

論核子武器之適法性^{*}

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關鍵字：核子武器、戰爭法、軍事必要、不必要痛苦、不加區別、比例失衡、軍事價值、持有、諮詢意見、戰爭犯罪。

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摘要

單兵或有能力區別平民及戰鬥人員，但空投轟炸與飛彈則欠缺此一能力。在核武世紀，平民成為核武直接或間接殺傷之目標。核子武器與細菌武器及化學武器同為大規模毀滅性武器。對於後者，國際公約已律定為違法；對於核子武器，卻尚無違法之明文。核武在戰略運用、軍事必要及國家安全具有一定之價值，而以核武為嚇阻戰爭之手法，建構自冷戰時期以來的恐怖平衡。然而，對攻擊客體不加區別及造成損害比例失衡，為核子武器之特質，而該兩項特質，與 1949 年日內瓦公約及國際習慣法中，交戰國應保護平民及非戰鬥人員之規定有違。運用違法武器從事作戰，該軍事行動即屬違法。本文主張核子武器更甚於毒武器，其本質違法；持有及運用核子武器均屬非法。

The Legality of Nuclear Weapons

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Abstract

Use of nuclear weapons erases the distinction between military and civilians, combatants and noncombatants, neutral and belligerent; its destructive power annihilates a large segment of population, and produces long-term environmental and biological destruction. Indiscriminate and disproportionate destruction caused by nuclear explosion make nuclear weapon's destructive capability unique. Far-reaching and long-lasting radioactive fallout contamination poisons all creatures, resources and environment. If the use of poison on an arrow made it a poisoned weapon, the use of uranium in nuclear weapons would appear to render the latter "poisoned" in the same sense. Nuclear weapons are more than functionally equivalent to poison weapons; as a matter of law, they are by no means to be treated differently from other weapons of mass destruction.

International conventions and treaties are silent regarding the legality of nuclear weapons. However, the principles and rules of laws of war have never changed and can never be ignored; the laws of humanity and dictates of public conscience is always the core of the laws of war, and it is codified in the Preamble of the Hague Convention in 1907. This note analyzes principles and rules of the international conventional law and customary law criticizing proposals for the legitimization of nuclear weapons, proposing that nuclear weapons are illegal per se and can not be employed in any lawful manner, and use of nuclear weapons is a crime against humanity.