption of the lesser evil is a principle of Islamic law. In the case of prisoners and businessmen who are indistinguishable, the public interest will be given preference over individual interest.<sup>67</sup>

There are some acts which are not allowed in the normal situation but are allowed in war, for example telling a lie and being firm with the enemy. So the use of weapons like Mangonel is allowed in certain circumstances, despite its negative effects.

Whether the order (*Hukm*) of weapons like Mangonel can not be extended through analogy to the nuclear weapons?

- i. It is clear from the jurists' views that the killing of some non-combatants allowed in extreme necessity while nuclear weapons will kill unlimited number of innocent civilians. According to the jurists a limited destruction is allowed but there is unlimited destruction in the nuclear weapons. And sometime its influence can be seen in the next generation.

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<sup>66</sup> Al- Shīrazī, vol.2, p. 234.

<sup>67</sup> Kamā al-Dīn Muhammad ibn 'Abdul Wāhid Ibn al-Hummām, *Fathu al- Qadeer*, vol. 5 (Beirut: Darul-Fikar 1997), pp. 447-448.

Allāh says "Fight in the cause of God those who fight you, but do not transgress limits".<sup>68</sup> "And make not your own hands contribute to (your) destruction; but do good; God loves those who do well".<sup>69</sup>

- ii. The jurists have used the word "forts" which means the places where the combatants hide or existing. So if Muslims put the Mangonel on such forts and there are non-combatants then their killing will be excused. In other words the difference between military and civilians objects is clear. But nuclear weapon does not differentiate between military and civilians objects.
- iii. The object of *qital* is not to remove the *kufar* totally but to push back the danger. The use of nuclear weapons will remove them totally.
- iv. The objectives of Sharī'ah are there which declare that the protection of *Dīn* is more important than the lives but whether the killing of the whole community would be allowed for the protection of *Dīn*?

The Egyptian Scholar Yūsuf Al-Qaradhawi, whose rulings are extremely popular in Egypt and across the Sunni Arab world, is also not in favor of using nuclear weapons. In a Friday sermon broadcast on Qatari television, *Sheikh* Al-Qaradhawi said: "I say that the Muslims must obtain this

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<sup>68</sup> The Qurān, 2:190.

<sup>69</sup> The Qurān, 2:195.

[nuclear] weapon but not use it. We must obtain this weapon, but it is forbidden to use it, because it serves as deterrence and threat, [as the Qurān says] 'whereby you may daunt with it the enemy of Allāh and your enemy.' This is what is called armed peace, when you have means of deterring and frightening the enemy, and then your enemy has no way of waging aggression against you".<sup>70</sup>

### **2.7 Use of nuclear in retaliation under Sharī'ah**

In Sharī'ah there is the principle of reciprocity and proportionality which is extracted from the verse of the Holy Qurān as Allāh says "The prohibited month for the prohibited month, and violation of sanctity [calls for] fair retribution. So if one commits aggression against you, attack him as he attacked you, but be mindful of God, and know that he is with those who mindful of him".<sup>71</sup>

"And if ye punish, let your punishment be proportionate to the wrong that has been done to you: but if ye show patience that is indeed the best (course) for those who are patient".<sup>72</sup>

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<sup>70</sup> [http:// www. Islam online. Net/iol-arbic/dowalia/alhadith](http://www.Islamonline.Net/iol-arbic/dowalia/alhadith), (last visited on 15<sup>th</sup> November 2006).

<sup>71</sup> The Qurān, 2: 194.

<sup>72</sup> The Qurān, 16: 126.

On the principle of reciprocity if the enemy is doing some thing wrong with you, you can response with such like wrong. Can this principle will be invoked in case of nuclear weapons?

Some scholars have discussed this issue and their views are given below:

*Sheikh* Tantawi said that the Caliph Abū Bakr (may Allāh be pleased with him) had instructed the Muslim commander Khaled ibn Al-Walid to fight the enemy with the sword if the enemy fought him with the sword and to use the spear if the enemy fought him with the spear. *Sheikh* Tantawi explained: "Had Abū Bakr (may Allāh be pleased with him) lived today he would have said to Khaled ibn Al-Walid: 'If they fight you with a nuclear bomb, fight them with a nuclear bomb. Strength is [one] of the traits of good and wise people who know their obligation towards their God and towards their homeland, and they use this strength in order to defend their faith and their homeland. This is the *Sunnāh* that was known to the forefathers of all times, and is known to us as well".<sup>73</sup>

*Sheikh* Yousuf Mawlawi, Deputy Chairman of the European Fiqh Council, said, "If the enemy uses this type of weapon and causes harm to many noncombatant Muslims, we are allowed to treat him identically, until he

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<sup>73</sup> [http:// www. mailto:Living.Shariāh@iolteam.com](http://www.mailto:Living.Shariāh@iolteam.com), (last visited on 10<sup>th</sup> November 2006).

stops using these means. Identical treatment is a principle that is legitimate in all international norms and laws".<sup>74</sup>

Shedding more light on this, *Sheikh* Faysal Mawlawi, Deputy Chairman of the European Council for *Fatwa* and Research, adds:

"We would like to say also that Islam cares much for keeping the environment clean and pure so that man can lead a better and healthy life free from any diseases or illnesses. However, in case these nuclear weapons are used against Muslims, it becomes permissible for Muslims to defend themselves using the same weapon. This is based on the words of Allāh: "If ye punish, then punish with the like of that wherewith ye were afflicted." Besides, reciprocity is surely a principle known to all members of the international community".<sup>75</sup>

An unusually long *fatwa* by the Saudi *Sheikh* Nasser bin Hamid al Fahd appeared in May 2003 conclude that nuclear weapon can be used against enemy on the basis of reciprocity. *Sheikh* Nasser bin Hamd al-Fahad is recognized as one of the senior Muslim scholar in Saudi Arabia.<sup>76</sup>

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<sup>74</sup> Ibid.

<sup>75</sup> Ibid.

<sup>76</sup> <http://www.al-ansar.biz/> (last visited on 10<sup>th</sup> November 2006).

In My view we cannot extend the principle of reciprocity as much to allow every kind of act which is prohibited under Sharī‘ah. As Dr. Hamidullah says “if the enemy conduct is merciless with us we will adopt human conduct to treat them according to our own code.”<sup>77</sup>

But when there is danger to the existence of Muslims and there is no other way to repel the aggression of enemy and the enemy using nuclear weapons then the care of the principle of proportionality cannot be taken. Therefore, nuclear weapons can be used in retaliation in extreme circumstances when there is greatest threat to the survival of Muslims.

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<sup>77</sup> Muhammad Hamidullah, *Khutbati Bahawalpur*, (Islamabad: Services Book Club, 1995), p. 131.

**Chapter Three****THE CONDUCT OF NUCLEAR POWERS**

In this chapter the role and conduct of nuclear powers in making laws which deal the nuclear weapons will be elaborated. How they address the nuclear weapons and what they have done in the past? What are their views and practices? From this We can easily conclude that the nuclear powers do not want to touch the core issue and if any State wants to touch it they do not reply sincerely.

**3.1 Practices of Nuclear Powers**

“The Geneva Protocol 1925, which bans asphyxiating, poisonous or other gases and bacteriological methods of warfare, United States did not ratify this protocol till 1975.”<sup>1</sup>

“Truman ordered the use of the weapons on Japanese cities, hoping it would send a strong message which would end in the surrender of the Japanese leadership and avoid a lengthy invasion of the island. On August 6, 1945, a uranium-based weapon, "Little Boy", was assent to free on the Japanese city of

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<sup>1</sup> John Dewar, *Nuclear Weapons the Peace Movement and the Law* (London: Macmillan, 1986), p. 8.

statement that the law of war applies to nuclear weapons. This was the price of Great Powers support for the resolution. The Great powers, and in particular the United States of America and the United Kingdom further conditioned their participation in the new round of Geneva conferences also on the non-applicability to nuclear weapons of the resulting agreement.”<sup>5</sup>

The additional Protocol of 1977 to the 1949 Convention which United Kingdom and United States have signed were the only signatories to make explicit reservation that the new rules introduced by the Protocol is not intended to have any effect on and does not regulate or prohibit the use of nuclear weapons.<sup>6</sup>

At the 1978 special session of the General Assembly devoted to disarmament, a new phase began in the continuing search for ways to eliminate the danger of nuclear war. For this purpose a resolution was adopted. Likewise a similar resolution was adopted in 1982. The United States and other western countries casting negative votes on these resolutions doing so on the grounds inter alia that to ban the use of nuclear weapons under any circumstance would be inconsistent with the Charter, which provided that all States must not use or threaten to use force in their relation with other State except in self-defence or in the other situations permitted under the Charter and did not outlaw nuclear means for deterrence or defense against attack.<sup>7</sup>

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<sup>5</sup> John Dewar, pp. 6- 7.

<sup>6</sup> Ibid.

<sup>7</sup> P.C. Sinha, pp. 262-263.



The United Nations General Assembly in the resolution of No First Use of Nuclear Weapons 1984 declares that:

“Whereas, continued refusal of the US to make a pledge of no first use will increase international tensions and make nuclear war more likely, and will continue to harm the US stature regarding its moral position”.<sup>8</sup>

It was advice to the President to declare that it shall be the policy of the United States to renounce the first use of all nuclear weapons, and to conclude treaties with all nations renouncing the first use of all nuclear weapons.

Before the International Court of Justice in 1996, United States bravely argued that because deterrence is essential to its international security therefore the threat or use of nuclear weapons must be legal. The United States representative stated: "If these weapons could not lawfully be used in individual or collective self defence under any circumstance, there would be no credible threat of such use in response to aggression and deterrent policies would be futile and meaningless. In this sense, it is impossible to separate the policy of deterrence from the legality of the use of the means of deterrence. Accordingly, any affirmation of a general prohibition on the use of nuclear weapons would be directly contrary to one of the fundamental premises of the national security policy of each of these States".<sup>9</sup>

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<sup>8</sup> GA/RES/ 39/54 of 1984.

<sup>9</sup> [http://: www, Waging Peace.org](http://www.WagingPeace.org), (last visited on 15th July 2006).

“The United States, joined by the United Kingdom, France, and Russia, argue the Court that it should not hear the case because this was a political rather than legal issue. The Court, turning aside these arguments, issued its historic opinion on July 8, 1996. It was an opinion of great significance for humanity, but to date it has been largely ignored by the United States and its North Atlantic Treaty Organization allies. It has also been largely ignored by the United States media.”<sup>10</sup>

So it is obvious from the above conduct that how nuclear powers treat the law with regard to the nuclear weapons. Over the past history they are never been seen sincere to reduce the fear of nuclear war from the globe. Due to this law has no potency to reduce the threat.

### **3.2 States views regarding Nuclear Weapons**

#### **3.2.1 United States**

The Army Field Manual, the Law of Land Warfare, United States, Department of the Army, 1956 is extremely stark: the use of explosive atomic weapons whether by air, sea, or land forces, can not as such be regarded as violation of international law in the absence of any customary rule of international law or international convention restricting their employment. The same statement was issued in Air Force Manual (United States, Department of the Air Force, 1976).<sup>11</sup>

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<sup>10</sup> <http://www.malitia.dkriege@Napf.org> (last visited on 30<sup>th</sup> June 2006).

<sup>11</sup> John Dewar, p. 32.

“In 1983, Secretary of Defence Casper W. Weinberger summarized this aspect of American policy in a report to the Congress. To maintain a sound deterrence, we must clear to our adversary that we would decisively answer his attack. To talk of action that the U.S Government could not in good conscience, undertake tends to defeat the goal of deterrence.”<sup>12</sup>

“In 1991, before the Gulf war, talks were held in Geneva between Iraqi Foreign Minister Tariq Aziz and United States Secretary of State James Baker. During the converse Baker said to Aziz “if Iraq put chemical weapons to use we, sure to retaliate, we have the measure. If so, it should come up to the erasure of the regime of Iraq. Baker afterward presented Aziz with a letter describing the United States position in the statements, addressed to President Saddam Hussain and signed by President George Bush. Aziz retorted “this is not a letter by a leader of State but threaten.”<sup>13</sup>

In 1995, an official statement by the American government stated, “The United States reaffirms that it will not use nuclear weapons against non-nuclear-weapons States parties to the Treaty on the Non-Proliferation of Nuclear Weapons except in the case of an invasion or any other attack on the United States, its territories, its armed forces or any other troops, its allies or States towards which it has a security commitment, carried out or sustained by

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<sup>12</sup> Theodore A. Coulombis, *Introduction to International Relations*, (New Jersey: Prentice Hall, Inc, Englewood Cliffs, 1986), p. 227.

<sup>13</sup> Shimbun, Ashi, p. 157.

such a non-nuclear-weapon State, in association or alliance with a Nuclear Weapon State”.<sup>14</sup>

“Robert Bell, who was national security assistant of President Clinton, has stated recently that, the United States will continue to rely on nuclear arms as cornerstone of its national security for the indefinite future.”<sup>15</sup>

“In October 1999, John Deuch, the United States Deputy Secretary of Defence, submitted impressive testimony to the House Committee on foreign affairs. He said nuclear weapons will play a changed role in our National Security Strategy.”<sup>16</sup>

“The Bush administration has told the United States military to greatly expand preparations for the use of nuclear weapons in future wars, according to press reports which have been confirmed by the Pentagon and White House.

The Pentagon has been directed to develop contingency plans for nuclear attacks on seven different countries. These include China and Russia, the two powers which have long been targeted by the US nuclear arsenal; Iraq, Iran and North Korea, the three countries demonized by Bush as the “axis of evil” in his State of the Union speech; and the other two were Libya and Syria. The report says the Pentagon should be prepared to use nuclear weapons in an Arab-Israeli conflict, in a war between China and Taiwan, or in an attack from North Korea

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<sup>14</sup> [http://www. World Socialist Web Site.com](http://www.WorldSocialistWebSite.com) (last visited on 11<sup>th</sup> April 2006).

<sup>15</sup> John Dewar, p. 70.

<sup>16</sup> Shimbun Ashi, p. 158.

on South Korea. They might also become necessary in an attack by Iraq on Israel or another neighbour, he said.”<sup>17</sup>

“In December 2002, the Bush administration published a statement that the United State will continue to make clear that it reserves the right to respond with overwhelming force-including through resort to all our options-to the use of [weapons of mass destruction] against United State, our forces abroad and friends and allies”.<sup>18</sup>

On March 15, 2005, the Pentagon placed on its public website a draft version of Joint Publication "Doctrine for Joint Nuclear Operations." This 69-page report made clear that the Bush Administration fully integrated nuclear weapons into the conventional war-fighting. The Executive Summary stated: "For many contingencies, existing and emerging conventional capabilities will meet anticipated requirements; however, some contingencies will remain where the most appropriate response may include the use of United States nuclear weapons. Integrating conventional and nuclear attacks will ensure the most efficient use of force and provide United States leaders with a broader range of strike options to address immediate contingencies. Integration of conventional and nuclear forces is therefore crucial to the success of any comprehensive strategy".<sup>19</sup>

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<sup>17</sup> [http://www. World Socialist Web Site.com](http://www.WorldSocialistWebSite.com) (last visited 21<sup>st</sup> July 2006).

<sup>18</sup> A Feiveson Harold and Ernst Jan Hogendoorn, *View Point no First Use of Nuclear Weapons*, (London: 2003), p. 1.

<sup>19</sup> [http:// www. eirtoc/2005.3221.html](http://www.eirtoc/2005.3221.html), (last visited on 20th May 2006).

“Seymour Hersh reported that the US government developing plans for the possible preemptive use of nuclear weapons against Iranian nuclear facilities. Although George Bush dismissed such reports as “wild speculation,” he did not deny them.”<sup>20</sup>

### **3.2.2 Russia**

“Russian Federation maintains that it will not use nuclear weapons against non-nuclear weapon States parties to the Treaty on the Non-Proliferation of Nuclear Weapons, except in the case of an invasion or other attack on Russian Federation, its territory, its armed forces or other troops, its allies or a State toward which it has a security commitment, carried out or sustained by such a State, in association or alliance with a nuclear-weapon State.”<sup>21</sup>

“In 1982, Soviet Union, declared that it would never be the first to use nuclear weapons.”<sup>22</sup>

“The document “strategy for Russia” which was published in the middle of 1992 declared that” Russia’s present economic and political weaknesses, as well its interests, make it necessary to preserve its reliance on nuclear weapons and on nuclear deterrence policy”.<sup>23</sup>

But in 1993, facing a steep drop in conventional military strength Russia renounced the 1982 Soviet policy of no first use, and alter its declaratory policy to maintaining option to use nuclear weapons against any nuclear armed

<sup>20</sup> [http:// www. wagingpeace.org](http://www.wagingpeace.org), (last visited 27<sup>th</sup> May 2006).

<sup>21</sup> [http://www. Nuclear Age Peace Foundation. Com](http://www.NuclearAgePeaceFoundation.Com), (last visited 10<sup>th</sup> October 2006).

<sup>22</sup> Michael Atiyah, p.175.

<sup>23</sup> [http://www. nutilus.org](http://www.nutilus.org), (last visited on 27<sup>th</sup> July 2006).

aggressor including non-nuclear State allied with a nuclear weapons States a formulation as was already indicated essentially the same as that of the North Atlantic Treaty Organization nuclear weapons State.<sup>24</sup>

“In the 1993, version of the military doctrine, Russia declared for the first time its right to use nuclear weapons either in response to a Weapons of Mass Destruction attack against herself and her allies, or while defending against a major conventional attack in a critical situation for Russia and her allies. The document then proceeded to give negative security guarantees to non-nuclear weapons States.”<sup>25</sup>

“In October of 2003, President Putin called nuclear deterrence forces “the main foundation of Russia’s national security”, both for the present and the future. This form of reassurance, undoubtedly, is a positive contributing factor in the overall Russian decision-making process.”<sup>26</sup>

“Russian President Vladimir Putin conducted a meeting with scientists of the Russian Federal Nuclear Center. The Russian President said that nuclear weapons had always been and would remain the basis for Russia's security. He also stressed that "it is important to maintain safety and stability of combat systems." According to Vladimir Putin, quality of the Russia's nuclear weapons "must meet the strictest universality, efficiency and safety requirements." He pointed out that "Russian scientific nuclear centers must work as effectively as

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<sup>24</sup> Harold, pp. 3-4.

<sup>25</sup> Tremin Demitri, *Russia Nuclear Policy in the 21<sup>st</sup> century Environment*, (Paris: Institute français des relations Internationals, 2005), p. 13.

<sup>26</sup> Demitri Tremin, *Russia Nuclear Policy in the 21<sup>st</sup> Century Environment*, (Paris: Institute Français des relations Internationals, 2005), PP. 8-9

possible to be able to carry out a widest range of scientific and research as well as research and development tasks".<sup>27</sup>

### **3.2.3 United Kingdom**

In one of the few published studies of British tactical nuclear targeting, Milan Rai wrote in his 1994 paper 'Tactical Trident (Drava Papers)':

"Sir John Slessor, Marshall of the RAF in the 1950s, and one of the most influential military theorists of the period, believed that 'In most of the possible theatres of limited war ... it must be accepted that it is at least improbable that we would be able to meet a major communist offensive in one of these areas without resorting to tactical nuclear weapons'.<sup>28</sup>

In 1995, United Kingdom made the following statement: "United Kingdom will not use nuclear weapons against non-nuclear-weapon States parties to the Treaty on the Non-Proliferation of Nuclear Weapons except in the case of an invasion or any other attack on United Kingdom, its dependent territories, its armed forces or other troops, its allies, States towards which it has a security commitment, carried out or sustained by such a non-nuclear-weapon State, in association or alliance with a nuclear-weapon State."<sup>29</sup>

More than a decade later and prior to the start of the second Iraq war in 2003, the Secretary of State for Defence, Geoff Hoon, was questioned by members of the select committee and appeared to indicate that Britain

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<sup>27</sup>[http:// www. Russia, Weekly Archive Search.com](http://www.Russia, Weekly Archive Search.com), (last visited on 19<sup>th</sup> June 2006).

<sup>28</sup>[http:// www Global Security .com](http://www.Global Security .com), (last visited on 27<sup>th</sup> July 2006).

<sup>29</sup>[http:// www.comeclean.org.uk](http://www.comeclean.org.uk), (last visited on 17<sup>th</sup> July 2006).



maintained this policy. In relation to a State such as Iraq he said: "They can be absolutely confident that in the right conditions we would be willing to use our nuclear weapons".<sup>30</sup> This exchange did not make clear whether this would be in response to a nuclear attack initiated by a State such as Iraq.

Hoon was again asked whether nuclear use might be in response to non-nuclear weapons such as chemical or biological weapons. He replied:

"Let me make it clear the long-standing British government policy that if our forces or our people were threatened by weapons of mass destruction we would reserve the right to use appropriate proportionate responses which might in extreme circumstances include the use of nuclear weapons".<sup>31</sup>

Later on, Hoon made it clear that he could envisage circumstances in which British nuclear weapons were used in response to chemical or biological weapons. He was later asked by Dimbleby: "But you would only use Britain's weapon of mass destruction after an attack by Saddam Hussein using weapons of mass destruction? Hoon replied: "Clearly if there were strong evidence of an imminent attack if we knew that an attack was about to occur and we could use our weapons to protect against it".<sup>32</sup>

The implication of this is clear – that there are circumstances where Britain would consider using nuclear weapons in response to a non-nuclear attack involving chemical or biological weapons and would even consider using nuclear weapons to pre-empt such an attack.

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<sup>30</sup> Ibid.

<sup>31</sup> Ibid.

<sup>32</sup> Ibid.

**3.2.4 France**

“France has consistently rejected the adoption of a "no first-use" posture. Paris sees nuclear retaliation\_as\_consistent with the right to self-defence recognized by Article 51 of the United Nations Charter. It also asserts that countries that do not respect their own non-proliferation commitments should not expect negative security assurances (granted in 1995 by nuclear weapon States to non-nuclear members of the Non-Proliferation Treaty) to apply to them, thus implicitly subscribing to the norms of "belligerent reprisals" that also support US and British nuclear doctrines.”<sup>33</sup>

France affirms that it will not use nuclear weapons against non-nuclear-weapon States parties to the Non Proliferation Treaty, except in the case of an invasion or any other attack on it, its territory, its armed forces or other troops, its allies or a State toward which it has a security commitment, carried out or sustained by such a State, in alliance in association with a nuclear-weapon State.

In response to the requests made by a large number of countries, France has sought to harmonize the content of its negative assurances to the maximum extent possible with those of the other nuclear powers. The declarations concerning negative security assurances made by France, the United States, Russia and the United Kingdom, are now practically identical.<sup>34</sup>

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<sup>33</sup> <http://www.NuclearAgePeaceFoundation.com>, (last visited 10<sup>th</sup> October 2006).

<sup>34</sup> <http://www.WagingPeace.org>, (last visited 27<sup>th</sup> May 2006).

In 2006 President Jacques Chirac said that France was prepared to launch a nuclear strike against any country that sponsor a terrorist attack against French interests. He said his country's nuclear arsenal had been reconfigured to include the ability to make a tactical strike in retaliation for terrorism

Chirac said "The leader of State, who would use terrorist means against us, as well as those who would envision using... weapons of mass destruction, must understand that they would lay themselves open to a firm and fitting response on our part". This response could be a conventional one. It could also be of a different kind".<sup>35</sup>

### **3.2.5 China**

China's official position on nuclear deterrence and nuclear weapons generally is that it stands for total nuclear disarmament and the complete prohibition of nuclear weapons. China has often criticized the policy of nuclear deterrence based on the implied or clear threat to use nuclear weapons first. China has been particularly critical of the policy of extended nuclear deterrence, or so-called "nuclear umbrellas," provided by the other nuclear weapon State (particularly the United States) to their allies. China is also officially opposed to the deployment of nuclear weapons outside national territories and has stated that China had never deployed nuclear weapons on the territory of another country. China has also been especially critical of using nuclear deterrence against non-nuclear weapon State, and has repeatedly called on the Nuclear

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<sup>35</sup> [http:// Washingtonpost.com](http://Washingtonpost.com), (last visited on 15<sup>th</sup> August 2006).

Weapon State to agree to a legally-binding, multilateral agreement under which they would pledge not to use or threaten to use nuclear weapons against non-nuclear weapon State.

China undertakes not to be the first to use nuclear weapons at any time or under any circumstances. China undertakes not to use or threaten to use nuclear weapons against any non-nuclear-weapons State or nuclear-weapon-free zones at any time or under any circumstance.

China was the first country to call for the complete prohibition and comprehensive destruction of nuclear weapons in its proposal for a world summit in 1963, before its first nuclear explosion. On the same day of China's first nuclear explosion, it again stated that "the Chinese government hereby solemnly proposes to the governments of the world that a summit conference of all the countries of the world be convened to discuss the questions of the complete prohibition and thorough destruction of nuclear weapons and that as the first step, the summit conference conclude an agreement to the effect that the nuclear powers and those countries which may soon become nuclear powers undertake not to use nuclear weapons either against non-nuclear countries and nuclear-free zones or against each other. This has evolved into China's basic position on nuclear disarmament and it has never given up its efforts to promote an international convention to ban nuclear weapons."<sup>36</sup>

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<sup>36</sup> [http:// www China weekly archive.com](http://www.China-weekly.archive.com), (last visited 30<sup>th</sup> April 2006).

**3.3 Agreement between USA and USSR**

For the first time USA and USSR entered to an agreement on the prevention of nuclear war. The agreement was signed at Washington June 22, 1973, entered into force June 22, 1973. The basic articles of this agreement are the Article one and two.

Article one stated: "that each party will act in such a manner as to prevent the development of situations capable of causing a dangerous exacerbation of their relations, as to avoid military confrontations, and as to exclude the outbreak of nuclear war between them and between either of the Parties and other countries."<sup>37</sup>

Article two stated: "that each Party will refrain from the threat or use of force against the other Party, against the allies of the other Party and against other countries, in circumstances which may endanger international peace and security."<sup>38</sup>

And if there was a risk of nuclear conflict they shall immediately enter into urgent consultations with each other and make every effort to avert this risk.

Exceptions were also mentioned in this agreement, article four states: that nothing in this Agreement shall affect or impair:

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<sup>37</sup> Article 1 of the Agreement on the prevention of nuclear war, 1973.

<sup>38</sup> Article 2 of the Agreement on the prevention of nuclear war, 1973.

- i. The inherent right of individual or collective self-defence as envisaged by Article 51 of the Charter of the United Nations,
- ii. The provisions of the Charter of the United Nations, including those relating to the maintenance or restoration of international peace and security, and
- iii. The obligations undertaken by either Party towards its allies or other countries in treaties, agreements, and other appropriate documents.<sup>39</sup>

Here article four clearly stated that “Nothing in this Agreement shall affect or impair: the inherent right of individual or collective self-defense as envisaged by Article 51 of the Charter of the United Nations.”<sup>40</sup>

In November, 1985 Ronald Reagan the President of the USA, and the Soviet leader Gorbachev went to a summit meeting in Geneva. There, the two Presidents made a joint statement that a nuclear war can never be won and therefore should never be fought.<sup>41</sup>

#### **3.4 Agreement between Pakistan and India**

Agreement was signed between Pakistan and India in 1988, on the Prohibition of Attack against Nuclear Installations and Facilities of each other. But there is nothing about nuclear war in this agreement.

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<sup>39</sup> Article 4 agreement on the prevention of nuclear war, 1973.

<sup>40</sup> <http://www.wagingpeace.org>, (last visited 20<sup>th</sup> May 2006).

<sup>41</sup> <http://www.Wagingpeace.org>, (last visited 20<sup>th</sup> May 2006).

Lahore Declaration which was signed at Lahore on the 21st day of February 1999, Pakistan and India apart from other agreed that they, shall take immediate steps for reducing the risk of accidental or unauthorized use of nuclear weapons and discuss concepts and doctrines with a view to elaborating measures for confidence building in the nuclear and conventional fields, aimed at prevention of conflict.

After the agreement the Memorandum of Understanding was signed by the Foreign Secretaries of both countries and agreed that, the two sides are fully committed to undertake national measures to reduce the risks of accidental or unauthorized use of nuclear weapons under their respective control. The two sides further undertake to notify each other immediately in the event of any accidental, unauthorized or unexplained incident that could create the risk of a fallout with adverse consequences for both sides, or an outbreak of a nuclear war between the two countries, as well as to adopt measures aimed at diminishing the possibility of such actions, or such incidents being misinterpreted by the other. The two sides shall identify and establish the appropriate communication mechanism for this purpose.<sup>42</sup>

This agreement and declaration not specifically described that India and Pakistan will not use nuclear weapons against each other. So both countries are not legally bound to refrain from the use of nuclear weapons against each other. So the threat of nuclear war is still exist in the world and it can not be removed easily. As it also clear from the United Nations Resolution of 2005 on the effective international arrangements to assure non nuclear weapons States

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<sup>42</sup> [http:// www.meadev.gov.in/govt/Lahore.htm](http://www.meadev.gov.in/govt/Lahore.htm), (last visited on 10th June 2006).

against the use or threat of use of nuclear weapons. It was said in this Resolution that nuclear weapons still pose the greatest threat to man kind and to the survival of civilization.<sup>43</sup>

Although under the Article 2(4) of the United Nations Charter use of force or the threat of use of force is illegal but it become legal under the Article 51. This is the place where all the States are agreed that they will use nuclear weapons in the self-defence.

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<sup>43</sup> UN/RES/59/290 2005.



Nuclear weapons that are the greatest threat to the survival of human beings are still the headache of international community. International law is not effective to remove this threat from the world. The acquisition of nuclear weapons is not strictly prohibited in international law. Non Proliferation Treaty and other similar treaties are there, but no State is bound to accede the treaty. These treaties only limit or restrict the proliferation of nuclear weapons.

In this regard the conduct of nuclear powers is very shocking. Every State has fright from other State and thinks that if other does this, it will do that otherwise not. So every State has fear of nuclear weapons from other State. Due to this no State is ready to eliminate the nuclear weapons altogether. They are arguing if we destroy our nuclear weapons there will be threat to our national security because there is no guarantee for peace in the world.

The nuclear club is responsible for spread of nuclear weapons in the world. If they started the elimination of these weapons sincerely there will be no such fear in the world.

China government has suggested the followings for the disarmament of nuclear weapons.

First, all the parties should establish a security concept based on mutual trust, mutual benefit, equality and cooperation so as to create a favorable regional and international environment for nuclear disarmament.

Second, nuclear disarmament should contribute to the maintenance of international strategic stability and should be based on the principle of undiminished security for all.

Third, nuclear disarmament should be carried out through a just and reasonable process of gradual reduction towards a downward balance.<sup>1</sup>

Coming to the use of nuclear weapons there is no specific international law to prevent the nuclear war. Every State has the option to use it first or in the name of self-defence. The door for this was kept open also in the International Court of Justice decision in 1996.

So, the threat of nuclear war still exists and there is no specific prohibition that it will not occur. This position is clear from the policies and the conduct of nuclear powers.

The legitimacy for initiating nuclear war in the past was the self-defence; today they are giving different names for the legitimacy of this war. Almost all States have the policy that they will use nuclear weapons against terrorism. In the future it is possible to change this legitimacy to another ground with the passage of time.

In reality if nuclear weapons are brutal it will be considered brutal for all the people of the world whether they are from the West or East, Muslims or non-

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<sup>1</sup> [http:// www.comeclean.org.uk](http://www.comeclean.org.uk), (last visited on 11<sup>th</sup> November 2006).

Muslims, Americans or Russians. There will be no discrimination among States in this regard.

The position of Sharī'ah is clear in this regard, Sharī'ah ordained the Muslims to acquire weapons as much as you can to make threats for the enemy. No body can say that the acquisition of nuclear weapons is prohibited under the Sharī'ah. It is obligatory under the Sharī'ah to make every kind of preparation against the enemy. Making and suggesting treaties for others and keeping himself under the umbrella of nuclear weapon is illogical.

Under the Sharī'ah nuclear weapons can be used in some circumstances as we discussed above. Today there is no nuclear State, which has bound itself that it will not use nuclear weapons in any situation. States that are strongly against the nuclear weapons, are the States that have no nuclear weapons or far away to get it in the near future.

If the international community as a whole oblige that they will not acquire and use nuclear weapons in any circumstances, then Muslim States are require to do the same.

If all the nuclear powers are free to acquire and spread nuclear weapons and have the policies to use it and threaten others day by day, then there is no logic to prevent others from doing so. Therefore fear of nuclear weapons will not be removed in this way. There is need for sincere efforts to remove this danger from the world.

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