FACULTY OF LAW
Lund University

Sofia Björk

Use the force?

An analysis of the effect of the TPN on the legality or illegality of nuclear weapons

JURM02 Graduate Thesis

Graduate Thesis, Master of Laws program
30 higher education credits

Supervisor: Valentin Jeutner

Semester of graduation: Period 1 Spring Semester 2018

Contents

Summary

In its Advisory Opinion on the Legality of Nuclear Weapons the ICJ was unable to conclude definitely the legality or illegality of nuclear weapons in international law. Since then the Treaty on the Prohibition of Nuclear Weapons have been signed, with the aim of establishing a total prohibition on nuclear weapons. However, while the Treaty have an honourable aim, the lack of sufficient ratifications hinders it from being binding at this time. Simultaneously the *Lotus* case prescribe that an explicit prohibition is necessary for the ban on nuclear weapons, making a prohibition dependant on the Treaty. While it can be argued that the *Lotus* case have played its most central role in international law due to increasing globalisation and interdependence as well as the existence of a more developed international law today, the existence of a binding treaty prohibiting nuclear weapons would be a great step in their overall ban. Today, no general consensus as to the illegality of nuclear weapons can be found in General Assembly resolutions, neither can an explicit authorisation. Furthermore, is there no general practice supporting an illegality, rather the practice of deterrence shows a consistent use and reliance upon nuclear weapons for protection also by non-nuclear-weapon States. Consequently, no basis for an illegality of nuclear weapons due to treaty law can be found at this time. While an emerging *opinio juris* can be found amongst the States as to their illegality, no uniform State practice support such an *opino juris*. The existence of the Treaty on the Prohibition of Nuclear Weapons can therefore not be said to have created an absolute ban on nuclear weapons and not to have changed the answer of the Court in its Advisory Opinion.

Sammanfattning

I sin Advisory Opinion on the Legaliy of Nuclear Weapons var ICJ oförmögen att slutligen avgöra frågan om kärnvapnens laglighet eller olaglighet i folkrätten. Sedan dess har the Treaty on the Prohibition of Nuclear Weapons signerats med målet att skapa ett absolut förbud mot kärnvapen. Medan traktatet har ansenligt syfte, har dock bristen på ett tillräckligt antal ratifikationer vid denna tidpunkt hindrat det från att bli bindande. Samtidigt föreskriver *Lotus* fallet att en uttrycklig prohibition är nödvändig för ett förbud mot kärnvapen, vilket gör ett förbud beroende av traktatet. Medan det går att argumentera för att *Lotus* fallet mist sin mest centrala roll i folkrätten på grund av den ökade globaliseringen och interdenpendensen samt den idag mer utvecklade folkrätten skulle ett bindande traktat som förbjuder kärnvapen vara ett viktigt steg mot ett absolut förbud. Idag går det inte att finna en generell konsensus vad gäller kärnvapnens olaglighet i Generalförsamlingens resolutioner, inte heller en uttrycklig auktorisering. Ytterligare går det inte att finna någon generell sedvana som visar på kärnvapnens olaglighet, snarare visar avskräckningspolicyn på ett konstant begagnande av och tillit till kärnvapen för skydd av den egna staten också av icke-kärnvapenstater. Följaktligen kan ingen grund för kärnvapnens olaglighet finnas vid denna tidpunkt, medan en utvecklande *opinio juris* för deras illegalitet kan ses bland många stater finns det ingen enhetlig sedvana som stöttar en sådan *opinio juris*. The Treaty on the Prohibition of Nuclear Weapons kan därför inte sägas ha skapat ett absolut förbud mot kärnvapen och därmed inte heller ha ändrat svaret av domstolen i dess Advisory Opinion.

Abbreviations

BWC	Biological Weapons Convention
CTBT	Comprehensive Nuclear-Test-Ban Treaty
CWC	Chemical Weapons Convention
ESCWA	Economic and Social Commission for Western Asia
EU	European Union
First Geneva Convention	Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field
IAEA	International Atomic Energy Agency
ICAN	International Campaign to Abolish Nuclear Weapons
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ILC	International Law Commission
NATO	North Atlantic Treaty Organization
NPR	Nuclear Posture Review
NPT	Treaty on the Non-Proliferation of Nuclear Weapons
PCIJ	Permanent Court of International Justice
TPN	Treaty on the Prohibition of Nuclear Weapons
UN	United Nations
UN Charter	Charter of the United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNCLOS	United Nations Convention on the Law of the Sea
US	United States of America
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization

1 Introduction

1.1 History of the nuclear bomb

This essay will investigate how and to what extent the Treaty on the Prohibition of Nuclear Weapons answer the question whether, in the view of the current state of international law, the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence in which the very survival of a State would be at stake, which the ICJ in its Advisory Opinion on the Legality of Nuclear Weapons in paragraph 105(2)(E) struggled to answer.

The case of the nuclear weapon is a special one. Described as a threat to humanity and civilisation,[1] nuclear weapons have only been employed twice in war: during World War II against the cities Hiroshima and Nagasaki. Upon detonation, the explosion of a nuclear weapon creates heat of over 1 million degrees Celsius.[2] Following the explosion is a hurricane-type wind and nuclear fallout, i.e. beta particles and gamma radiation which are continuously emitted from the fission products released from the core of the weapon. Apart from the nuclear fallout, nuclear weapons also release radiation in the form of thermal radiation, electromagnetic pulse and initial nuclear radiation consisting of gamma rays, electrons and neutrons.[3] It is estimated that the bombs dropped on Hiroshima and Nagasaki had killed over 210 000 people by the end of 1945[4], with increasing cases of leukaemia five

[1] UN General Assembly resolution, *Declaration on the prohibition of the use of nuclear and thermos-nuclear weapons*, A/RES/1653.

[2] Nystuen. et.al., p. 6; Singh and McWhinney, p. 17.

[3] Sheldon, p. 186-187; Nystuen et.al., p. 6; for a more detailed description see Report of the British Mission to Japan, *The Effects of the Atomic Bombs at Hiroshima and Nagasaki*.

[4] Singh and McWhinney, p. 387; ICAN: Hiroshima and Nagasaki bombings, <http://www.icanw.org/the-facts/catastrophic-harm/hiroshima-and-nagasaki-bombings/>, accessed 12 February 2018.

to six years after the bombings and cases of thyroid, breast, lung and other forms of cancer ten years after. Higher rates of miscarriages and deaths among infants were experienced among pregnant women exposed to the bombings, while the children they were carrying had an increased risk of cancer and were more likely to have an impaired growth and intellectual disabilities.[5]

To date, there are an estimated 15 000 nuclear weapons in the world. Russia has the largest arsenal with 7 000 warheads, followed by the United States with 6 800 warheads. Together these States have roughly 1 800 nuclear weapons on high-alert status, ready to be launched at any time.[6]

Work has been conducted towards limiting the proliferation of nuclear weapons. In 1957, the International Atomic Energy Agency (IAEA) was established to ensure the peaceful uses of nuclear energy[7] and in 1970 the Treaty on the Non-Proliferation of Nuclear Weapons[8] (NPT) entered into force to prevent the spread of nuclear weapons and the enhanced risk of a nuclear war that would follow the proliferation.[9] However, the decades after World War II were dominated by the Cold War and the "policy of deterrence"[10] came to dictate international politics. Before the NPT was opened for signature in July 1968, the UN Security Council adopted resolution 255 (1968), assuring the non-nuclear-weapon States parties to the NPT the security of the nuclear-weapon States in the event of aggression with nuclear weapons or a threat of aggression with nuclear weapons against a non-

[5] ICAN: Hiroshima and Nagasaki bombings, <www.icanw.org/the-facts/catastrophic-harm/hiroshima-and-nagasaki-bombings/>, accessed 12 February 2018.

[6] ICAN: Nuclear Arsenals, <www.icanw.org/the-facts/nuclear-arsenals/>, accessed 12 February 2018.

[7] See art. 1 and 2 of the Statute of the International Atomic Energy Agency, 276 UNTS 3.

[8] Treaty on the Non-Proliferation of Nuclear Weapons, 729 UNTS 161. (Hereafter Treaty on the Non-Proliferation of Nuclear Weapons.)

[9] See the preamble of the Treaty on the Non-Proliferation of Nuclear Weapons.

[10] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, p 226, para. 67. (Hereafter Advisory Opinion.)

nuclear-weapon State.[11] Despite the NPT, States are modernizing their arsenals and have failed to provide detailed plans for the elimination of their arsenals.[12]

For this reason, the General Assembly turned to the International Court of Justice (ICJ) for an advisory opinion concerning the legality of nuclear weapons.[13] The uncertainty of the Court concerning the legality of the weapons in extreme cases of self-defence has been discussed and questioned by scholars.[14] Designed to fill this gap in international law, is the Treaty on the Prohibition of Nuclear Weapons[15] (TPN). As the only weapon of mass destruction not subject to a complete ban, the TPN was negotiated at the United Nations (UN) in New York in June and July 2017 to prohibit nuclear weapons and was opened for signature on 20 September 2017.[16]

1.2 Questions and purpose

The purpose of this essay is to investigate the legality of nuclear weapons by analysing the effect of the TPN in relation to the Advisory Opinion on the Legality of Nuclear Weapons. For this purpose, the following question will be answered in the essay:

To what extent does the new Treaty on the Prohibition of Nuclear Weapons answer the question whether, in the view of the current state of international law, the threat or use of nuclear weapons would be lawful or unlawful in an

[11] Security Council resolution, *Question relating to measures to safeguard non-nuclear-weapon States parties to the Treaty on the Non-Proliferation of Nuclear Weapons*, S/RES/255.

[12] ICAN: Nuclear arsenals, <http://www.icanw.org/the-facts/nuclear-arsenals/>, accessed 13 February 2018.

[13] General Assembly resolution, *General and complete disarmament*, A/RES/49/75 K.

[14] See e.g. Boisson de Chazournes and Sands; Akande.

[15] Treaty on the Prohibition of Nuclear Weapons, A/CONF.229/2017/8. (Hereafter Treaty on the Prohibition of Nuclear Weapons.)

[16] ICAN: The Treaty, <http://www.icanw.org/the-treaty/>, accessed 13 February 2018.

extreme circumstance of self-defence in which the very survival of a State would be at stake, which the ICJ in its Advisory Opinion on the Legality of Nuclear Weapons in paragraph 105(2)(E) struggled to answer?

For the purpose of investigating the Treaty's effect on the answer of the Court the "current state of international law" will be determined by answering the following questions:

- Has the treaty produced, or could it produce, a rule prohibiting nuclear weapons according to treaty law?
- Has the treaty produced, or could it produce, a rule prohibiting nuclear weapons according to customary international law?

1.3 Method and Material

The method used for this essay is a legal doctrinal method,[17] used for the purpose of identifying the existing law on the area of nuclear weapons. This will be done by analysing the effect of the TPN on the existing law and analyse the result in relation to the answer of the ICJ in its Advisory Opinion on the Legality of Nuclear Weapons. When identifying the *lex lata* an analysis has been made of international cases, treaties, custom and scholars as per article 38 of the ICJ Statute.[18] However, the legal doctrinal method also has its weaknesses when solely focusing on legal sources. The close relationship between public international law and politics concerning the question of the legality or illegality of nuclear weapons mean that the essay will also take into consideration political statements when determining the legality of nuclear weapons. These political statements take the form of policies and UN resolutions. While the purpose of the essay is to objectively examine *lex lata*, some comments about *lex ferenda* has also been made to show the possible effect of the TPN on the legality of nuclear weapons in the future. In considering *lex ferenda* I am aware of the fact that some of my preference

[17] Hutchinson, p. 131.

[18] Statute of the International Court of Justice, 3 Bevans 1179; 59 Stat. 1031; T.S. 993. (Hereafter ICJ Statute.)

towards the illegality of nuclear weapons might have shone through. The purpose of the essay and the method used however, is to determine the existing international law on nuclear weapons. To identify the law, some comparative research has also been made, comparing nuclear weapons to other weapons of mass destruction with the aim of determining the traditional regulation of weapons of mass destruction and to see a possible evolution in the legality or illegality of nuclear weapons.

For the purpose of determining the current state of international law on nuclear weapons, this essay is based on treaties, judgments and scholars to define the basics of international treaty law and customary international law. With the aim of determining the *opinio juris* and practice of State, notice has been taken of General Assembly and Security Council resolutions, State policies, treaties on nuclear weapons and State ratifications to these treaties.

While numerous works have been written on the legality or illegality of nuclear weapons, these have historically been focused on an analogical interpretation on treaties prohibiting poisoned or poisonous weapons.[19] More recently, after the Advisory Opinion, scholars have discussed the application of international humanitarian law and environmental law to the use of nuclear weapons.[20] However, due to the recentness of the TPN, not much has been written on the treaty or its relation to the Advisory Opinion. This essay will therefore not focus on the legality or illegality of nuclear weapons according to international humanitarian law, environmental law or be an evaluation of the legal arguments of the ICJ in the Advisory Opinion. The hope is that this essay will shed some light on the Treaty and the effect it has on the status of nuclear weapons in current international law by examining its effect according to the fundamental rules of treaty law and customary international law.

[19] See e.g. Spaight, p. 273-277; Sack. The use of analogy was criticised by Mc Dougal and Feliciano, p. 831.

[20] See e.g. Boisson de Chazournes and Sands.

1.4 Delimination

As stated above, this essay will be focused on the effect of the TPN on the legality or illegality of nuclear weapons in the current state of international law. This will be done by investigating the Treaty and its effect according to the principles of treaty law and international customary law. The essay will therefore not discuss the legality of nuclear weapons under humanitarian law and environmental law, areas previously heavily studied by scholars in the relation to nuclear weapons. Furthermore, the essay will not discuss the case of nuclear weapons and self-defence but will be aimed at determining whether the TPN creates an overall prohibition on nuclear weapons, which in turn would render the use of nuclear weapons in self-defence illegal.

1.5 Disposition

Following the introduction, the next chapter will contain a rendition of the Advisory Opinion for the purpose of explaining the answer of the ICJ to the question of the legality or illegality of nuclear weapons and provide a background to the possible effect of the TPN on that answer. In chapter three the TPN will be discussed together with principles on the illegality of weapons of mass destruction and principles of treaty law for the purpose of determining the effect of the TPN according to treaty law. The ensuing chapter will contain a discussion of whether the TPN changes the customary international law on the area. This will be done by discussing the principles on creating a customary rule and the qualification of statements, General Assembly resolutions and the policy of deterrence as the *opinio juris* and practice of States. Lastly the result will be analysed in the final chapter.

2 Advisory Opinion

2.1 Introduction

After several General Assembly resolutions declared the use of nuclear weapons to be constituting a violation of the UN Charter[21] and a crime against humanity,[22] the General Assembly in Resolution 49/75 K stressed the belief that the only assurance against the threat of nuclear war would be the complete elimination of nuclear weapons. The General Assembly noted that the Fourth Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons left more to want in the area of progress towards the complete elimination of nuclear weapons. Therefore, pursuant to article 96(1) of the UN Charter, the General Assembly requested the International Court of Justice to give an advisory opinion on the question: "Is the threat or use of nuclear weapons in an any circumstance permitted under international law"?[23] This chapter will present the most important aspects of

[21] Charter of the United Nations, 59 Stat. 1031; TS 993; 3 Bevans 1153. (Hereafter UN Charter.)

[22] UN General Assembly resolution, *Declaration on the prohibition of the use of nuclear and thermos-nuclear weapons*, A/RES/1653; UN General Assembly resolution, *Review of the implementation of the recommendations and decisions adopted by the General Assembly at its tenth special session*, A/RES/33/71 B; UN General Assembly resolution, *Review of the implementation of the recommendations and decisions adopted by the General Assembly at its tenth special session*, A/RES/34/83 G; UN General Assembly resolution, *Review of the implementation of the recommendations and decisions adopted by the General Assembly at its tenth special session*, A/RES/35/152 D; UN General Assembly resolution, *Review of the implementation of the recommendations and decisions adopted by the General Assembly at its tenth special session*, A/RES/36/92; UN General Assembly resolution, *Review and implementation of the concluding document of the 12th special session of the General Assembly*, A/RES/45/59; UN General Assembly resolution, *Review and implementation of the concluding document of the 12th special session of the General Assembly*, A/RES/46/37 D.

[23] UN General Assembly resolution, *General and complete disarmament*, A/RES/49/75 K.

the Court's advisory opinion in light of this essay's objective, the opinions of its judges as well as shortly the controversy around the Court's conclusion in paragraph 105(2)(E) of the Advisory Opinion.

2.2 Primary issues

The first issue addressed by the Court was the issue of its jurisdiction, which for the purpose of this essay will not be investigated deeply. After having found that it had the authority to deliver an opinion on the question, despite the argument that the question posed by the General Assembly was too vague and would force the Court to take a law-making position, the ICJ moved on to consider what might be the relevant applicable law of the international law norms available to it.[24]

After having found that neither article 6 of the International Covenant on Civil and Political Rights[25] (ICCPR) or article II of the Convention on the Prevention and Punishment of the Crime of Genocide[26] would definitely and in all circumstances hinder the use of nuclear weapons,[27] it was further argued by some States that norms concerning the protection of the environment prohibited the use of nuclear weapons. Although recognizing the threat to the environment the use of nuclear weapons poses, the Court stressed the right of self-defence under international law and the fact that the environmental treaties under consideration do not set out to deprive a State of that right. However, the Court noted that the environmental considerations must be taken into account when judging the necessity and proportionality of a self-defence act.[28]

[24] The Advisory Opinion, para. 10-19.

[25] International Covenant on Civil and Political Rights, 999 UNTS 171.

[26] Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277.

[27] The Advisory Opinion, para. 25-26.

[28] The Advisory Opinion, para. 27-33.

The Court thereafter found the most directly relevant law to answer the question of the General Assembly to be the law of the prohibition on the use of force in the UN Charter and international humanitarian law, as well as possible relevant treaties on nuclear weapons.[29]

2.3 Jus ad bellum and jus in bello

2.3.1 Use of force in the UN Charter

Initially the Court stressed the fact that a weapon, unlawful *per se* by treaty or custom, does not become legal by being used for a legitimate purpose pursuant to the Charter.[30] Use of force is prohibited under article 2(4) of the Charter, however, under article 51 of the Charter force can be used lawfully for self-defence or with the authorisation of the Security Council according to article 42 of the Charter. For the purpose of investigating the legality or illegality of nuclear weapons in relation to the provisions in the UN Charter the Court focused its attention on the right to self-defence. It noted that the ICJ in the *Nicaragua*[31] case found customary international law to include a necessity and proportionality condition in the exercise of self-defence. Consequently, in the exercise of self-defence only measures proportional to the armed attack and necessary in responding to the attack are lawful.[32] The Court held these conditions to equally apply to article 51 of the Charter.[33] While the principle of proportionality might not in all circumstances result in the unlawfulness of use of nuclear weapons in self-defence, the Court found that the use must, however, meet the requirements of the law applicable in armed conflict, especially international humanitarian law.[34]

---

[29] The Advisory Opinion, para. 34.

[30] The Advisory Opinion, para. 39.

[31] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* ICJ Reports 1986, p. 14. (Hereafter *Nicaragua* case.)

[32] *Nicaragua* case, para. 176.

[33] Advisory Opinion, para. 41.

[34] Advisory Opinion, para. 42.

2.3.2 Treaties on nuclear weapons

Firstly, when examining international humanitarian law, the Court noted that there exists no specific authorisation of the threat or use of nuclear weapons or any other weapon in international customary and treaty law. Secondly, it further noted that nor does there exist any principle or rule of international law that requires such a specific authorisation for the threat or use of any weapon. Rather, illegality stems from prohibitions.[35] However, the Court could not at the time of the opinion find any specific treaty prohibiting the use of nuclear weapons.[36] The ICJ therefore turned to other treaties and found that the resort to nuclear weapons was addressed in two conventions: the Treaty of Tlatelolco of 14 February 1967 for the Prohibition of Nuclear Weapons in Latin America[37] and the Treaty of Rarotonga of 6 August 1985.[38] The Treaty of Tlatelolco expressly prohibits the use of nuclear weapons by the State parties[39] and article 3 of Additional Protocol II, which is open to nuclear-weapon States outside the region, stipulates that States who have signed and ratified the protocol "undertake not to use or threaten to use nuclear weapons against the Contracting Parties of the Treaty"[40]. After noting that the five nuclear weapon States had signed and ratified the Protocol, the Court also took note of the various declarations made by the same States, which mostly concerned the right to self-defence which they found article 3 to be without prejudice to or had the right to reconsider or review in the event of aggression or attack by a Party supported by or in support of a nuclear-weapon State. The ICJ furthermore noted that none of the parties expressed any objections to the statements.[41]

---

[35] Advisory Opinion, para. 52.

[36] Advisory Opinion, para. 57.

[37] Treaty for the Prohibition of Nuclear Weapons in Latin America and the Caribbean, 634 UNTS 326. (Hereafter Treaty of Tlatelolco.)

[38] South Pacific Nuclear Free Zone Treaty, 1445 UNTS 177. (Hereafter Treaty of Rarotonga.); Advisory Opinion, para. 59.

[39] Art 1 the Treaty of Tlatelolco.

[40] Art 3 Additional Protocol II of the Treaty of Tlatelolco.

[41] Advisory Opinion, para. 59.a.

The Treaty of Rarotonga, on the other hand, does not explicitly prohibit the use of nuclear weapons, although in Protocol 2, open for ratification by the five nuclear weapon States, article 1 stipulates that no party shall use or threaten to use nuclear explosive devices against any Party or the territory of the Treaty. However, the Court found that while China and Russia are parties to the Protocol, they had made similar reservations as to the Treaty of Tlatelolco Protocol, and while France, the United Kingdom and the United States had signed the Protocol, they had not ratified it at the time of the Advisory Opinion.[42]

While said treaties bear witness to an emergence of a complete legal prohibition of all uses of nuclear weapons, according to some States, other States argue that the fact that the same treaties take note of the security assurances by the nuclear-weapon States to the non-nuclear-weapon States result in what cannot be understood as a prohibition on the use of nuclear. The same States also use the security assurances made by the Security Council in resolutions 255 (1968) and 984 (1995) in relation to the NPT as an argument for the legality of the use of nuclear weapons.[43]

While the Court agreed that the treaties could be seen as suggesting a future general prohibition of the use of nuclear weapons, the treaties dealt exclusively with acquisition, manufacture, possession, deployment and testing, and could therefore not be seen as constituting a prohibition alone.[44]

[42] Advisory Opinion, para. 59.b. Since the Advisory Opinion France has ratified Protocol II on 20 September 1996 and the United Kingdom on 19 September 1997. The United States has not yet ratified Protocol 2. See the Nuclear Threat Initiative: South Pacific Nuclear-Free Zone (SPNFZ) Treaty of Rarotonga, <http://www.nti.org/learn/treaties-and-regimes/south-pacific-nuclear-free-zone-spnfz-treaty-rarotonga/>, accessed 19 February 2018.

[43] Advisory Opinion, para. 60-61.

[44] Advisory Opinion, para. 62.

2.3.3 Customary international law

After investigating the treaty law on the area, the Court moved on to discuss whether there exists a customary rule prohibiting the use of nuclear weapons. The material of customary international law, as noted by the ICJ in the *Continental shelf (Libya/Malta)*[45] case, is to be sought for "primarily in the actual practice and *opinio juris* of States".[46]

When arguing for the illegality or legality of nuclear weapons, States use the same practice of non-utilization. While States arguing for the illegality argue that the non-recourse to nuclear weapons is an expression of an *opinio juris* by those who possesses nuclear weapons, States arguing for the legality of such weapons invoke the policy of deterrence from the same practice of non-utilization.[47]

One can debate that the policy of deterrence is just that, a policy, and therefore has no legal standpoint in the formation of a customary rule but should rather be an object regulated by law.[48] Judge Ferrari Bravo concurred and further held the policy of deterrence as lacking legal validity and force, and while being a legal practice of nuclear-weapon States and their allies, the policy of deterrence cannot be considered a legal practice which could be the basis of an international custom.[49] Judge Guillaume, on the other hand, maintained that the Court ought to have explicitly recognised the legality of the policy of deterrence, particularly when it comes to the defence of the fundamental interests of states as this has been the practice of a significant section of the international community for several years.[50] Agreeing with Judge Guillaume

[45] *Continental Shelf (Libyan Arab Jarnahiriya/Malta)*, Judgment, ICJ Reports 1985, p. 13. (Hereafter *Continental Shelf (Libya/Malta)* case.)

[46] *Continental Shelf (Libya/Malta)* case, para. 27.

[47] Advisory Opinion, para. 65-66.

[48] Advisory Opinion, Declaration of Judge Shi, p. 277.

[49] Advisory Opinion, Declaration of Judge Ferrari Bravo, p. 283-284.

[50] Advisory Opinion, Separate Opinion of Judge Guillaume, p. 290-291.

was Judge Fleischhauer who maintained that the policy of deterrence is based on the right of self-defence, and that the reservations to the treaties of Tlatelolco and Rarotonga as well as the lack of objections to these treaties indicate a practice which must be regarded as legal State practice.[51] The policy of deterrence will be further discussed in relation to customary law on the area of nuclear weapons in chapter four.

Due to the division of the members of the international community on the area of whether the non-recourse to nuclear weapons is an illustration of an *opinio juris*, the Court found itself unable to declare that there is such an *opinio juris*.[52]

The Court moved on to consider the General Assembly resolutions affirming the illegality of nuclear weapons, starting with resolution 1653 (XVI) of 24 November 1961, and whether these proved the existence of a rule of customary international law prohibiting the use of nuclear weapons. First and foremost, it is of importance to note that General Assembly Resolutions, in general, are not binding[53] and that the voting on the resolutions was far from unanimous.[54] However, the Court stressed that although they are not binding, the General Assembly resolutions may sometimes have regulating value. "They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence on an *opinio juris*."[55] Of importance is the content and the condition of the adoption, and whether an *opinio juris* exists as to the resolution's regulating character. A series of resolutions may also indicate a gradual evolution, necessary for the creation of a new rule. However, due to the substantial number of negative votes and

[51] Advisory Opinion, Separate Opinion of Judge Fleischhauer, p. 307-309.

[52] Advisory Opinion, para. 67.

[53] However, they are binding in case of internal affairs, e.g. when the General Assembly accepts a new Member pursuant to art. 4 or decides on the amendment of the Charter pursuant to art. 97 of the UN Charter.

[54] See chapter 4.2.1.

[55] Advisory Opinion, para. 70.

abstentions to the resolutions, the Court found them unable to establish the existence of an *opinio juris* on the subject.[56]

To sum up, the Court found a strong tension between an emerging *opinio juris* and the practice of deterrence, evidence of which can be seen in the voting on the resolutions and the reservations to the treaties above, hampering the emergence of a rule of customary international law prohibiting the use of nuclear weapons.

2.3.4 Nuclear weapons and self-defence

After having found international humanitarian law applicable to nuclear weapons, as well as the principle of neutrality, the Court stressed that this does not necessarily result in a prohibition as such of the recourse to nuclear weapons. While international humanitarian law prohibits methods and warfare not distinguishing between civilian and military targets or causing unnecessary suffering to combatants, which nuclear weapons appear to do, the Court did not consider itself having enough "sufficient elements" to determine certainly whether the use of nuclear weapons were illegal in any circumstance pursuant to the principles and rules of law applicable in armed conflict.[57] Moreover, the Court emphasised the fundamental right of State survival and consequently the right of every State to use self-defence when its survival is at risk and noted the lack of objections from the parties to the Tlatelolco and Rarotonga Treaties to the reservations made by the nuclear-weapon States.[58] Consequently, the ICJ found itself unable to reach a definite conclusion on the legality or illegality of the use of nuclear weapons in a case of extreme self-defence, when a State's survival is at stake.[59] This reasoning by the Court seems to indicate that in the case of a threat to a State's survival

[56] Advisory Opinion, para. 70-71.

[57] Advisory Opinion, para. 85-89, 95.

[58] Advisory Opinion, para. 59.a-b, 62 and 96.

[59] Advisory Opinion, para. 97.

it may use nuclear weapons in self-defence, even if it means a severe danger to humanity and risks a nuclear war.

2.4 The controversy of operative paragraph 105(2)(E)

In the Advisory Opinion the ICJ stressed the necessity to consider the operative paragraphs in relation to the Advisory Opinion in its entirety. Still operative paragraph 105(2)(E) has created some controversy in its ambiguity.

> "*It follows from the above-mentioned requirements that the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law;*
> *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 an extreme circumstance of self-defence, in which the very survival of a State would be at stake;*"[60] [italics added].

By seven votes to seven and the President having the casting vote, the Court voted for operative paragraph 105(2)(E). There are several controversies concerning the paragraph, the first one being the statement that nuclear weapons *generally* would be contrary to the law applicable in armed conflict and, furthermore, that due to the current state of international law the Court could not conclude whether the threat or use of nuclear weapons in extreme circumstances of self-defence would be lawful or unlawful. Many questions have arisen concerning what constitutes an "extreme circumstance of self-defence" and what "generally be contrary to the rules of international law

[60] Advisory Opinion, para. 105(2)(E).

applicable in armed conflict" means.[61] This essay, however, will focus on "the current state of international law" and whether the new Treaty on the Prohibition of Nuclear Weapons would change the Court's inability to answer the question definitely in the paragraph.[62]

2.5 Summary

The Court found itself unable to definitely answer the question whether the threat or use of nuclear weapons is legal under international law. Although both it and the States were in agreement as to the applicability of international humanitarian law, the opinions differed as to the possibility of recourse to nuclear weapons in self-defence. The Court found that in the absence of an explicit prohibition the requirements of necessity and proportionality to self-defence meant that recourse to nuclear weapons for this purpose could only be used in extreme cases of self-defence when the survival of the State is at stake. Thus, the Court failed to definitely rule on the legality or illegality of the nuclear weapon. Nevertheless, it stressed the importance to continue the work to stop the proliferation of nuclear weapons and work towards a nuclear-weapon-free world.[63]

[61] See e.g. Boisson de Chazournes and Sands; Akande.

[62] The answer of the Court will be revised in the final chapter.

[63] Advisory Opinion, para. 105(2)(F).

3 Treaty on the Prohibition of Nuclear Weapons

3.1 Introduction

The International Court of Justice in the Advisory Opinion on the Legality of Nuclear Weapons, noted, among other things, the lack of an explicit prohibition at the time of the Advisory Opinion and hence could not definitely determine whether the recourse to nuclear weapons would be lawful or unlawful in an extreme case of self-defence. This chapter will discuss the Treaty on the Prohibition of Nuclear Weapons and the relevance of the *Lotus* principle in international law and international treaty law for the purpose of investigating in what way the TPN can affect the legality of nuclear weapons and subsequently determine whether the TPN definitely establishes the illegality of nuclear weapons according to treaty law. If a legally binding prohibition on nuclear weapons can be found in the TPN it would answer the ambiguity of the Court's answer in the Advisory Opinion.

3.2 The *Lotus* principle

The *Lotus*[64] case, to which the ICJ refers in its Advisory Opinion, concerned the question whether Turkey had violated international law by instituting criminal proceedings pursuant to Turkish law against an officer of a French ship after a collision between it and a Turkish ship on the high seas resulting in the death of eight Turkish soldiers. An important question arose as to whether it was for the Turkish Court to point to a specific rule of jurisdiction authorising it to exercise jurisdiction in the case, as claimed by the French Government, or whether France had to prove a rule limiting the jurisdiction of Turkey, who's competence otherwise had to be viewed as established.

[64] *S.S. Lotus (Fr. v. Turk.)*, 1927 PCIJ. (ser. A) No. 10. (Hereafter *Lotus* case.)

Examining the question, the Permanent Court of International Justice (PCIJ) founded its argumentation on the sovereignty of States. It declared international law as governing the relations between independent States and the rules of international law as emanating from their own free will, therefore restrictions upon the independence and sovereignty of States could not be presumed, according to the PCIJ. After not having found a general prohibition on States extending jurisdiction of their courts to persons, property and acts outside their territory, the Court concluded that this leaves States a "wide measure of discretion"[65] only limited by prohibitive rules. This discretion, the Court argued, explained the many rules of international law which States have been able to adopt without objections from other States.

The decision by the PCIJ was used by the ICJ in its Advisory Opinion as one of the reasons for not being able to definitely conclude the illegality or legality of the threat or use of nuclear weapons. Coming to this conclusion they drew parallels to other treaties prohibiting weapons of mass destruction, which will be further presented below.[66]

3.2.1 The *Lotus* case today

The question remains whether the principle drawn from this case and relied upon by the Court in the Advisory Opinion is still valid in the more substantial and developed international law of today.

While the majority in the *Lotus* case found it was up to France to prove a rule of prohibition limiting the competence of Turkey, the judgement was criticised by some of the judges. Judge Loder in his dissenting opinion did not accept that everything under international law which is not prohibited is permitted, or as he put it "every door is open unless it is closed by treaty or by established Custom"[67]. Lord Finley argued that the Turkish courts had

[65] *Lotus* case, p. 19.

[66] Advisory Opinion, para. 57; See below chapter 3.2.2 for a presentation of these treaties.

[67] *Lotus* case, p. 34.

jurisdiction as long as international law authorized the jurisdiction, it was not for France to produce a rule prohibiting the jurisdiction[68] and Judge Nyholm maintained that the reasoning of the Court was a confusion of ideas and that it was necessary for a distinction to be drawn between the facts in the existing case and what establishes a rule of international law, for a rule of international law can only be created by a special process and not deduced from a situation of fact solely.[69] The conclusion of the Court on this matter was hence far from unanimous and the view on international law as being based solely on State consent and consequently requiring an explicit ban to prohibit a certain conduct questioned.

It can be argued that the Court based its reasoning on the positivist school and its thinking that international law springs from the free will of sovereign States. In the absence of a prohibitive rule, States remain free to act according to their will since, according to the positivist school, no restrictions on the independence of States can be assumed.[70] However, Brierly stresses the fact that neither can the absence of prohibitions, for one may not deduce the law applicable to a case from the sole fact of State sovereignty.[71]

The positivist school of law is mainly focused on separating what law is and what it ought to be and therefore declare that law should be analysed empirically; focus should be on its science and not politics, and as such it is necessary to separate it from ethical elements. Justice is for the political science.[72] The school is centred around State sovereignty, one of the fundamental basis of international law and laid down in article 2(1) of the UN Charter. According to the doctrine of positivism, law consist of a sum of rules States have consented to be bound to. Therefore, nothing can be law unless

[68] *Lotus* case, p. 52.

[69] *Lotus* case, p. 60-61.

[70] For arguments along these lines see Sheldon, p. 247-248.

[71] See Brierly, p. 155-156.

[72] Kelsen, p. 477-483; Dworkin, p. 4.

they have consented to it.[73] However, this view has its faults; it fails to explain how a new State can be bound by principles of law without consenting to it, it fails to explain how a State acquiring new territory, e.g. sea, become bound by the law of the sea without prior consent[74] and it further fails to explain how customary international law can sometimes bind states who have not consented to it. Finally, as pointed out by Birerly, the positivist school is an inadequate account of the system, it fails to explain why the law is binding,[75] when applied to international law it merely explains that rules obeyed by States ought to be obeyed.[76]

The doctrine of positivism could therefore be said to have its faults and following this reasoning one could question the conclusion of the Courts in the *Lotus* case and in the Advisory Opinion; that in the absence of an explicit prohibition (and explicit authorisation), the sovereignty and independence of States result in an act being lawful, since no decision to the contrary has been consented to by the States. This thinking by the Courts would mean that the inability to reach a definite answer as to the legality or illegality of nuclear weapons by the ICJ in the Advisory Opinion renders nuclear weapons legal, their use only limited by the conventional rules of humanitarian international law and use of force. However, it is also of importance to note the development of international law since the *Lotus* case and its possible effect on the applicability of the principle.

In the *Arrest Warrant*[77] case Belgium claimed it was, in accordance with the *Lotus* case, entitled to confer upon itself a universal jurisdiction because of the absence of a prohibitive rule saying otherwise. President Guillaume in his Separate Opinion stated that the absence of a decision by the Court in the

[73] Clapham, p. 49-50.

[74] Hart, p. 221.

[75] Clapham, p. 50.

[76] See Hart, p. 230.

[77] *Arrest Warrant of 11 April 2000, Democratic Republic of the Congo v Belgium*, ICJ Report 2002, p. 3. (Hereafter *Arrest Warrant* case.)

Lotus case was understandable due to the lack of substantial treaty law at the time, however today the situation is much different, and he therefore maintained that the basis for the universal jurisdiction could and should be looked for in the many treaties or international customary law.[78] Rather than following the principle from the *Lotus* case and maintaining that the lack of prohibition determines the lawfulness of a situation, president Guillaume claimed that authorization need be sought in the existing international treaty and customary law. Following this line of argumentation, the legality of nuclear weapons need to be sought in an explicit authorization found in international law and not in the lack of prohibition. However, president Guillaume's opinion was a minority one and it is to be noted that the prohibition of other weapons of mass destruction is to be found in treaties prohibiting their use.[79] Furthermore, the *Lotus* case was also relied upon by the ICJ in *Military and Paramilitary Activities in and against Nicaragua* where it stated that

> "*in international law there are no rules, other than such rules as may be accepted by the State concerned, by treaty or otherwise, whereby the level of armaments of a sovereign State can be limited*"[80] [italics added].

Thereby confirming the principle of the *Lotus* case concerning the regulation of armaments.

Consequently, it can therefore be deduced that the legal argument for the legality of nuclear weapons is heavily based on absolute state sovereignty and the policy of deterrence. However, were we to acknowledge the *Lotus* principle and the consequence that everything not prohibited is permitted, we would, as Meyrowitz put it, be ignorant of the fact that international law is constantly evolving and responding to the new problems and changes of the international system.[81] There is an ever-increasing interdependence of States

[78] *Arrest Warrant* case, Separate Opinion of President Guillaume, p. 43.

[79] See below under chapter 3.2.2.

[80] *Nicaragua* case, para. 269.

[81] Meyrowitz, p. 84.

today, an obvious example of which would be the European Union (EU), and transnationalism connecting not only States, but companies and individuals around the world in a much easier and faster way than ever before through technological advancement. Globalisation is a continuous integration of our world socially, politically, economically and culturally, not only occurring through top-down forces, but increasingly so through bottom-up forces. No country today can survive closing itself off from the world; treaties are signed to increase trade and to deal with cross-border problems, while citizens and companies increasingly interact over borders. All contributing to the loss of sovereignty for the States as well as a decreasing importance of territory and political power.[82]

While I would argue for the limited notice that should be paid to the *Lotus* case today, due to the decreasing importance of state sovereignty (although it still plays a central role in the international community), the fact that the judges in the case were not discussing general international law, but a specific case of criminal jurisdiction, and the circumstance that they were divided on the matter, one must not forget that the law on weapons of mass destruction still mainly consists of treaties prohibiting their use, as seen in the *Nicaragua* case.

[82] For arguments along these lines see Enriquez, p. 1290-1293 and 1299; Economic and Social Commission for Western Asia, *Annual Review of Developments in Globalization and Regional Integration in the Countries of the ESCWA Region*, U.N. Doc. E/ESCWA/GRID/2002/2, p. 1; UNESCO: Globalisation – Introduction, <http://www.unesco.org/education/tlsf/mods/theme_c/mod18.html>, accessed 16 March 2018; The total membership of the WTO, 164 members (16 March 2018), also supports the argument for the need of international co-operation among States when it comes to trade. See WTO: Members and Observers, <https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm>, accessed 16 March 2018. The WTO and EU also lend support to the argument against absolute sovereignty as they both are examples of a supranational organizations.

3.2.2 Prohibition on weapons of mass destruction

According to the *Lotus* principle, legality or illegality stems from explicit prohibitions, and as the Court in the Advisory Opinion concluded, traditionally the illegality of weapons of mass destruction has taken place through treaties of prohibition.

The first multilateral treaties prohibiting poisoned or poisonous weapons are The Hague Regulations of 1899[83] and 1907[84]. However, the list of prohibited weapons did nothing to stop the use of chemical gas weapons in World War I.[85] This lead to the signing of the 1925 Geneva Protocol[86], which prohibits the use of biological and chemical weapons in war. However, the imprecise language, the many reservations to the protocol expressing that the prohibitions will be nullified in the case of a prior attack using prohibited weapons, and the fact that the obligations under the Protocol exists merely between the State parties, limited the effective implementation of the Protocol.[87] Similar reservations have been made by nuclear weapon states to the Treaty of Rarotonga and Tlatelolco, as stated above.

The illegality of nuclear weapons was after the second World War argued from an analogy of the Protocols above. Several scholars argued the illegality due to the prohibition of poisonous weapons and drew parallel lines between the effects of chemical weapons and nuclear weapons.[88] However, these

[83] Hague Convention II with Respect to the Laws and Customs of War on Land and its annex: Regulation concerning the Laws and Customs of War on Land, 32 Stat. 1803, art. 23.a.

[84] Hague Convention IV - Laws and Customs of War on Land, 187 CTS 227, art. 23.a.

[85] Joyner, p. 88; United Nations Office for Disarmament Affairs: Chemical Weapons, <https://www.un.org/disarmament/wmd/chemical/>, accessed 6 March 2018.

[86] The Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare, 94 LNTS 65.

[87] Joyner, p. 89.

[88] See e.g. Spaight, p. 273-277; Sack.

conclusions were also criticised[89] and has not led to an accepted legal basis for the illegality of nuclear weapons.

The first multilateral disarmament treaty prohibiting the development, production and stockpiling of an entire category of weapons of mass destruction, was the Biological Weapons Convention (BWC)[90]. Its development stems from several UN General Assembly resolutions[91] and the 1925 Geneva Protocol and is an example of the Disarmament Process described by Sigh and McWhinney as a phenomenon which is beginning to develop on its own without the need of any particular political-governmental initiatives and pressure.[92] It was opened for signature in 1972 and entered into force in 1975. Following 12 years later, the Chemical Weapons Convention (CWC)[93] entered into force in 1997 as the first disarmament treaty negotiated within a multilateral framework providing for the full elimination of an entire category of weapons of mass destruction under international control.[94] The CWC was later followed up by the Land Mines Treaty[95] and Cluster Munitions Treaty[96].

---

[89] See e.g. Mc Dougal and Florentino, p. 831.

[90] Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, 1015 UNTS 163.

[91] UN General Assembly resolution, *Question of general and complete disarmament*, A/RES/2162 B (XXI); UN General Assembly resolution, *Question of chemical and bacteriological (biological) weapons*, A/RES/2063 A and B (XXIV), UN General Assembly resolution, *Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction*, A/RES/2826 (XXVI).

[92] Singh and McWhinney, p. 252.

[93] Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, 1974 UNTS 45.

[94] United Nations Office for Disarmament Affairs: Chemical Weapons, <https://www.un.org/disarmament/wmd/chemical/>, accessed 6 March 2018.

[95] Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 2056 UNTS 241.

[96] Convention on Cluster Munitions, 2688 UNTS 39.

The 1925 Geneva Protocol, the CWC and the BWC, together with withdrawals of reciprocity reservations from the 1925 Geneva Protocol, and State practice has been argued to have produced a rule of general customary international law forbidding the use of chemical and biological weapons even in retaliation.[97]

While these treaties have been used as an example and acceptance of the *Lotus* principle, it is possible to claim that the gradual development of the CWC and BWC is an indicator that the work towards nuclear prohibition is on the way and perhaps best achieved through a step-by-step approach.[98] Can the evidence that the steps to a prohibition on chemical and biological weapons were small and seemed to happen without any major external forces be an indicator that the same is about to happen with nuclear weapons? The examination of the TPN has shown that so far not enough States have ratified the treaty for it to enter into force, and several non-nuclear States depend on the military support of nuclear-weapon States and have hence abstained from voting on the adoption of the Treaty.[99] In addition, the ICJ still stresses the importance of the *Lotus* principle in prohibiting weapons of mass destruction, although its position in international law can be questioned. With this in mind, the treaty in itself does not appear to be, at this moment, enough to stipulate a prohibition on the use and threat of nuclear weapons. However, the number of General Assembly resolutions, nuclear-weapon-free zone treaties as well as the NPT are evidence of a growing urgency to regulate nuclear weapons. The next chapter will examine the possible customary implications of the treaty by investigating the General Assembly resolutions and the treaties covering nuclear weapons and the possible effect on the prohibition of nuclear weapons, but first the TPN will be examined.

[97] Joyner, p. 90.

[98] Singh and McWhinney, p. 251-255.

[99] General Assembly, *United Nations conference to negotiate a legally binding instrument to prohibit nuclear weapons: Second session*, Item 9, A/CONF.229/2017/L.3/Rev.1.

3.3 The Treaty on the Prohibition of Nuclear Weapons

3.3.1 The work towards a ban

The Treaty on the Prohibition of Nuclear Weapons was adopted on 7 July 2017 by 122 nations. As the only weapon of mass destruction not subject to a categorical ban, it was designed to fill a considerable gap in international law. Behind the Treaty lay the idea that a prohibition of a specific weapon enables the progress towards the elimination of that weapon as such prohibitions in international treaties has contributed to the view of these weapons as illegitimate, consequently losing their political status.[100]

After a recommendation[101] by a UN open-ended working group on nuclear disarmament[102] the First Committee of the UN General Assembly adopted a resolution on 14 October 2016 to convene a UN conference "to negotiate a legally binding instrument to prohibit nuclear weapons, leading towards their total elimination".[103]

The TPN was adopted in July 2017 by 122 votes against 1. Interesting to note is that States voting against the UN resolution establishing the mandate for nations to negotiate the prohibition treaty, did not vote against the Treaty on

[100] ICAN: How the ban treaty works, <http://www.icanw.org/why-a-ban/the-case-for-a-ban-treaty/>, accessed 7 March 2018.

[101] UN General Assembly, *Report of the Open-ended Working Group to develop proposals to take forward multilateral nuclear disarmament negotiations for the achievement and maintenance of a world without nuclear weapons*, A/68/514.

[102] Acting pursuant to General Assembly resolution, *Taking forward multilateral nuclear disarmament negotiations*, A/RES/67/56; Established as a subsidiary organ to the UN General Assembly, convening in Geneva, pursuant to General Assembly resolution, *Taking forward multilateral nuclear disarmament negotiations*, A/RES/70/33.

[103] UN General Assembly, *Taking forward multilateral nuclear disarmament negotiations*, A/C.1/71/L.41, para. 8.

the Prohibition of Nuclear Weapons (except the Netherlands), but abstained from voting.[104] This due to either to being nuclear-weapon States or, most commonly, claiming themselves dependent on the military support of the United States.[105]

3.3.2 The treaty

The Treaty on the Prohibition of Nuclear Weapons prohibits the use of, or threat to use, nuclear weapons or other nuclear explosive devices.[106] It further prohibits States from developing, testing, producing, manufacturing, otherwise acquiring, possessing or stockpiling nuclear weapons or other nuclear explosive devices, as well as prohibiting the transfer of nuclear weapons or other nuclear explosive devices or the control over such weapons and the stationing of such weapons in its territory or any place under its jurisdictional control.[107] Also forbidden pursuant to the Treaty is the assistance, encouragement and inducement to engage in any activity prohibited under the Treaty by State Parties to anyone.[108]

Each State Party shall, not later than 30 days after the Treaty's entering into force for that State, submit a declaration to the Secretary-General of the UN in which it shall declare whether it owns, possesses, controls or have any nuclear weapons or other nuclear explosive devices in its territory or any place under its jurisdiction.[109]

---

[104] General Assembly, *United Nations conference to negotiate a legally binding instrument to prohibit nuclear weapons: Second session*, Item 9, A/CONF.229/2017/L.3/Rev.1.; ICAN: Positions on the Treaty, <http://www.icanw.org/why-a-ban/positions/>, accessed 7 March 2018.

[105] ICAN: Positions on the Treaty, <http://www.icanw.org/why-a-ban/positions/>, accessed 7 March 2018.

[106] Treaty on the Prohibition of Nuclear Weapons, art. 1.1.d.

[107] Treaty on the Prohibition of Nuclear Weapons, art. 1.1.a-c., g.

[108] Treaty on the Prohibition of Nuclear Weapons, art. 1.1.e-f.

[109] Treaty on the Prohibition of Nuclear Weapons, art..2.1.a-c.

States owning, possessing or controlling nuclear weapons or other nuclear explosive devices may be parties to the Treaty if they follow a legally binding time plan to remove and destroy them, as decided by State Parties at the first meeting, and conclude a safeguard agreement with the IAEA.[110] The same for States Parties with nuclear weapons or other nuclear explosive devices in its territory or under its jurisdiction.[111]

Moreover, each State Party shall provide assistance to individuals under its jurisdiction affected by the use or testing of nuclear weapons and take necessary and appropriate measures towards the environmental remediation of areas contaminated by the use or testing of nuclear weapons or other nuclear explosive devices.[112]

The TPN is therefore more far-reaching than the NPT which aim is to hinder the proliferation of nuclear weapons and therefore mainly lays down obligations on non-nuclear-weapon States, while the TPN contains obligations on both non-nuclear-weapon States and nuclear-weapon States equally. Furthermore, the TPN contains obligations for the protection of individuals and the environment, the protection of which does not exist in the NPT.

Finally, the TPN will enter into force 90 days after the fiftieth ratification and will be of unlimited duration.[113] As of now, 15 May 2018, 58 States have signed the Treaty and nine ratified it; Austria, Cuba, Guyana, Holy See,

[110] Treaty on the Prohibition of Nuclear Weapons, art. 4.2-3.

[111] Treaty on the Prohibition of Nuclear Weapons, art. 2.4.

[112] Treaty on the Prohibition of Nuclear Weapons, art. 6.1-2; Interesting to note here is the necessity for State Parties to provide assistance to individuals only affected by the use or testing of nuclear weapons and not also other nuclear explosive devices, as in the case of environmental remediation. This is however not of importance for the purpose of this essay and will not be investigated any further.

[113] Treaty on the Prohibition of Nuclear Weapons, art. 15.1 and art. 17.1.

Mexico, Palau, Palestine, Thailand, and Venezuela.[114] It is therefore clear that the Treaty has not entered into force yet and hence is not legally binding for the State Parties.[115] However, although the signatures to the Treaty has no effect on its legal binding, States having signed a treaty must refrain from acts defeating the object and purpose of the treaty until the State has made its decision clear about whether to become a party to the treaty or not.[116] Therefore, although the Treaty has not entered into force, it has some value in binding the States from acting against the purpose and object of the Treaty.

In the next sub-chapter, the possible legal effects of the Treaty will be discussed for the purpose of determining its effect on the current state of international law according to treaty law.

3.4 The law of treaties

3.4.1 Introduction

This chapter will focus on the question whether the TPN has given, or could give, rise to legal obligations that would change the answer of the Court as to the legality or illegality of nuclear weapons. If the TPN could, within the limits of treaty law, create a law prohibiting nuclear weapons binding even on States that have not ratified the Treaty, this would render the use of nuclear weapons illegal even when used in self-defence. It must therefore be investigated whether treaties can create such a law binding on all States, regardless of whether all States in the international community have ratified the treaty or not, and whether the TPN could be considered as such a law-making treaty.

---

[114] ICAN: Signature/ratification Status of the Treaty on the Prohibition of Nuclear Weapons, <http://www.icanw.org/status-of-the-treaty-on-the-prohibition-of-nuclear-weapons/>, accessed 8 March 2018.

[115] Vienna Convention on the Law of Treaties, 1155 UNTS 331, art. 14 and 24. (Hereafter VCLT.); Treaty on the Prohibition of Nuclear Weapons, art. 15.1.

[116] VCLT, art. 18.1.

3.4.2 Law-making treaties

Treaties have been described as the most important source of obligations and rules of international conduct in international law.[117] While treaties give rise to rights and obligations between the contracting parties, for the purpose of understanding the impact of the Treaty on the Prohibition of Nuclear Weapons, it is of importance to investigate whether treaties can create law, as opposed to merely obligations. It is in this context the discussion of so-called "law-making" treaties will be held.

Law-making treaties is an expression used for treaties which lay down general rules and are applicable to the international community generally, as opposed to ordinary treaties merely binding between the parties.[118] For a treaty to have a law-making effect, special attention need to be payed to the number of parties to the treaty, the general acceptance of the rules by States and sometimes the declaratory character of the provisions, i.e. the universal form of an obligation.[119] Examples of treaties of this kind are the Hague Regulations of 1899 and 1907, and the 1925 Geneva Protocol, all mentioned above. A more recent example is the United Nations Convention on the Law of the Sea (UNCLOS).[120] Below will be investigated whether the TPN can be viewed as a law-making treaty.

3.4.3 Can the TPN be seen as a law-making treaty?

One of the characteristics of law-making treaties, as explained above, is the large number of ratifications to these treaties. This is the first obvious hindrance for the TPN. The Treaty needs 50 ratifications to become binding, and so far, merely nine States have ratified it, as compared to UNCLOS which

[117] Crawford, p. 30; Jennings and Watts, p. 31.

[118] Jennings and Watts, p. 32; Crawford, p. 31; Clapham, p. 55-56.

[119] Crawford, p. 31.

[120] United Nations Convention on the Law of the Sea, 1833 UNTS 3. (Hereafter UNCLOS.)

has 168 ratifications.[121] The lack of ratifications could indicate that there is not a general acceptance among the States on a prohibition of nuclear weapons. However, not a sufficient amount of time has passed since the adoption of the Treaty to definitely be able to determine the general acceptance from the ratifications alone, since ratification of a treaty generally require some time. The lack of general acceptance of the rules of the treaty can further seen in the statements made in the adoption of the TPN however, as well as the large number of nuclear weapons possessed by the nuclear-weapon States and the policy of deterrence used by these same States which further contributes to undermine a general acceptance.

The condition of a declaratory character of the provisions is not a necessary one for a treaty to be considered to be law-making. The prohibitions in the TPN is directed to the State Parties,[122] and do therefore lack a universal character. However, while the articles of UNCLOS is universally addressed,[123] the Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field[124] (First Geneva Convention), generally considered to be law-making, is addressed solely to the High Contracting Parties.[125] One can therefore deduce that the non-declaratory character of the provisions in the treaty will not hinder the TPN from becoming a law-making treaty.

[121] Oceans & Law of the Sea, United Nations: Chronological lists of ratifications of, accessions and successions to the Convention and the related Agreements, <http://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm>, accessed 14 March 2018; United Nations Office for Disarmament Affairs: Treaty on the Prohibition of Nuclear Weapons, <http://disarmament.un.org/treaties/t/tpnw>, accessed 13 May 2018.

[122] See e.g. art. 1.

[123] See e.g. art. 2 and 3 UNCLOS.

[124] Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 UNTS 31. (Hereafter First Geneva Convention.)

[125] See e.g. art. 2 First Geneva Convention.

Although the lack of universally addressed provisions do not hinder the TPN from being a law-making treaty, the law-making treaties are still limited by ordinary treaty law. This means that the TPN, due to lack of 50 ratifications, cannot be binding[126] and the lack of general acceptance means that it cannot be seen as a law-making treaty. Should it be binding, Brierly still stresses that a law-making treaty cannot bind States that are not parties to the treaty.[127] The TPN would then only bind the parties of the Treaty, making the prohibition rather ineffective. However, should the treaty come to be seen as representing customary international law it will bind not only the parties to the treaty. If one believes that international law is based on state consent and that *opinio juris* is sufficient to create a customary rule, as Cheng proposes,[128] a general acceptance of the Treaty might be sufficient to lay down a law prohibiting nuclear weapons. Even unratified treaties might, in special cases, be considered as evidence of generally accepted rules.[129] In the *Continental Shelf (Libya/Malta)* case the ICJ took great notice of certain parts of UNCLOS, although it had not yet entered into force.[130] However, lack of general acceptance of the TPN would mean that no special notice should be taken of it at this time. Furthermore, the conventional way of establishing customary international law is still for the rules of the TPN to be accepted by *opinio juris* and State practice to become binding on States not parties to the treaty.[131] The lack of general acceptance of the rules in the TPN means that the Treaty would only be binding between the parties and therefore need the support of *opinio juris* and state practice to become binding on all States as a treaty evidence of international customary law or developing international

[126] Art. 24.1 VCLT and art. 15.1 Treaty on the Prohibition of Nuclear Weapons.

[127] Clapham, p. 56.

[128] See below, chapter 4.2.2.

[129] Crawford, p. 32; Jennings and Watts, p 33 note 12; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, ICJ Reports 1971, p. 16, para. 94. (Hereafter *South West Africa* case.)

[130] *Continental Shelf (Libya/Malta)* case, para. 26-34.

[131] *North Sea Continental Shelf*, ICJ Reports 1969 p. 3, para. 71 and 74. (Hereafter *North Sea Continental Shelf* cases.)

customary law. As a generally accepted Treaty, it would however inevitably help develop a customary rule. When States start viewing a treaty as generally accepted, they start acting accordingly and in turn develop a customary law as to the universal binding of the obligations in the Treaty. While the TPN is set out to be a law-making treaty, law-making treaties' actual effect differs little from a normal contractual treaty. As any treaty it is binding between the contracting parties and only binding on all States when an *opinio juris* evidenced in State practice has been established as to its binding on all States. The treaty has then helped develop a customary rule as to the law-making quality of the treaty and a customary rule will exist parallel to the treaty. However, it is dependent on a customary rule for the establishment of its own universal law-making.

Treaties as creating customary international law will be investigated in the following chapter as well as the *opinio juris* and state practice on the prohibition or authorisation of nuclear weapons for the purpose of investigating whether the TPN can change the answer of the Court in the Advisory Opinion. If proof can be found as to the support of the provisions of the TPN from *opinio juris* and State practice, the TPN might be binding on all States through customary international law, even though it might be binding as a possible law-making treaty.

3.4.4 Summary

Due to the unlikeliness that the nuclear-weapon States and States dependant on the military support of the US will sign the treaty, the TPN need to develop a law-making character to have any effect. Although there is no formal hindrance to the TPN becoming a law-making treaty, the current lack of ratifications and lack of general acceptance of the treaty, hinders it from, in a close future, developing into a law-making treaty. However, one should keep in mind that not a year has gone since the treaty opened to ratification and we might see an increase in ratifications after political considerations have been done. Due to the lack of ratifications the Treaty is, at this time however, not

legally binding according to treaty law. Simultaneously, the step-by-step approach that could be seen in the illegality of other weapons of mass destruction has so far not resulted in a ban on nuclear weapons. Therefore, the next chapter will discuss the effect of the treaty on customary law and its effect on the prohibition of nuclear weapons according to customary international law.

4 International customary law

4.1 Custom as a part of international law

This chapter will discuss treaties as a way of creating customary international law. Since the TPN has not reached its necessary number of ratifications to become binding, this chapter will discuss the possibility that the TPN affects customary law, creating a rule prohibiting nuclear weapons. Hence, the chapter will focus on the customary international law on the area, with special attention to UN resolutions and the policy of deterrence and the basics for treaties as codifying or creating customary international law. If the TPN can be said to develop an international customary rule prohibiting nuclear weapons, it would affect the answer of the Court and generate an absolute prohibition on nuclear weapons.

Article 38(1)(b) of the ICJ Statute recognises international custom as a part of international law, when the general practice in question is accepted as law. Hence, not every usage can be viewed as custom, but for a usage to have the character of an international custom, the general practice needs to be viewed by the States as law. To examine the existing custom on the area one has to investigate the behaviour of States in their dealings with other States and try to determine the reason for their behaviour, i.e. whether the State acts in a certain way due to an imagined obligation to do so or if the behaviour is not a conscious recognition of a customary rule,[132] since, as explained by the ICJ in the *Continental shelf (Libya/Malta)* case, it is not only the actual practice of States but also the *opinio juris* of States that determine the content of customary law.[133]

[132] Clapham, p. 57; Villiger, p. 4.

[133] *Continental Shelf (Libya/Malta)* case, para. 27.

The principles of customary international law will be further investigated with the practice and *opinio juris* of States on the area of nuclear weapons in the following sub-chapter.

4.2 Customary international law on the area of nuclear weapons

When determining the content of customary international law, the International Law Commission (ILC) listed a non-exhaustive list of various materials in which "Evidence of Customary International Law"[134] could be found. These materials include, but are not limited to, treaties, decisions of both national and international courts, national legislation, diplomatic correspondence, opinions of national legal advisers and finally the practice of international organisations.[135] Not included in the list by the ILC are statements by States, argued by Villiger and Akehurst to be a possible source of State practice.[136] The ICJ have recognised the validity of verbal acts of States when determining the customary law on a certain area. In the *Fisheries Jurisdiction* case[137] for example, the ICJ referred to conference debates as the basis of State practice from which the customary law on the fishery zone and the "preferential rights of fishing in adjacent waters" for the coastal State evolved[138] and in the *Asylum* case[139] the ICJ took equal notice of the "official views" of States on the one hand and the "exercise of diplomatic asylum" on

[134] Yearbook of the International Law Commission, vol. II, 1950, *Report of the International Law Commission to the General Assembly*, document A/1316, p. 368. Sub-heading.

[135] Yearbook of the International Law Commission, vol. II, 1950, *Report of the International Law Commission to the General Assembly*, document A/1316, p. 368-372.

[136] Villiger, p. 6-8; Akehurst, p. 1-8.

[137] *Fisheries Jurisdiction (United Kingdom v. Zeeland)*, Merits, Judgment, ICJ Reports 1974, p. 3. (Hereafter *Fisheries Jurisdiction* case.)

[138] *Fisheries Jurisdiction* case, para. 52.

[139] *Colombian-Peruvian asylum case*, Judgment of November 20th 1950, ICJ Reports 1950, p. 266.

the other when determining whether the usage was constant and uniform.[140] Furthermore, the ICJ in the *Nuclear Tests* case[141] recognised unilateral acts of declarations, concerning legal situations, as having an effect on legal obligations and their creation. Crucial is the State's intent to be bound, but no strict requirement on form exists.[142]

Verbal acts of States can easily be identified and catalogued within international organisation such as the UN. Judge Ammoun in his Separate Opinion in the *Barcelona Traction* case[143] claimed that positions and votes taken by the States in international organisations, such as the UN, and in conferences form a natural part of custom and contribute to its development.[144] The next sub-chapter will therefore be focused on the UN resolutions leading up to the TPN.

4.2.1 Resolutions

Scholars have argued for the inclusion of General Assembly resolutions when validating a customary rule.[145] On the area of lawfulness or unlawfulness of nuclear weapons, several General Assembly resolutions and Security Council resolutions have been adopted. These will be presented below, while their relevance and importance for the identification of customary international law will be analysed in the next sub-chapter for the purpose of answering the question of the TPN's effect on the customary rules on the area.

---

[140] *Colombian-Peruvian asylum case*, Judgment of November 20th 1950, ICJ Reports 1950, p. 266, p. 277.

[141] *Nuclear Tests (Australia v. France)*, Judgment, ICJ Reports 1974, p. 253. (Hereafter *Nuclear tests* case.)

[142] *Nuclear tests* case, p. 267-268.

[143] *Barcelona Traction, Light and Power Company, Limited*, Judgement, ICJ Reports 1970, p. 3. (Hereafter *Barcelona Traction* case.)

[144] *Barcelona Traction* case, Separate Opinion of Judge Ammoun, p. 302-303.

[145] See e.g. Villiger, p. 142-145; Sloan p. 71-73; DJ Harris, p. 58.

In the Advisory Opinion, the ICJ concluded that the number of negative votes and abstentions to the resolutions hindered the existence of an *opinio juris* on the unlawfulness of the use of nuclear weapons.[146] However, here the analysis will also be focused on the continued and gradual development and the consistency of the content of the resolutions, and for this purpose a few have been chosen.

The first resolution to be mentioned is the General Assembly resolution 1653. In 1961 the General Assembly adopted resolution 1653 declaring the use of nuclear weapons to be a direct violation of the UN Charter and contrary to international law and international humanitarian law.[147] The total voting membership was 103 States, of whom 55 voted Yes, 20 No, 26 abstained and 2 did not vote.[148]

A few years later in 1978, the General Assembly adopted resolution A/RES/33/71[B] on the "Non-use of Nuclear Weapons and Prevention of Nuclear War" with 103 States voting Yes, 18 States voting No, 18 States abstaining and 11 States not voting.[149] The resolution declared the prohibition of nuclear weapons due to the fact that they would be a violation of the UN Charter and that their use would constitute a crime against humanity.

---

[146] Advisory Opinion, para. 71.

[147] UN General Assembly resolution, *Declaration on the prohibition of the use of nuclear and thermos-nuclear weapons*, A/RES/1653, para. 1.

[148] United Nations Bibliographic Information System, Voting record search: A/RES/1653, <http://unbisnet.un.org:8080/ipac20/ipac.jsp?profile=voting&index=.VM&term=ares1653> , accessed 23 March 2018.

[149] United Nations Bibliographic Information System, Voting record search: A/RES/33/71[B], <http://unbisnet.un.org:8080/ipac20/ipac.jsp?session=15A818H012572.73957&profile=voting&uri=full=3100023~!875356~!10&ri=1&aspect=power&menu=search&source=~!horizon>, accessed 23 March 2018.

In 1980 the General Assembly once more adopted a resolution on the "Non-use of Nuclear Weapons and Prevention of Nuclear War" with 112 States voting Yes out of a total voting membership of 154 States.[150]

Continuing, in December 2017, the General Assembly adopted, with 123 supporting votes out of a total of 193, a resolution restating its request to the Conference on Disarmament to start negotiations "on an international convention prohibiting the use or threat of use of nuclear weapons under any circumstances".[151]

Finally, at the same time the General Assembly adopted resolutions declaring nuclear weapons a violation of the UN Charter, the Security Council adopted two resolutions giving security assurances to non-nuclear-weapon States. With the NPT in mind, a treaty mainly laying down obligations for the non-nuclear-weapon States, the Security Council adopted two resolutions upon the request of some non-nuclear-weapon States; one in 1968 on "measures to safeguard non-nuclear-weapon States parties to the Treaty on the Non-Proliferation of Nuclear Weapons"[152] and one in 1995 on "security assurances against the use of nuclear weapon to non-nuclear-weapon States that are

---

[150] UN General Assembly resolution, *Non-use of nuclear weapons and prevention of nuclear war*, A/RES/35/152D; United Nations Bibliographic Information System, Voting record search: A/RES/35/152D, <http://unbisnet.un.org:8080/ipac20/ipac.jsp?session=15A818H012572.73957&profile=voting&uri=full=3100023~!866162~!7&ri=5&aspect=power&menu=search&source=~!horizon>, accessed 23 March 2018.

[151] General Assembly resolution, *Convention on the Prohibition of the Use of Nuclear Weapons*, A/RES/72/59; United Nations Bibliographic Information System, Voting record search: A/RES/72/59, <http://unbisnet.un.org:8080/ipac20/ipac.jsp?session=15A818H012572.73957&profile=voting&uri=full=3100023~!1153235~!0&ri=3&aspect=power&menu=search&source=~!horizon>, accessed 23 March 2018.

[152] Security Council resolution, *Question relating to measures to safeguard non-nuclear-weapon States parties to the Treaty on the Non-Proliferation of Nuclear Weapons*, S/RES/255.

Parties to the Treaty on the Non-Proliferation of Nuclear Weapons"[153] with 10 respectively 15 votes Yes.[154]

Conclusively, one can see a pattern of a consistent adoption of General Assembly resolutions on the non-use of nuclear weapons and disarmament, while the Security Council in two resolutions have given security assurances, by way of nuclear weapons, against non-nuclear weapon States. The relevance of these will be discussed below.

4.2.2 Statements and resolutions as a way of creating law

General Assembly resolutions are generally accepted as evidence of a custom already created by traditional state practice. However, it has been suggested that General Assembly resolutions may also serve as a "collective" state practice and contribute to the creation of a customary rule.[155]

For the formation of a customary rule, general State practice is required. It is not necessary for the practice to be universal, however it must be extensive and representative, any remaining inconsistent practice must be minimal and without any immediate legal effect.[156] In this case the resolutions above show

[153] Security Council resolution, *Question relating to measures to safeguard non-nuclear-weapon States that are Parties to the Treaty on the Non-Proliferation of Nuclear Weapons*, S/RES/984.

[154] United Nations Bibliographic Information System, Voting record search: S/RES/255, <http://unbisnet.un.org:8080/ipac20/ipac.jsp?session=B51I169C87903.61748&menu=search&aspect=power&npp=50&ipp=20&spp=20&profile=voting&ri=1&source=~%21horizon&index=.VM&term=sres255&x=0&y=0&aspect=power>, accessed 23 March 2018; United Nations Bibliographic Information System, Voting record search: S/RES/984, <http://unbisnet.un.org:8080/ipac20/ipac.jsp?session=B51I169C87903.61748&menu=search&aspect=power&npp=50&ipp=20&spp=20&profile=voting&ri=2&source=~%21horizon&index=.VM&term=sres984&x=0&y=0&aspect=power>, accessed 23 March 2018.

[155] DJ Harris, p. 58; Sloan, p. 71-73.

[156] Villiger, p. 13.

an adoption of the General Assembly resolutions with a large majority of States voting Yes. However, with a not irrelevant number of negative votes and abstentions.[157] Additionally, there is an adoption of two Security Council resolutions promising security assurances to non-nuclear-weapon States from nuclear-weapon States. The relevance of which can be questioned on two grounds, the fact that they were adopted by the nuclear-weapon States, who would never question the legality of their own actions, and the fact that they could be adopted mainly on political reasons, which are not of great importance when determining the existence of a customary rule which will be evidenced below. Against the great number of States voting for the adoption of the General Assembly resolutions need also be discussed the policy of deterrence. This discussion will take place in the following sub-chapter.

In addition to the requisite of a general practice, a usage must be uniform and consistent over time.[158] However, the requirement for duration is relative. While a certain stability in the usage is enabled over time, the more States that adhere to a usage and the greater conformity, the less time is required for a custom to form.[159] In the *North Sea Continental Shelf* cases the ICJ considered whether a custom was formed after only 11 years.[160] In this context, it is argued that the UN have accelerated the development of customary rules and made possible the formation of "instant international law".[161] The US delegate Mr Meeker argued in 1963 that the General Assembly had an important role in the development of outer space law, a new legal regime established in a series of resolutions in the 1960s, and put great importance into a unanimously adopted General Assembly resolution:

[157] There was between 20 to 50 negative votes on the General Assembly resolutions above.

[158] *North Sea Continental Shelf* cases, para. 74.

[159] Villiger, p 23.

[160] *North Sea Continental Shelf* cases, para. 73-74.

[161] Villiger, p 25; Cheng used the expression "instant international customary law" when examining how General Assembly resolutions had formed international space law in the early 1960s, see Cheng, p. 125-149.

> "*A General Assembly resolution would be the most appropriate instrument for a declaration of general principles. Some delegations had argued that only an international agreement signed by Governments would be legally binding. International agreements were not, however, the only sources of law. […] When a General Assembly resolution proclaimed principles of international law […] and was adopted unanimously, it represented the law as generally accepted in the international community*"[162] [italics added].

However, is an instant creation of international law possible through General Assembly resolutions? Cheng argues that art 38(1)(b) of the ICJ Statute would have been more correct had it been formulated in the terms of "international custom as evidenced by a general practice accepted as law", instead of "international custom, as evidence of a general practice accepted as law", for the opposite is not correct, customary rules are not the evidence of general practice.[163] Consequently, he argues the usage in customary law to be merely evidentiary and unnecessary should the *opinio juris* be undoubtedly established. Due to the sovereignty of States and the fact that, he claims, international law rests upon the consent and recognition of States, there is no need to investigate duration and general practice should there be a general *opinio juris* among the States. As their own law-makers, a general *opinio juris* of States is the only necessary requirement to establish a rule of general international law.[164] The binding force of the principles do therefore not originate from the resolutions themselves, but from the recognition of Member States as being part of international law. Identifying the underlying *opinio juris* of the Member States, the resolutions can be said to have a "law-finding" character. For a resolution to have this "law-finding" character the

[162] General Assembly, Committee on the peaceful uses of outer space, *Consideration of legal problems arising from the exploration and use of outer space*, A/AC.105/C.2/SR.20, p. 10-11.

[163] Cheng, p. 138.

[164] Cheng, p. 138-139.

required *opinio communis juris* must have existed among the Member States that the resolution they were adopting contained binding legal rules and the wording must clearly identify the content of the binding rules as well as state the *opinio communis juris*.[165]

Interestingly to note, when discussing resolutions as having a "law-finding" character, is the fact that the ICJ, when defining the customary rule prohibiting use of force in the *Nicaragua* case, relied exclusively on *opinio juris* and on General Assembly resolutions to prove the necessary customary rule.[166] However, as noted by DJ Harris, it did not go as far as claiming the General Assembly resolutions to also be the source of general practice when determining customary international law, as advocated by Sloan.[167]

In the case of nuclear weapons, the General Assembly has over several years adopted resolutions on the non-use of nuclear weapons and for the prevention of nuclear war. The resolutions have had a large number of voting States, a clear majority of which have voted for the adoption of the resolutions, however with a not insignificant number of negative votes. The largest number of negative votes have been for the resolutions aiming to create a convention on the prohibition of nuclear weapons.[168] Whereas the large number of States participating in the voting on the resolutions is necessary to establish a general practice, the abstentions and negative votes might be too many to qualify the resolutions as general practice. Although a universal practice is not necessary for the creation of a customary rule, the practice need be extensive and representative, and, as stated above, the conflicting practice minimal. Not only are there around 20-50 negative votes to the General Assembly resolutions, there is an additional 10-26 abstentions to each

[165] Cheng, p. 139-141.

[166] *Nicaragua* case, para. 188-192.

[167] Sloan, p. 71-73; DJ Harris, p. 59.

[168] General Assembly resolution, *Convention on the Prohibition of the Use of Nuclear Weapons*, A/RES/72/59; UN General Assembly resolution, *Declaration on the prohibition of the use of nuclear and thermos-nuclear weapons*, A/RES/1653.

resolution. These abstentions may be part of general practice if the State have not explicitly or impliedly revealed its dissatisfaction with the emerging rule over a substantial period of time and in circumstances where other State could have expected it to do so. The number of States that can be silent depend mainly on the time passed and the amount of inconsistent practice.[169] The time passed from resolution 1653 to the TPN is over 50 years, during which the Cold War has been a major factor in the question of the legality of nuclear weapons. It is not unreasonable to presume that these abstentions are based mainly on political reasons, which are irrelevant when identifying the existing law. The TPN vote did indeed disclose that a majority of States not participating in the vote admitted relying on the military support of the US.[170] However, the abstentions to the resolutions are in themselves a legal act, relevant when concluding the lack of unanimously adopted resolutions or abstentions from the vote on the TPN. The problem with qualifying statements as State practice is that it might be very difficult to differentiate between statements giving expression of a political opinion and statements qualifying as law.[171] While the abstentions might be due to political reasons, an abstention to a treaty is still a legal act and although the policy of deterrence might be a policy based on political and military considerations, it is still valid as a legal act when determining the State practice on the area. Though there might be a large number of States advocating a prohibition or a non-use of nuclear weapons, as seen in the resolutions, the political considerations behind, and the reliance on, the practice of deterrence hinders the resolution from getting a unanimous vote or developing what can be defined as a general practice. Because in international law, every legal act of a State originates from a political will.

[169] Villiger, p. 18-20.

[170] See above under chapter 3.3.1.

[171] See here also Villiger, p. 6, stating that political comments are not immediately relevant for a customary rule.

4.2.2.1 Statements and resolutions as evidence of *opinio juris*

The resolutions can hence not be said to express a general practice. However, they might be evidence of an *opinio juris*. Sloan argued the possibility that the only requirement necessary to create customary law was the *opinio juris* of States.[172] This line of approach would certainly benefit "newly" independent States, while a more traditional approach to State practice and customary law would seem to benefit "Western" States, since state practice and *opinio juris* rely heavily on traditional documents and practice of "Western" States.[173] In the nuclear weapon case, an approach were *opinio juris* could be the sole basis of customary international law would be to the benefit of the non-"Western" States as the States advocating for the illegality of nuclear weapons and having signed the TPN are mostly South American or African States, however not exclusively.

The resolutions show a clear gradual development of the *opinio juris* of States on the legality or illegality of nuclear weapons. While the resolutions have continuously been adopted with a great majority, the abstentions and negative votes have always been present. However, the resolutions calling for a convention on the prohibition of nuclear weapons and *opinio juris* have finally developed into a treaty prohibiting nuclear weapons, the TPN. A total of 135 nations participated in the negotiation of the treaty, 122 nations, almost two-thirds of the UN Membership[174], voted in favour of adopting it, with only one nation (the Netherlands) voting against it and one abstaining (Singapore).[175]

For a resolution to be law-finding however, the *opinio communis juris* of the States must be that the resolution in question contains binding legal rules and

---

[172] Sloan, p. 75.

[173] Villiger, p. 7.

[174] ICAN: Positions on the Treaty, <http://www.icanw.org/why-a-ban/positions/>, accessed, 27 March 2018.

[175] General Assembly, *United Nations conference to negotiate a legally binding instrument to prohibit nuclear weapons: Second session*, Item 9, A/CONF.229/2017/L.3/Rev.1.

the content of the binding rules as well as the *opinio communis juris* must be clearly identified. The ICJ in the Advisory Opinion found the resolutions, starting with resolution 1653, to fall short of establishing an *opinio juris* due to the large number of negative votes and abstentions.[176] The resolution therefore fails to clearly identify the *opinio communis juris* of the States and the *opinio juris* of States that the resolution contains legally binding rules as there is nothing in the resolutions that support the belief that the States thought the resolutions to be anything but ordinary General Assembly resolution, which are generally not legally binding, as stated above. However, the call for a conclusion of a convention on the prohibition of nuclear weapons by the General Assembly each year, showed a desire by the community to take a step towards complete nuclear disarmament, according to the ICJ,[177] which can further be said to be envisioned through the adoption of the TPN. The resolutions can therefore be said to be evidence more of *lex ferenda* than *lex lata* at the time of their adoption.

In relation to their law-finding character it is also of importance to note that resolutions' identification of nuclear weapons as illegal due to the UN Charter is insufficiently clear and fails to clearly identify the content of the binding rules as well as the *opinio communis juris*. The General Assembly resolutions can therefore not be said to have a law-finding character and do not suffice of themselves as customary law on the area. However, the overwhelming number of States participating in the negation of the TPN and the number of States adopting it shows, accompanied by the yearly adoption of the General Assembly resolutions on nuclear weapons, that there is a very strong emerging *opinio juris* as to the prohibition of nuclear weapons. This however, cannot stand on its own as the legal basis for a prohibition, but must be accompanied by State practice, which is still the conventional way of defining customary law.[178] The practice of States must therefore be investigated in

[176] Advisory Opinion, para. 71.

[177] Advisory Opinion, para. 71-73.

[178] *Nicaragua* case, para. 184; art. 38(1)(b) ICJ Statute.

relation to the *opinio juris* to determine whether the *opinio juris* has support in State practice.

In the next section, the practice of States and particularly the policy of deterrence will be examined to determine whether there exists a customary rule on the prohibition of nuclear weapons.

4.2.3 Policy of deterrence

The policy of deterrence played a central role during the Cold War, and to a certain extent still today. The traditional definition of deterrence is the use of military retaliation threats to prevent an opponent from using military force with the purpose of gaining foreign policy aims.[179] During the Cold War nuclear weapons were used as a way of hindering the opposing State from attacking the own State by threatening to inflict insufferable injury to the opposing government and society. Deterrence had a retributive definition where threat to the government and society of the opponent was used as a punishment regardless of whether the forces of that State triumphed in battle or not.[180]

At the end of, and in the years following the end of the Cold War, Russia and the US entered into bilateral arms control treaties to reduce the number of strategic warheads and missiles possessed by the States.[181] While the non-proliferation of the nuclear-weapon States have proceeded to some extent, the States are not following their agreements set up pursuant to the obligations of the NPT and a continuous modernisation of nuclear weapons is proceeding.[182]

---

[179] Allan, p 204.

[180] Allan, p. 205.

[181] See e.g. the 1991 Strategic Arms Reduction Treaty (START), S. Treaty Doc. No. 102-20, renewed in 2010; the 1987 Intermediate-Range Nuclear Forces Treaty, 1657 UNTS 485; the 2002 Strategic Offensive Reductions Treaty, S. Treaty Doc. No. 107-8.

[182] ICAN: Nuclear Arsenals, <http://www.icanw.org/the-facts/nuclear-arsenals/>, accessed 29 March 2018; Nuclear Threat Initiative: Treaty on the Non-Proliferation of Nuclear

Additionally, the policy of the nuclear-weapon States has changed little. Trump in the 2018 Nuclear Posture Review (NPR) expressed the opinion that nuclear weapons are essential for the purpose of deterring both nuclear and non-nuclear aggression.[183] However, should deterrence fail, the US "would only consider the employment of nuclear weapons in extreme circumstances to defend the vital interests of the United States, its allies, and partners".[184] Hence, the US policy for nuclear weapons use is in extreme cases of self-defence, in accordance with the Advisory Opinion. However, it does not definitely rule out a first-strike possibility or the prospect that nuclear weapons might be used in self-defence against non-nuclear attacks. Adding to this uncertainty is the tension between the United States' president Trump and the Democratic People's Republic of Korea's supreme leader Kim Jong-un during the last year.[185]

In the 2010 Military Doctrine of Russia the role of nuclear weapons was somewhat reduced in Russia's national security policy. While still being viewed as an important factor in deterring nuclear and non-nuclear conflicts, the criteria for deploying nuclear weapons has changed and become slightly stricter. In the 2000 Doctrine, nuclear weapons could be used in situations critical for the Russian national security. However, in the 2010 Doctrine,

---

Weapons (NPT), <http://www.nti.org/learn/treaties-and-regimes/treaty-on-the-non-proliferation-of-nuclear-weapons/>, accessed 19 May 2018.

[183] United States of America Office of the Secretary of Defence, *Nuclear Posture Review,* Executive Summary, February 2018, p. 2. (Hereafter Nuclear Posture Review February 2018.)

[184] Nuclear Posture Review February 2018, p. 4.

[185] Eli Watkins, 'Trump taunts North Korea: My nuclear button is 'much bigger,' 'more powerful'', CNN, <https://edition.cnn.com/2018/01/02/politics/donald-trump-north-korea-nuclear/index.html>, (3 January 2018) , accessed 29 March 2018.

nuclear weapons may be used only in cases where the mere existence of Russia is endangered.[186]

The military policies of the two States having the most nuclear weapons clearly illustrates the fact that the policy of deterrence is still an active part of defence strategy today. A practice that needs to be taken into account when examining the customary law on nuclear weapons.

4.2.4 Treaties on nuclear weapons

The practice of States can also be found in treaties.[187] Treaties establishing nuclear-weapon-free zones, the Comprehensive Nuclear-Test-Ban Treaty[188] (CTBT) and the Non-Proliferation Treaty are some of the most important treaties covering nuclear weapons.

The treaties establishing nuclear-weapon-free zones consist of the Treaty of Tlatelolco prohibiting nuclear weapons in Latin America, the Treaty of Rarotonga covering the South Pacific, the Treaty of Bangkok[189] covering Southeast Asia, the Treaty of Pelindaba[190] covering Africa and the Treaty on a Nuclear-Weapon-Free Zone in Central Asia[191]. During the negotiations of a nuclear-weapon-free zone treaty nuclear-weapon States should be consulted

---

[186] Nikolai Sokov, 'The New Russian Military Doctrine: The Nuclear Angle', <https://www.nonproliferation.org/new-2010-russian-military-doctrine/>, (5 February 2010), accessed 29 March 2018.

[187] Signature and acceptance of a convention are widely held as being important for the formation of customary law, Villiger, p. 10-11.

[188] Comprehensive Nuclear-Test-Ban Treaty, UN Doc. A/50/1027, 35 ILM 1439. (Hereafter Comprehensive Nuclear-Test-Ban Treaty.)

[189] Treaty on the Southeast Asia Nuclear Weapon-Free Zone, 35 ILM 635. (Hereafter Treaty of Bangkok.)

[190] African Nuclear-Weapon-Free Zone Treaty (Pelindaba Treaty), 35 ILM 698. (Hereafter Treaty of Pelindaba.)

[191] Treaty on a Nuclear-Weapon-Free Zone in Central Asia, *The United Nations Disarmament Yearbook*, vol. 31, 2006, Appendix II, p. 323. (Hereafter Treaty on a Nuclear-Weapon-Free Zone in Central Asia.)

so as to enable their signature and ratification.[192] As presented above, nuclear-weapon States have ratified the treaties but made certain reservations as to the use of nuclear weapons in self-defence,[193] which was used by nuclear-weapon States in the Advisory Opinion as a proof of inconsistent practice and support for the legality of nuclear weapons as these reservations were made without the objection of the other parties, something also noted by the ICJ.[194] The fact that the treaties were established, also spoke of a lack of prohibition on nuclear weapons in the first place, it was argued by the nuclear-weapon States, as the treaties would not have to be signed otherwise.[195]

Following the 1963 Treaty Banning Nuclear Weapon Tests in Atmosphere, in Outer Space and under Water[196], the CTBT seeks to achieve a complete ban on the testing of nuclear weapons for all time.[197] Pursuant to article 1(1) of the CTBT, each State Party shall not "carry out any nuclear weapon test explosion or any other nuclear explosion" and shall prohibit and prevent these explosions "at any place under its jurisdiction or control". The Treaty will enter into force 180 days after all the States formally participating in the work of the 1996 session of the Conference on Disarmament and which appear in the IAEA's 1995 and 1996 edition of "Nuclear Power Reactors in the World" have ratified it.[198] So far, China, Democratic People's Republic of Korea,

---

[192] UN General Assembly, *Report of the Disarmament Commission*, Supplement No. 42 A/54/42, p. 8.

[193] Reservations have been made to the protocols of the Treaty of Tlatelolco, the Treaty of Rarotonga, the Treaty of Pelindaba and the Treaty on a Nuclear-Weapon-Free Zone in Central Asia. However, no nuclear-weapon State has ratified or signed the protocol of the Treaty of Bangkok. Status of the ratifications and reservations to the treaties can be found at United Nations Office for Disarmament Affairs: Disarmament Treaties Database, <http://disarmament.un.org/treaties/>.

[194] Advisory Opinion, para. 62 and 96.

[195] Advisory Opinion, para. 61.

[196] Treaty Banning Nuclear Weapon Tests in Atmosphere, in Outer Space and under Water, 48 UNTS 43.

[197] Comprehensive Nuclear-Test-Ban Treaty, preamble.

[198] Comprehensive Nuclear-Test-Ban Treaty, art XIV and Annex 2 to the Treaty.

Egypt, India, Iran, Israel, Pakistan and the United States of America have not ratified the Treaty out of the required Article XIV States.[199]

As the only binding commitment in a multilateral treaty aimed at disarmament for the nuclear-weapon States, the Treaty on the Non-Proliferation of Nuclear Weapons is a landmark treaty.[200] Article VI stipulates that each of the Parties must pursue negotiation in good faith for the cessation of the nuclear arms race while the State Parties are further prohibited according to art I and II of the Treaty from transferring or receiving a transfer of nuclear weapons or other nuclear explosive devices, manufacturing or otherwise acquiring such weapons. In 1995 it was decided in the NPT Review and Extension Conference that the Treaty should continue in force indefinitely.[201] The Treaty has had varying success, in 2003 the Democratic People's Republic of Korea withdrew from the Treaty,[202] whereas Pakistan, India, Israel have not yet signed the Treaty.[203] In the 2015 Review Conference the Parties failed to agree on the draft Final Document, resulting in a setback for the review process to assure the accountability of the States.[204]

---

[199] United Nations Office for Disarmament Affairs: Comprehensive Nuclear-Test-Ban Treaty, <https://www.un.org/disarmament/wmd/nuclear/ctbt/>, accessed 30 March 2018.

[200] United Nations Office for Disarmament Affairs: Treaty on the Non-Proliferation of Nuclear Weapons, <https://www.un.org/disarmament/wmd/nuclear/npt/>, accessed 30 March 2018.

[201] The Review and Extension Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, Decision 3. Can be accessed at <https://unoda-web.s3-accelerate.amazonaws.com/wp-content/uploads/assets/WMD/Nuclear/1995-NPT/pdf/1995-NY-NPTReviewConference-FinalDocumentDecision_3.pdf>, accessed 30 March 2018.

[202] United Nations Office for Disarmament Affairs: Democratic People's Republic of Korea: Accession to Treaty on the Non-Proliferation of Nuclear Weapons (NPT), <http://disarmament.un.org/treaties/a/npt/democraticpeoplesrepublicofkorea/acc/moscow>, accessed 30 March 2018.

[203] United Nations Office for Disarmament Affairs: Treaty on the Non-Proliferation of Nuclear Weapons, <http://disarmament.un.org/treaties/t/npt>, accessed 30 March 2018.

[204] United Nations: 2015 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons (NPT), <http://www.un.org/en/conf/npt/2015/>, accessed 30 March 2018; United Nations Office for Disarmament Affairs: Treaty on the Non-

Conclusively, the treaties covering nuclear weapons range from nuclear-weapon-free-zones and test ban treaties to the Non-Proliferation Treaty. No universal treaty ban has prior to the TPN existed and the treaties covering nuclear weapons so far have had various forms of success, with reservations, lack of ratifications and non-fulfilment. Nevertheless, the treaties recognise the threat of nuclear weapons and illustrate a willingness to regulate their existence, even though the practice is not uniform.

4.2.5 Uniform practice

Not every usage of States or position taken over a considerable period of time is relevant when determining the practice of States and customary law. As said above, usage must be accompanied by the idea of a legal obligation. The ICJ in the *North Sea Continental Shelf* cases stressed that there are many acts in the international community which are merely motivated by politeness, convenience and tradition, performed without any consciousness of legal obligation.[205] The fact brought up by nuclear-weapon States in the Advisory Opinion, that the lack of objections to the reservations to the nuclear-weapon-free zones treaties, can be explained by the fact that the State Parties, for political reasons, would rather have the nuclear-weapon States sign the treaty with a reservation, than not at all. The Security Council resolutions on the security assurances to non-nuclear-weapon States can equally be explained by political reasons. After the NPT, which mostly lays down obligations for non-nuclear-weapon States, it was clear that these States needed security assurances if the nuclear-weapon States were not to fulfil their obligation to enter into negotiations of disarmament, a very weak obligation compared to the obligation on the non-nuclear-weapon States not to transfer, manufacture or otherwise acquire nuclear weapons. Equally it is not surprising that the reservations to the nuclear-weapon-free zone treaties did not result in an

Proliferation of Nuclear Weapons, <https://www.un.org/disarmament/wmd/nuclear/npt/>, accessed 30 March 2018.

[205] *North Sea Continental Shelf* cases, para. 77.

objection of the Security Council, as the permanent Members of the Security Council all have nuclear weapons and were the ones to make the reservations in the first place. However, while politics is not relevant for the identification of law, the resolutions and reservations are relevant for determining the existence of a uniform practice and international legal acts are commonly motivated by political considerations. Therefore, one cannot ignore the Security Council resolutions and the lack of reaction to the reservations to the nuclear-weapon-free zone treaties.

Consequently, there are several treaties prohibiting the use of nuclear weapons in nuclear-weapon-free zones, the manufacturing and acquisition of nuclear weapons, as well as disarmament. However, there is also some evidence of an opposing practice in the Security Council resolutions and the policy of deterrence. As said above, a practice needs to be general and constant. However, the State practice need not be in exact conformity with the rule it is meant to establish.[206] Due to change of facts and circumstances during a long period of time, too much attention need not be paid to a scarce number of inconsistencies or uncertainties in the practice examined.[207] However, the existing practice that concerns the legality or illegality of nuclear weapons is not sufficiently clear to disregard any inconsistencies. No uniform practice can be established as to either the legality or the illegality of nuclear weapons. The existing treaties on nuclear weapons are not all in force and those that are, are lined with reservations or insufficiently manage to ensure the accountability of the States, while the General Assembly resolutions fail to produce unanimously adopted principles and the policy of deterrence still plays a central role in the self-defence considerations by several States, including non-nuclear-weapon ones.

How should one then judge the lack of resort to nuclear weapons since the end of the Second World War? Qualified passive behaviour might, as a part

[206] *Nicaragua* case, p. 98.

[207] *Fisheries case*, Judgement of December 18th, 1951, ICJ Reports 1951, p.116, p. 138.

of general practice, help form a customary rule.[208] However, for a passive behaviour to be considered a part of an emerging customary rule, the State must not have revealed its opinion explicitly or impliedly over a substantial period of time where it could have been expected by other States to do so. The number of States that may be silent on the matter depends mainly on the time passed and the extent of inconsistent practice concerning the emerging rule.[209] While no nuclear weapons have been used since the end of the Second World War, nuclear-weapon States have consistently opposed any emerging principle unconditionally prohibiting the use of nuclear weapons. In the Advisory Opinion they clearly voiced arguments for the legality of nuclear weapons as long as they fulfil the obligations under international humanitarian law and the survival of the State is at stake.[210] Furthermore, the reservations made to the nuclear-free-zone treaties as well as the voting on the General Assembly resolutions also serve to clarify the opinion of some of the nuclear-weapon States. These statements by the nuclear-weapon States operates as a clarification of their opinion on the legality or illegality of nuclear weapons, thereby effectively disqualifying the lack of resort to nuclear weapons as a qualified passive conduct accompanying the State practice that supports the illegality of nuclear weapons.

On another account, when evaluating the practice of States, scholars and courts have argued that special attention need be paid to specially affected States.[211] With this in mind, Villiger stated that special attention should be paid to the practice of the nuclear-weapon States and States with the technology to develop nuclear weapons.[212] As the only States in the possession of nuclear weapons, they will be most affected by their total illegality, not just the illegality of their use. This however, would go against

[208] Villiger, p. 18.

[209] Villiger, p. 19-20.

[210] Advisory Opinion, para. 22 and 61-73.

[211] *North Sea Continental Shelf* cases, para. 73; Mendelson, p. 377; Also discussed in Villiger, p.4.

[212] Villiger, p. 14.

the fundamental principle of equality and sovereignty in international law.[213] The principle of sovereign equality implies that no State is above any other and no special attention should be paid to the opinion or practice of these States when determining international law. Furthermore, in the case of nuclear weapons, their use is arguably a potential threat to both humanity and the environment and every State can therefore, in some sense, be said to be specially affected.[214] One can therefore argue that no special attention should be paid to the nuclear-weapon States in the case of determining the customary law concerning nuclear weapons.

The abstention of the nuclear-weapon States from using, however not threatening to use,[215] nuclear weapons and the abstentions from the General Assembly Resolutions and the TPN by certain States, is hard to validate from a legal perspective, as evidenced by the different opinions of the judges in the Advisory Opinion. Judge Shi argued in his Declaration that the policy of deterrence is merely a political policy and should hence be regulated by law, not regulate law, while Judge Fleischhauer in his Separate Opinion held the policy of deterrence to be State practice and therefore valuable when determining *lex lata*.[216] The policy of deterrence cannot be claimed to be a legal phenomenon of itself, but as a part of State practice it effects the emergence of a customary rule. As opinions to the opposite have been clearly voiced by the nuclear-weapon States, as said above, the abstentions from using nuclear weapons cannot be used as a qualified passive conduct supporting a prohibition on nuclear weapons. However, neither can the

[213] See art 2.1 of the UN Charter.

[214] The General Assembly described nuclear weapons as a threat to humanity and civilisation in UN General Assembly resolution, *Declaration on the prohibition of the use of nuclear and thermos-nuclear weapons*, A/RES/1653.

[215] See e.g. the threats made by the US and North Korea. Eli Watkins, 'Trump taunts North Korea: My nuclear button is 'much bigger,' 'more powerful'', CNN, <https://edition.cnn.com/2018/01/02/politics/donald-trump-north-korea-nuclear/index.html>, (3 January 2018) , accessed 29 March 2018.

[216] Advisory Opinion, Declaration of Judge Shi, p. 277; Advisory Opinion, Separate Opinion of Judge Fleischhauer, p. 309.

opposite, as the resolutions, treaties and TPN hinders a general and constant practice opposing a prohibition from developing. As previously stated the practice need not be in exact conformity with the rule, however in the circumstance the resolutions, abstentions and treaties do not form a general and constant practice as to either the illegality or legality of nuclear weapons.

4.3 Treaty as a way of creating or codification of customary international law

Meyrowitz argued that in the absence of a treaty, people would grow accustomed to the presence of nuclear weapons which would inevitably strengthen the argument for their legality.[217] Arguably that is what has occurred. Combined with the policy of deterrence it is very hard to find a sufficiently clear and conclusive *opinio juris* and practice supporting the illegality of nuclear weapons. In this part the discussion will therefore be focused on whether the TPN can be used for developing, or as a codification of, customary international law.

In the *Continental shelf (Libya/Malta)* case the ICJ concluded that multilateral conventions may have an important role in the development of a customary rule.[218] In addition to developing international customary law, treaties may also codify customary law. The VCLT, for example, is partly a codification by the International Law Commission (ILC) of the customary rules governing treaties.[219] Likewise, the 1925 Geneva Protocol is now considered customary international law binding those States not parties to the Protocol and together with the CWC and the BWC it establishes customary rules prohibiting the use of chemical and biological weapons.[220] However, it is of importance to note

[217] Meyrowitz, p. 60.

[218] *Continental shelf (Libya/Malta)* case, para. 27.

[219] *South West Africa* case, para. 94; *Fisheries Jurisdiction* case, para. 36; *Golder v. The United Kingdom,* App. No. 4451/70, [1975] ECHR 1, para. 29.

[220] See above under 3.2.2.

that customary international law and the treaty law continues to exist alongside each other, and hence must not make an exact overlap, although an exact crystallisation is possible.[221] For the determination of whether principles in a convention represent a rule of customary international law one must "examine the status of the principle as it stood when the Convention was drawn up, as it resulted from the effect of the Convention, and in the light of State practice subsequent to the Convention".[222]

As examined above there was no uniform custom prohibiting nuclear weapons at the time of the adoption of the TPN. While an *opinio juris* is developing for the prohibition of nuclear weapons, State practice is still insufficiently clear on the question. In the process of adoption of the TPN, the rule prohibiting nuclear weapons must therefore be seen as a principle *lex ferenda* rather than *lex lata*. Next it must be determined how the principle changed as a result of the TPN. The effect of the TPN is hard to determine due to the short period of time passed since it was opened for signature in September 2017. However, it could be argued that the Treaty is another step in developing an *opinio juris* on the prohibition of nuclear weapons and, in turn, perhaps creating a uniform practice in a step-by-step approach similar to that of the of the biological and chemical weapons. This can only be determined once more time has passed, however. So far, the practice of nuclear-weapon States, cannot be said to have changed after the adoption of the TPN, rather the tension and threats to use nuclear weapon seems to have risen the last year, particularly between the United States of America and the Democratic People's Republic of Korea. The TPN can thus not be said to be a codification of existing customary international law and therefore not universally binding at the present time, but dependent on State ratifications to become legally binding and, furthermore, general acceptance for a law-making quality. Once *opinio juris* as to the principles of the Treaty and

[221] *Nicaragua* case, para. 176; *North Sea Continental Shelf* cases, para. 63.

[222] *North Sea Continental Shelf* cases, para. 60.

practice has been established, a customary rule will have been created, existing separate from the Treaty.

However, the TPN is important in the way it establishes a treaty prohibition in the line of previous General Assembly resolutions. This continued practice is also a proof of the growing and more substantial *opinio juris* claiming the illegality of nuclear weapons. Depending on how many States that sign the Treaty, it might, combined with concurring statements of States and General Assembly resolutions, be enough to establish a customary rule. However, that is unlikely to happen as long as States continue to adhere to the policy of deterrence.

4.4 Summary

Consequently, while the General Assembly resolutions can be said to show a continued and emerging *opinio juris* that ultimately has resulted in a treaty prohibiting nuclear weapons, the policy of deterrence results in the lack of signatories to the TPN and reservations to treaties necessary to establish a sufficiently uniform practice. While it has been argued that *opinio juris* should be enough to establish a customary rule, the conventional way of creating customary international law, as accepted by States, is through an *opinio juris* and State practice. The TPN can therefore not be said to have helped create a customary prohibition of nuclear weapons at this time. However, it remains to see whether the TPN after some time can help create a customary rule prohibiting nuclear weapons or if its obligations come to be regarded as codification of a customary law when more time has passed since its adoption.

5 The TPN and the Current State of International Law

To answer the question to what extent the Treaty on the Prohibition of Nuclear Weapons would change the answer of the ICJ in paragraph 105(2)(E), concerning the legality or illegality of the use of nuclear weapons in the case of self-defence where the survival of the State is at stake, according to the current state of international law, the TPN has been investigated in relation to treaty law and customary international law. The result of which will be discussed in this chapter.

When determining the question of the legality or illegality of the use of nuclear weapons, the main consideration for the ICJ was the application of international humanitarian law and the right to self-defence. While international humanitarian law "generally"[223] meant that the use of nuclear weapons would be illegal, in certain circumstances the use could be justified in self-defence when there was a threat to the very existence of the State. When examining the military policies of the two States with the largest nuclear weapon arsenal this is reflected in their policies; both Russia and the United States have stated that nuclear weapons will be used only in self-defence. The purpose of the TPN, however, is to establish a definite prohibition of nuclear weapons, even in cases of their use in self-defence, like that on the prohibition of chemical and biological weapons. If the TPN could provide a legally binding rule on the prohibition of nuclear weapons, the current state of international law would answer the question of the illegality of nuclear weapons, which the ICJ answered with quite some ambiguity.

When discussing the legality or illegality of nuclear weapons in international law in the Advisory Opinion, the ICJ stressed the fact that there was no treaty

[223] See the wording by the ICJ in para 105(2)(E) in the Advisory Opinion.

prohibiting nuclear weapons. As recognised in the *Nicaragua* case and illustrated above, the illegality of weapons of mass destruction normally stems from treaty provisions. However, the illegality is also now incorporated in international customary law when looking at the prohibition of biological and chemical weapons. Furthermore, the relevance of the *Lotus* principle can be questioned. To a lesser extent than previously international law can be said to be based solely on State consent, the increasing globalisation of today has decreased State sovereignty and supranational organisations produce rules beyond the immediate consent of States. Furthermore, while the illegality of weapons of mass destruction normally are regulated in treaties, this does not exclude a possible unlawfulness due to a prohibition in customary international law. Moreover, international law must be said to have developed since the *Lotus* case in the early 20th century, and in the substantiality of international law today, it cannot be maintained that everything not prohibited is legal. I would therefore argue for the decreasing relevance of the *Lotus* principle in international law today.

The consequence of the fact that the *Lotus* principle has played its role in international law, does not mean however that nuclear weapons are prohibited; it is also necessary to investigate the existence of an authorisation of nuclear weapons in international law. Such an authorisation does not exist in any treaty, neither is there any explicit authorisation in customary international law. The ICJ in the Advisory Opinion did find however, that in extreme cases of self-defence a recourse to nuclear weapons might be legal, though the ICJ failed to closer declare in what circumstance such a recourse to nuclear weapons could be legal and proportionate. Further illustrating the lack of an overall explicit authorisation in international law is the States' agreement in the Advisory Opinion that international humanitarian law is applicable to the use of nuclear weapons, forbidding the use of weapons not discriminating between combatants and civilians as well as not respecting neutrality. Hence, there does not seem to exist a general authorisation of the use of nuclear weapons.

The fact that the *Lotus* principle has lost its importance and one cannot find support for an explicit authorisation to use nuclear weapons in international law does not mean however, that no prohibition is necessary. Without a treaty prohibition, there must be an *opinio juris* and practice of States as to their illegality. To assume the unlawfulness of nuclear weapons based on a lack of authorisation would not sufficiently convince States of their illegality and would therefore prove to be futile when trying to establish an *opinio juris* as to their illegality. While international law no longer exclusively is based on State consent, State consent is still the most widely accepted basis of international law.

When searching for a prohibition on nuclear weapons, one can turn to treaty law or customary international law. Scholars after the Second World War tried to argue for the illegality of nuclear weapons pursuant to an analogical interpretation of the 1925 Geneva Protocol. Today scholars are mainly focused on the application of the international humanitarian law to the use of nuclear weapons. However, with the new Treaty on the Prohibition of Nuclear Weapons, there is a possibility to argue the general illegality of nuclear weapons and not only their use, which can possibly be justified pursuant to the principle of self-defence according to the ICJ.

It has been established above that the TPN lack the required ratifications to become legally binding as well as the qualities to be considered a law-making treaty. The important question is whether the TPN, combined with other treaties, can create a prohibition on nuclear weapons in a step-by-step approach as in the case of biological and chemical weapons. Covering nuclear weapons is also the nuclear-free-zone treaties, the NPT, the Treaty Banning Nuclear Weapon Tests in Atmosphere, in Outer Space and under Water, and the CTBT. While the Treaty Banning Nuclear Weapon Tests in Atmosphere, in Outer Space and under Water was successful, the complete ban on nuclear testing envisioned in the CTBT has not yet been ratified by all of the required States. Consequently, there is no complete ban on the testing of nuclear weapons, several nuclear-free-zone treaties with reservations from nuclear-

weapon States and a treaty prohibiting nuclear weapons without the sufficient number of ratifications. These treaties cannot be said to demonstrate a sufficiently clear *opinio juris* and state practice on their own as the lack of ratifications must be considered a legal action to the opposite. However, with time a general acceptance of the Treaty might come to make it a binding law-making treaty or help develop a customary rule binding on all States regardless of their accession to the Treaty. Due to the short period of time since the adoption of the Treaty and the considerations that need be taken and the often complicated national process preceding a ratification, it is not possible at this time to definitely say whether such a general acceptance or customary rule will develop.

When it comes to determining the existence of a customary international rule prohibiting nuclear weapons, the policy of deterrence and the General Assembly resolutions have proven difficult to evaluate. While the General Assembly resolutions are not binding per se, their value lies in their evidence of the *opinio juris* of States. The General Assembly resolutions on nuclear weapons have generally been adopted with a great number of affirmative votes. Combined with the TPN and the other treaties covering nuclear weapons a more substantial *opinio juris* can be said to have emerged as to the prohibition of nuclear weapons, particularly as only one State voted against the adoption of the TPN. However, as evidenced in the voting on the General Assembly resolutions, the adoption of the Security Council resolutions and the policy of deterrence, the emerging *opinio juris* is not without an opposing practice. While it has been argued that a widespread *opinio juris* would be enough to establish a customary rule, the Statute of the ICJ and the Court in several of its cases are clear on the fact that attention need be paid to the practice of States when determining international customary law. Furthermore, should one consider that customary law is evidenced in practice, as argued by Sloan, this would still not lead to the illegality of nuclear weapons as the emerging *opinio juris* is not evidenced by an extensive and uniform practice showing a general recognition of the rule of the illegality of nuclear weapons, illustrated by the continued adherence to the policy of

deterrence also by non-nuclear-weapon States when they abstain from signing the TPN.

The difficulty in qualifying the policy of deterrence as relevant state practice lies in the fact that it is strongly linked to politics. Both Russia and the US in their defence policies maintained that nuclear weapons might be used when the own State is threatened. However, politics as such has little value when determining the customary rule on an area. That is also why some opinions has been raised as to the irrelevance of the policy of deterrence when determining the legality or illegality of nuclear weapons. Nevertheless, when determining the practice on the area, one must realise that the policy has resulted in a practice that must be recognised when determining customary international law. Likewise, the reliance of States on the US for military support and defence is a highly political fact. However, when it results in the non-ratification of the TPN, as explained in their statements when voting, it must be regarded as a legal statement which hinders their passivity from being qualified as support for the illegality of nuclear weapons.

Consequently, while the adoption of the TPN can be said to be a further proof of the *opinio juris* of a majority of States as to the illegality of nuclear weapons, a not inconsiderate number of States have effectively expressed statements of the opposite conviction and subsequently hindered a general and constant practice from being established. Furthermore, the lack of ratifications to the TPN show the hesitancy of a number of States from making a clear legal statement on the matter, which results in its legally unbinding quality. Subsequently, the TPN cannot be said to have changed the current state of international law so as to enable a change to the answer of the ICJ in paragraph 105(2)(E) in the Advisory Opinion. However, while the Treaty has not resulted in a legal binding prohibition on nuclear weapons, the signatories, currently 58, may not act in such a way as to hinder the object of the treaty. This is one of the present strengths of the Treaty; it is an important step on the way towards a nuclear free world. The ratifications of the TPN would

undoubtedly be a clear statement on the prohibition of nuclear weapons and would unquestionably be a contribution to their universal ban.

Bibliography

Literature

Akande, Dapo, 'Nuclear Weapons, Unclear Law? Deciphering the Nuclear Weapons Advisory Opinion of the International Court'. *British Yearbook of International Law* 1998, vol. 68.1, p. 165-217.

Akehurst, Michael, 'Custom as a Source of International Law'. *British Yearbook of International Law* 1974-1975, vol. 47, p. 1-53.

Allan, Charles T., 'Extended Conventional Deterrence: In from the Cold and Out of the Nuclear Fire?'. *Washington Quarterly* Summer 1994, vol. 17.3, p. 203-233.

Brierly, 'The 'Lotus' Case'. *Law Quarterly Review* 1928, vol. 44, p. 154-163.

Boisson de Chazournes, Laurence and Sands, Philippe (eds.), *International Law, the International Court of Justice and Nuclear Weapons*. Cambridge University Press, Cambridge, 1999.

Cheng, Bin, *Studies in International Space Law*. Clarendon Press, Oxford, 1997.

Clapham, Andrew (ed.), *Brierly's Law of Nations: An Introduction to the Role of International Law in International Relations*. Oxford University Press, 2012. (7th edition)

Crawford, James R (ed.), *Brownlie's Principles of Public International Law*. Oxford University Press, Oxford, 2012. (8th edition)

Dworkin, Ronald, 'A New Philosophy for International Law'. *Philosophy and Public Affairs* 2013, vol. 41.1, p. 2-30.

Enriquez, Paul, 'Deconstructing Transnationalism: Conceptualizing Metanationalism as a Putative Model of Evolving Jurisprudence'. *Vanderbilt Journal of Transnational Law* 2012, vol. 43.5, p. 1265-1336.

Harris, D. J., *Cases and Materials on International Law*. Sweet & Maxwell, London, 2004. (6th edition)

Hart, H.L.A., *The Concept of Law*. Clarendon Press, Oxford, 1961.

Jennings, Robert and Watts, Arthur (eds.), *Oppenheimer's International Law: Volume 1 Peace*. Oxford University Press, Oxford, 2008. (9th edition)

Hutchinson, Terry, 'The Doctrinal Method: Incorporating Interdisciplinary Methods in Reforming the Law'. *Erasmus Law Review* 2015, vol. 3, p. 130-138.

Joyner, Daniel H., *International Law and the Proliferation of Weapons of Mass Destruction*. Oxford University Press, Oxford, 2009.

Kelsen, Hans, 'The Pure Theory of Law'. *Law Quarterly Review* 1934, vol. 50, p. 474-498.

McDougal, Myres S. and Feliciano, Florentino P., 'International coercion and World Public Order: The General Principles of the Law of War'. *Yale Law Journal* 1958, vol. 67, p. 771-845.

McWhinney, Edward and Singh, Nagendra, *Nuclear Weapons and Contemporary International Law.* M. Nijhoff, Dordrecht, Boston, 1988. (2nd edition)

Mendelson, Maurice H., 'The formation of customary international law', in: The Hague Academy of International Law, *Collected Courses of the Hague Academy of International Law*, vol. 272. Brill/Nijhoff, Leiden, Boston, 1998, p. 1-410.

Meyrowitz, Elliot L., *Prohibition of Nuclear Weapons – the relevance of international law*. Transnational Publishers Inc, New York, 1990.

Nystuen, Gro et.al., *Nuclear Weapons – Under international law*. Cambridge University Press, Cambridge, 2014.

Sack, Alexander N., 'ABC-Atomic, Biological, Chemical Warfare in International Law'. *Lawyers Guild Review* 1950, vol. 10.1, p. 161-180.

Sheldon, Jill, 'Nuclear Weapons and the Laws of War: Does Customary International Law Prohibit the Use of Nuclear Weapons in All Circumstances'. *Fordham International Law Journal* 1996, vol. 20.1, p. 181-262.

Sloan, Blaine, *United Nations General Assembly Resolutions in our Changing World*. Transnational Publishers, Inc, Ardsley-on-Hudson, N.Y., 1991.

Spaight, J.M., *Air Power and War Rights*. Longmans, Green and Co., London, 1947. (3rd Edition)

Villiger, Mark E., *Customary International Law and Treaties*. Martinus Nijhoff Publishers, Dordrecht, 1985.

Electronic Sources

Eli Watkins, 'Trump taunts North Korea: My nuclear button is 'much bigger,' 'more powerful'', CNN, <https://edition.cnn.com/2018/01/02/politics/donald-trump-north-korea-nuclear/index.html>, (3 January 2018) , accessed 29 March 2018.

ICAN, Hiroshima and Nagasaki bombings, <http://www.icanw.org/the-facts/catastrophic-harm/hiroshima-and-nagasaki-bombings/>, accessed 12 February 2018.

ICAN, How the ban treaty works, <http://www.icanw.org/why-a-ban/the-case-for-a-ban-treaty/>, accessed 7 March 2018.

ICAN, Nuclear Arsenals, <www.icanw.org/the-facts/nuclear-arsenals/>, accessed 12 February 2018.

ICAN, Positions on the Treaty, <http://www.icanw.org/why-a-ban/positions/>, accessed 7 March 2018.

ICAN, Signature/ratification Status of the Treaty on the Prohibition of Nuclear Weapons, <http://www.icanw.org/status-of-the-treaty-on-the-prohibition-of-nuclear-weapons/>, accessed 8 March 2018.

ICAN, The Treaty, <http://www.icanw.org/the-treaty/>, accessed 13 February 2018.

Nikolai Sokov, 'The New Russian Military Doctrine: The Nuclear Angle', <https://www.nonproliferation.org/new-2010-russian-military-doctrine/>, (5 February 2010), accessed 29 March 2018.

Nuclear Threat Initiative, South Pacific Nuclear-Free Zone (SPNFZ) Treaty of Rarotonga, <http://www.nti.org/learn/treaties-and-regimes/south-pacific-nuclear-free-zone-spnfz-treaty-rarotonga/>, accessed 19 February 2018.

Nuclear Threat Initiative, Treaty on the Non-Proliferation of Nuclear Weapons (NPT), <http://www.nti.org/learn/treaties-and-regimes/treaty-on-the-non-proliferation-of-nuclear-weapons/>, accessed 19 May 2018.

Oceans & Law of the Sea, United Nations, Chronological lists of ratifications of, accessions and successions to the Convention and the related Agreements, <http://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm>, accessed 14 March 2018.

WTO, Members and Observers, <https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm>, accessed 16 March 2016.

UNESCO, Globalisation – Introduction, <http://www.unesco.org/education/tlsf/mods/theme_c/mod18.html>, accessed 16 March 2018

United Nations Office for Disarmament Affairs, Chemical Weapons, <https://www.un.org/disarmament/wmd/chemical/>, accessed 6 March 2018.

United Nations Office for Disarmament Affairs, Disarmament Treaties Database, <http://disarmament.un.org/treaties/>, accessed 13 May 2018.

United Nations Bibliographic Information System, Voting record search, A/RES/1653, <http://unbisnet.un.org:8080/ipac20/ipac.jsp?profile=voting&index=.VM&term=ares1653>, accessed 23 March 2018.

United Nations Bibliographic Information System, Voting record search, A/RES/33/71[B], <http://unbisnet.un.org:8080/ipac20/ipac.jsp?session=15A818H012572.73957&profile=voting&uri=full=3100023~!875356~!10&ri=1&aspect=power&menu=search&source=~!horizon>, accessed 23 March 2018.

United Nations Bibliographic Information System, Voting record search, A/RES/35/152D, <http://unbisnet.un.org:8080/ipac20/ipac.jsp?session=15A818H012572.73957&profile=voting&uri=full=3100023~!866162~!7&ri=5&aspect=power&menu=search&source=~!horizon>, accessed 23 March 2018.

United Nations Bibliographic Information System, Voting record search, A/RES/72/59, <http://unbisnet.un.org:8080/ipac20/ipac.jsp?session=15A818H012572.7

3957&profile=voting&uri=full=3100023~!1153235~!0&ri=3&aspect=power&menu=search&source=~!horizon>, accessed 23 March 2018.

United Nations Bibliographic Information System, Voting record search: S/RES/255, <http://unbisnet.un.org:8080/ipac20/ipac.jsp?session=B51I169C87903.61748&menu=search&aspect=power&npp=50&ipp=20&spp=20&profile=voting&ri=1&source=~%21horizon&index=.VM&term=sres255&x=0&y=0&aspect=power>, accessed 23 March 2018.

United Nations Bibliographic Information System, Voting record search, S/RES/984, <http://unbisnet.un.org:8080/ipac20/ipac.jsp?session=B51I169C87903.61748&menu=search&aspect=power&npp=50&ipp=20&spp=20&profile=voting&ri=2&source=~%21horizon&index=.VM&term=sres984&x=0&y=0&aspect=power>, accessed 23 March 2018.

United Nations Office for Disarmament Affairs, Treaty on the Prohibition of Nuclear Weapons, <http://disarmament.un.org/treaties/t/tpnw>, accessed 13 May 2018.

United Nations Office for Disarmament Affairs, Comprehensive Nuclear-Test-Ban Treaty, <https://www.un.org/disarmament/wmd/nuclear/ctbt/>, accessed 30 March 2018.

United Nations Office for Disarmament Affairs, Treaty on the Non-Proliferation of Nuclear Weapons, <https://www.un.org/disarmament/wmd/nuclear/npt/>, accessed 30 March 2018.

United Nations Office for Disarmament Affairs, Democratic People's Republic of Korea: Accession to Treaty on the Non-Proliferation of Nuclear Weapons (NPT), <http://disarmament.un.org/treaties/a/npt/democraticpeoplesrepublicofkorea/acc/moscow>, accessed 30 March 2018.

United Nations: 2015 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons (NPT), <http://www.un.org/en/conf/npt/2015/>, accessed 30 March 2018

Official Documents

International official documents

Economic and Social Commission for Western Asia, *Annual Review of Developments in Globalization and Regional Integration in the Countries of the ESCWA Region*, U.N. Doc. E/ESCWA/GRID/2002/2.

Report of the British Mission to Japan, *The Effects of the Atomic Bombs at Hiroshima and Nagasaki*, 1946. Available at <https://ia801301.us.archive.org/16/items/TheEffectsOfTheAtomicBombsAtHiroshimaAndNagasaki-ReportOfThe/british-mission-to-japan_text.pdf>, accessed 13 May 2018.

The Review and Extension Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, Decision 3. Can be accessed at <https://unoda-web.s3-accelerate.amazonaws.com/wp-content/uploads/assets/WMD/Nuclear/1995-NPT/pdf/1995-NY-NPTReviewConference-FinalDocumentDecision_3.pdf>, accessed 30 March 2018.

UN General Assembly, Committee on the peaceful uses of outer space, *Consideration of legal problems arising from the exploration and use of outer space*, A/AC.105/C.2/SR.20.

UN General Assembly, *Report of the Disarmament Commission*, Supplement No. 42 A/54/42.

UN General Assembly, *Report of the Open-ended Working Group to develop proposals to take forward multilateral nuclear disarmament negotiations for the achievement and maintenance of a world without nuclear weapons*, A/68/514.

UN General Assembly, *Taking forward multilateral nuclear disarmament negotiations*, A/C.1/71/L.41.

UN General Assembly, *United Nations conference to negotiate a legally binding instrument to prohibit nuclear weapons: Second session*, Item 9, A/CONF.229/2017/L.3/Rev.1.

United States of America Office of the Secretary of Defence, *Nuclear Posture Review,* Executive Summary, February 2018, p. 2. Available at

<https://media.defense.gov/2018/Feb/02/2001872877/-1/-1/1/EXECUTIVE-SUMMARY.PDF>, accessed 29 March 2018.

Yearbook of the International Law Commission, vol. II, 1950, *Report of the International Law Commission to the General Assembly*, document A/1316.

UN Resolutions

General Assembly resolutions

A/RES/1653, Declaration on the prohibition of the use of nuclear and thermos-nuclear weapons.

A/RES/2063 A and B (XXIV), Question of chemical and bacteriological (biological) weapons.

A/RES/2162 B (XXI), Question of general and complete disarmament.

A/RES/2826 (XXVI), Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction.

A/RES/33/71 B, Review of the implementation of the recommendations and decisions adopted by the General Assembly at its tenth special session.

A/RES/34/83 G, Review of the implementation of the recommendations and decisions adopted by the General Assembly at its tenth special session.

A/RES/35/152 D, Review of the implementation of the recommendations and decisions adopted by the General Assembly at its tenth special session.

A/RES/36/92, Review of the implementation of the recommendations and decisions adopted by the General Assembly at its tenth special session.

A/RES/45/59, Review and implementation of the concluding document of the 12th special session of the General Assembly.

A/RES/46/37 D, Review and implementation of the concluding document of the 12th special session of the General Assembly.

A/RES/49/75 K, General and complete disarmament.

A/RES/67/56, Taking forward multilateral nuclear disarmament negotiations.

A/RES/70/33, Taking forward multilateral nuclear disarmament negotiations.

A/RES/72/59, Convention on the Prohibition of the Use of Nuclear Weapons.

Security Council Resolutions

S/RES/255, Question relating to measures to safeguard non-nuclear-weapon States parties to the Treaty on the Non-Proliferation of Nuclear Weapons.

S/RES/984, Question relating to measures to safeguard non-nuclear-weapon States that are Parties to the Treaty on the Non-Proliferation of Nuclear Weapons.

Treaties

1987 Intermediate-Range Nuclear Forces Treaty, 1657 UNTS 485.

1991 Strategic Arms Reduction Treaty, S. Treaty Doc. No. 102-20.

African Nuclear-Weapon-Free Zone Treaty (Pelindaba Treaty), 35 ILM 698.

Charter of the United Nations, 59 Stat. 1031; TS 993; 3 Bevans 1153.

Comprehensive Nuclear-Test-Ban Treaty, UN Doc. A/50/1027, 35 ILM 1439.

Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 UNTS 31.

Convention on Cluster Munitions, 2688 UNTS 39.

Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277.

Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, 1015 UNTS 163.

Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, 1974 UNTS 45.

Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 2056 UNTS 241.

Hague Convention II with Respect to the Laws and Customs of War on Land and its annex: Regulation concerning the Laws and Customs of War on Land, 32 Stat. 1803.

Hague Convention IV - Laws and Customs of War on Land, 187 CTS 227.

International Covenant on Civil and Political Rights, 999 UNTS 171.

South Pacific Nuclear Free Zone Treaty, 1445 UNTS 177.

Statute of the International Court of Justice, 3 Bevans 1179; 59 Stat. 1031; T.S. 993.

Statute of the International Atomic Energy Agency, 276 UNTS 3.

The 2002 Strategic Offensive Reductions Treaty, S. Treaty Doc. No. 107-8.

The Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare, 94 LNTS 65.

Treaty Banning Nuclear Weapon Tests in Atmosphere, in Outer Space and under Water, 48 UNTS 43.

Treaty for the Prohibition of Nuclear Weapons in Latin America and the Caribbean, 634 UNTS 326.

Treaty on a Nuclear-Weapon-Free Zone in Central Asia, *The United Nations Disarmament Yearbook*, vol. 31, 2006, Appendix II, p. 323.

Treaty on the Non-Proliferation of Nuclear Weapons, 729 UNTS 161.

Treaty on the Prohibition of Nuclear Weapons, A/CONF.229/2017/8.

Treaty on the Southeast Asia Nuclear Weapon-Free Zone, 35 ILM 635.

United Nations Convention on the Law of the Sea, 1833 UNTS 3.

Vienna Convention on the Law of Treaties, 1155 UNTS 331.

Table of Cases